Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

Introductory Remarks

Delivered by Mr Justice Donal O'Donnell, Chief Justice, at a conference titled 'Civil Legal Aid Review: An Opportunity to Develop a Model System' on 24th February 2023

This is the second conference organised by the Chief Justice's Working Group on Access to Justice. The idea of establishing a Working Group under the leadership of the Chief Justice was one borrowed from Canada where a small Action Committee on Access to Justice in Civil and Family Matters, established by the Chief Justice of Canada and made up of a number of representatives, was shown to have had considerable success. In this case, the members of our working group include:

- Myself;
- Eilis Barry, CEO of FLAC (Free Legal Advice Centres);
- John McDaid, CEO of the Legal Aid Board;
- John Lunney, nominee of the Law Society;
- Joseph O'Sullivan BL representing the Bar Council; and
- Mr Justice John MacMenamin who has recently retired from the Supreme Court.

The first conference organised by the Chief Justice's Working Group was held on 1st and 2nd October 2021. It was effectively a remote conference held over two days and hosted at the Law Society. Notwithstanding the difficult circumstances, that conference gathered together very strong panels of speakers and contributors and attracted an impressively broad attendance from a number of different organisations and areas of society. Among the areas of access to justice considered at the conference were:

- awareness and information,
- access to justice in the environmental field,
- legal community outreach,

- accessibility of court procedures and legal representation,
- access to legal services for people in poverty, and
- equal treatment in the court process.

The outcome of the conference was an increased recognition that the umbrella phrase "*access to justice*" is not a single issue but is multi-factorial and involves issues such as education and outreach to inform people of the law and their rights, as well as what is traditionally understood as legal assistance and legal aid. It brought it home to me that access to courts and to litigation, as important as that is, forms only a part of access to justice.

The conference presented an opportunity to highlight some of the positive work already taking place to improve access to justice, such as the Review of the Administration of Civil Justice and the resulting report (also known as the Kelly Report); the Courts Service's Long Term Strategic Vision and its Modernisation Programme; and family justice reform as part of the Family Justice Strategy 2022-2025. I am very pleased that Minister Harris is here today to speak to the ongoing progress at this wider level in relation to access to justice. His attendance is a real indication of the importance attached by the government to these issues.

At the last Access to Justice Working Group conference, the then Minister – Minister Humphreys – referred to the establishment of a Judicial Planning Working Group, which has since been considering the number of judges required to administer justice and ensure timely access to justice in Ireland. That is perhaps the most fundamental aspect of access to justice. The work of the Judicial Planning Working Group ("JPWG"), which is informed by a detailed study carried out by the OECD, is the first evidence-based attempt to assess the demand for judges on an objective and measurable basis and to break the cycle of overloaded court backlogs and crisis. The Court Presidents made a very detailed and, I hope, constructive submission to JPWG and welcome the publication today of the Reports of the JPWG and the OECD. I understand that the Minister will speak to you in relation to the key recommendations of the report of the JPWG, but I very much welcome its acknowledgment of an acute need for more judges in Ireland, its recommendation that a number of additional judges be appointed in the short to

medium term, and that there should be ongoing assessment of judicial resource needs and associated judicial support into the future.

The Government's immediate acceptance of the JPWG report and its plan, which I understand is to create additional judicial positions and fill them, is also and in itself a very important and welcome development. It is a real and tangible recognition of the fact that a functioning justice system is not a luxury but is a critical component of a modern liberal democratic society which is founded on the rule of law.

The 2021 'Access to Justice' conference was a vivid illustration of the fact that while it is undoubtedly immensely challenging to provide high quality decision-making in courtrooms, it cannot be enough to treat that as the sole objective of the justice system. If people do not know about their rights to begin with or if they cannot get a hearing because of delays in the system, if they cannot afford to go to court because it is too expensive to obtain a lawyer or, if as in many cases, lawyers are willing to act but the risk of an adverse costs order is too great, then the quality of the justice in the courtroom falls short of providing the administration of justice that the Constitution requires and that members of the public are entitled to expect.

To paraphrase an observation made by Chief Justice Clarke in opening that conference: our laws could be perfect [and we know they are not] and our judges could be latter day Solomons, but it would mean nothing if a party cannot come into court and seek the enforcement of those laws. As he said on that occasion:
"… *it would little avail a party whose position those laws favoured, if that party has not reasonable access to a court to ensure, if all other means of resolution fail, that their position is vindicated*."

And as we say in all the best Supreme Court judgments, I concur, and I would like to acknowledge and pay tribute to the work Frank Clarke did in establishing this Working Group and in driving the organisation of the Working Group and the 2021 conference, held as it was during the pandemic, as he was about to retire from office, and at a time therefore when it would have been easy to let the matter pass.

That first conference was, I believe, a considerable success. The papers delivered and the reports of the breakout groups were collated and published in a report which was launched in the Ballymun Civic Centre in association with the Ballymun Law Centre in March of last year. That report is in itself a very useful resource in framing the many issues that arise in the sphere of access to justice, identifying the points of intersection between them, and pointing in the direction of some solutions, or at least in the direction of possible progress.

But we are now at a second public conference of the Chief Justice's Working Group on Access to Justice. This is, in legal conference terms, the equivalent of what I think is described in the music business as the difficult "second album syndrome". And to push that analogy a little further (if not to breaking point), the Chief Justice's Access to Justice Working Group is like of one of the Motown groups of the 60s, perhaps the Drifters or perhaps even more appropriately the Supremes, where the name stays the same but the composition of the group changes somewhat. In particular, the artist formerly known as the Chief Justice is now pursuing a successful solo career in the Law Reform Commission and former Chair of the Legal Aid Board, Philip O'Leary, has retired and so has been replaced by its CEO, John McDaid. But I think, indeed, I believe, that we have stayed true to the values of the original group.

The October 2021 conference set out to make a broad survey of the issue of access to justice. This year we had to decide on a specific theme and to pick one area from the many interlocking areas discussed in October 2021 and to focus on it.

The obvious issue, and one which was highlighted repeatedly at the last conference, is the civil legal aid system. First, because it is a major and unavoidable component of any system of access to justice, and second, because it is a particularly appropriate and timely subject given that the Minister for Justice has established a Legal Aid Review Group chaired by former Chief Justice Clarke, which is currently undertaking the first major review of the civil legal aid system since it was introduced more than 40 years ago. Part of the first session today will involve an address by Chief Justice Clarke on the development of that Civil Legal Aid Review Group and that in turn will be followed by discussions on the current

civil legal system, the international experience, and a panel discussion on alternative methods of legal assistance. Tomorrow will involve sessions providing a view from the judiciary and statutory bodies and a vision for the future.

In each case there is an impressive and exciting range of speakers with considerable expertise, both national and international. While inevitably there are different perspectives and insights, there is, I believe, a heartening convergence on some shared aims and objectives and, perhaps most importantly, a shared commitment to the ideal of improving the civil legal aid system. That commitment is evident from the enthusiasm with which speakers, panellists and moderators accepted invitations to be a part of this event; the high volume of attendees from across the justice sector, civil society, and advocacy organisations; and the people who are giving their time to work at the event and be part of what was described at the previous conference as a "coalition of reformers". There is not just a growing demand for change but, it seems to me, a growing willingness in all quarters to contemplate change.

I would like to take the opportunity to thank the individual members of the Chief Justice's Working Group for their input into organising this event, and the support provided by the organisations involved (The Bar, Law Society, Legal Aid Board and FLAC). The Working Group is also very grateful to the speakers, moderators and panellists who are generously giving their time and contributing their expertise to this conference. Many thanks also to the Courts Service for its support of the Working Group and in running this event, including to the judicial assistants who are in attendance to report on the sessions so that we can publish a report of the conference.

Civil legal aid might indeed have been an obvious focus of the first conference of the Work Group, but I think that it will be helpful that we are addressing that issue following on from the work done at that first conference in October 2021 which involved an initial mapping of the entire area. It means that discussions today and tomorrow can be approached not merely by focusing on the existing system and arguing that greater resources should be applied to it, but by understanding a broader canvas, where civil legal aid must be seen as one part – albeit one of the most substantial parts – of a complex jigsaw. This involves a recognition that there

is a whole world of providing information, legal assistance and advice which does not involve proceedings or going to court, and that even within the focus of access to justice in courts, there are a number of alternative aspects to meeting people's needs, such as involving the continued *pro bono* work by schemes such as the Voluntary Assistance Scheme of the Bar Council, by ordinary solicitors and barristers, by possible third party funding and by measures designed to reduce costs of proceedings.

I am afraid that I can remember the Pringle Report in 1977 and the eventual introduction of the civil legal aid system and the commentary that surrounded that. It is tempting to recall those days now in a rosy hue and to award campaign medals for those who pressed for a comprehensive legal aid system and criticise the supposed faceless bureaucrats in the civil service who were suspected of resisting the implementation of such a system. However, in truth, the arguments in the late 1970s were really quite simplistic. It was easy in those days for anyone dissatisfied with the system in Ireland to simply look to what happened in the UK and ask why we were not doing the same thing. But as Chief Justice Clarke said at the last conference, we must recognise that there are competing demands for funds and that government does not have a bottomless purse. That was certainly true then. I think that modern day public servants and, indeed, modern economists would be horrified if they had to experience the very limited and constrained budgetary conditions in Ireland in the late 1970s.

In the 1970s, it seemed that the welfare system in the United Kingdom was in full bloom, and in truth the envy of most of the world and not just Ireland. To take some interrelated issues, the National Health Service was the jewel in the crown of the welfare state. There had been two or three generations who had the benefit of free third level education with a generous grant system and in the legal field, the UK legal aid system, both civil and criminal, was widely regarded as the gold standard as far as legal aid was concerned.

It is both startling and sobering to see how that landscape has changed. The National Health Service in the UK is creaking, third level education is now fee based and student loan funded, and both the civil legal aid system and the criminal legal aid system in the UK have seen dramatic reductions in budgets that would

have seemed inconceivable a few decades ago. These reductions cannot be simply ascribed to ideology. There is, indeed, a more widespread acceptance that whatever changes are made to the system, there can be no return to the open ended, demand led system of the 70s.

This means that looking to other countries continues to have a benefit for Ireland, even if the lessons to be drawn are rather more complex and sobering than they might have appeared then. But Ireland now has more resources and more knowledge than it had in the late 1970s, and this conference is an attempt to bring that knowledge together and to help devise an efficient system that is well adapted to today's needs, and which will make the best use of the resources that may be available.

It might be tempting for a more pragmatic or perhaps cynical commentator to suggest that as reform of the system will inevitably incur a cost and create a bottomless and demand led system, it will be impossible to achieve significant improvements, and that really it is best left to muddle along and provide what it can. I think that is wrong for at least four reasons.

First, that assumes that the system can continue to muddle along and will not simply break under the weight of the increasing demands being put upon it to handle a greater volume of what are increasingly complex legal issues.

Second, as discussed at the October 2021 conference, there is an argument for investing in justice because legal problems can also create consequential problems in other areas such as health, at an additional cost to the taxpayer.

Third, it should not be assumed that the pace of reform is a matter in the sole control of administrators or even legislators. We are here today in this format precisely because the administration of justice is a shared space. One of the factors identified at the October 2021 conference in the insightful contribution offered by then Judge Síofra O'Leary, now the first Irish President of the Court of Human Rights, was that, to a very large extent, the law on legal aid (both civil and criminal) has been influenced by litigation and court decisions. Civil legal aid

was most dramatically influenced by the *Airey*[1] case in the Court of Human Rights, and criminal legal aid by cases such as *The State (Healy) v. Donoghue*,[2] and *Carmody*.[3] As Judge O'Leary pointed out, that position is not merely a matter of Irish constitutional law or the law of the European Convention on Human Rights, but also and increasingly an issue which arises in the field of EU law. A large and increasing proportion of our laws derive from EU law and are governed by standards which apply across Europe, and which increasingly provide for the requirement of legal representation in addressing matters such as applications for asylum and European arrest warrants. Similarly, the impact of European development is being felt most strongly in the field of environmental litigation, as was recently discussed in Mr Justice Brian Murray's judgment for a unanimous Supreme Court in *Heather Hill Management Company v. An Bord Pleanála*.[4]

I know that many thoughtful people are rightly uncomfortable with the idea that all social issues can be converted into legal issues. Apart from concerns derived from the separation of powers, there are real and valid concerns which relate to competence and resources. Broadly speaking, litigation shines a very bright light on issues, but does so through a keyhole and has some powerful but essentially crude weapons. It lacks the power, for example, to devise sophisticated administrative schemes, but the administration of justice is expressly provided for in the Constitution, the European Convention on Human Rights, and the treaties establishing the European Union and the Charter of Fundamental Rights. If problems in relation to legal aid cannot be resolved through the administrative and political systems, then it will not be surprising if claims are brought to court in Dublin, Strasbourg, or Luxembourg and possibly all three.

The fourth reason to reject a policy of inertia or benign neglect is particularly important today. The improvement of the administration of justice through the improvement of the civil legal aid scheme is the right thing to do in its own terms, but it is also arguably essential. It is worth asking why the EU is concerned with access to justice and the administration of justice, and why has the Court of Justice

[1] *Airey v. Ireland* (1979) 2 EHRR 305.
[2] [1976] IR 325.
[3] *Carmody v. The Minister for Justice, Equality and Law Reform & Ors* [2010] 1 IR.
[4] [2022] IESC 43.

of the European Union delivered a stream of judgments on the question of the independence of the judiciary and the administration of justice, starting with the Portuguese judges' case, and involving as recently as last month, the delivery of an Advocate General's opinion in respect of the appointment of judges in Romania. Why, we should ask ourselves, has this line of case law emphasising the rule of law recently become so prominent?

These cases are, I would suggest, examples of an increasing recognition that the administration of justice is not a luxury or a mechanism that can be taken for granted. It is one of the essential features in the structure of society, which binds it together and allows it to function and provide a legal environment in which people can live their lives in freedom in the type of societies we have taken for granted in Western Europe since the Second World War.

Again, even when the systemic importance of a functioning legal system is acknowledged, the commentary can be sometimes frustratingly simplistic. Everyone has heard about the importance of checks and balances in the democratic system, and how courts provide a significant check and balance on the power of government and parliament, particularly in a parliamentary system, where the government sits in the legislature. This, so far as it goes, is in recognition of an important and vital feature of our constitutional balance. It is also true that it is increasingly recognised that in an international world, a legal system that is demonstrably impartial, competent, and efficient is an essential component of an economy that seeks to attract international investment. But important though these things are, they are an insufficient and incomplete justification for the existence of a court system.

There are currently 170 judges in Ireland. In truth, it can be said that only the nine members of the Supreme Court regularly encounter fundamental issues of separation of powers and checks and balances, and even for them it is not in truth a daily occurrence. Fewer cases involve international investment. Most cases are more prosaic, but the District Court, for example, is by far the busiest court in terms of throughput, and apart from dealing with routine matters and processing cases for trial in the Circuit Court and the Central Criminal Court, the District Court deals mostly with what might be described as minor crime and increasingly large

amounts of family and child law. Crime and what can be broadly called 'family law' consume a lot of the legal aid budget.

These cases are not small or trivial matters. They may well be the only time people come before the courts, and people doing so need to believe that they will obtain justice. An important part of that is that they should feel that their side of the case will be presented and will be heard, and that if the case is decided against them, it is not because of an imbalance in legal representation. That belief in the justice process is a critical part of the bonds that hold a society together. Loss of faith in that system ultimately undermines belief in and commitment to the State itself. Maintaining a fair and accessible system in which disputes large and small can be resolved is not therefore, as I have said before, a luxury or an optional extra. It is in truth the business of the State, and it has always been the business of the State. The famous American lawyer Dean Wigmore said more than 100 years ago that the State has been in the business of law long before it entered the business of health or education. That is because civilisations with perhaps fractions of the resources now available in the modern world recognised that a functioning justice system was an essential service that had to be provided by any society which wished to endure, and in today's much more complex world, a fair and efficient court system is an essential component in any state which respects the rule of law. It is more difficult to deliver that demonstrable fairness if parties who may have to come before courts cannot access assistance advice and representation.
We have to find smarter, more efficient, and fundamentally better ways of providing information, advice, assistance and representation to people in this State. That is something which demands the attention, energy, and commitment of everyone here, and I hope – as I think we all should – that the outcome of this conference will significantly enrich the discussions and reflections of the Civil Legal Aid Review Group and will contribute to well thought out, beneficial and effective reform of our civil legal aid system.