PUBLIC INTEREST LAW AND LITIGATION IN IRELAND

REPORT COMMISSIONED BY FLAC (FREE LEGAL ADVICE CENTRES)

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Executive summary

The objective of this research was to examine the role which public interest law and litigation might have in advancing the position of disadvantaged and vulnerable groups in Irish society; to identify barriers to this role; and to set out options for a development strategy.

Public interest law and litigation (PILL) is defined as a way of working with the law for the benefit of vulnerable and disadvantaged people (chapter 2). Drawing on existing literature, public interest law involves

1) Law reform;
2) Legal education;
3) Community legal education; and
4) Public interest litigation.

Overall the study finds that public interest law and litigation (and its component parts) are at an early stage of development in Ireland (chapter 3). There is limited explicit public policy in the key areas although the Bar Council has recently introduced a potentially important Voluntary Assistance scheme. There is significant demand and support for the further development of the different aspects of a PILL approach from NGOs and individuals involved in this area.

In relation to public interest litigation, the study identified a range of barriers to bringing such litigation. The primary barrier was cost (including the cost of legal services, the risk of responsibility for the costs of the opposing side and the cost of expert witnesses and related issues). Other potential barriers included procedural barriers, and judicial attitudes. Chapter 4 considered a range of possible approaches to overcoming these barriers.

Finally, chapter 5 sets out a development strategy. The study found that the experience in this country and in neighbouring jurisdictions indicates that a public interest litigation strategy works best when it is part of a broader public interest law approach involving issues such as law reform and legal education. Accordingly it recommended that a development strategy to advance public interest law and litigation should adopt a comprehensive approach to PILL and should provide an integrated range of supports to measures in different areas.

This study sets out a range of options including

Law Reform

1) The appointment of a legal policy officer to support NGOs in developing law reform proposals;
2) The establishment of a Legal Research Fund to provide resources for the development of such proposals.
Legal education

1) Law schools (including professional law schools) should examine the extent to which their intake of students includes persons from disadvantaged and vulnerable backgrounds and what needs to be done to increase uptake;
2) Law schools should examine the concept of clinical legal education and consider whether it would be appropriate to them;
3) A Centre for Public Interest Law should be established to carry out research on public interest law issues; to provide advice and support to independent law centres (and possibly to others involved in the area) on PILL; and to develop links with community groups to support the provision of community legal education.

Community legal education

1) The funding of innovative and important initiatives in the area of community legal education.

Public interest litigation

It is recommended that development in this area should aim to expand capacity in a measured way over the medium term (i.e. say five years) rather than aiming for a dramatic increase over a short period. The following specific options are put forward:

1) A Public Interest Litigation Fund be established to help to meet the costs of certain public interest cases and to help to develop a greater body of litigation.
2) Public interest litigation should seek to clarify the legal position on costs including that concerning protective costs orders and on procedural issues including the locus standi of NGOs.
3) The law concerning recovery of costs should be amended to ensure that costs can be recovered in pro bono and independent law centre cases.
4) A public interest law officer be appointed to assist the independent law centres to develop their work in this area and to facilitate a sharing of expertise and resources.

A network of independent law centres committed to PILL will be essential to the development of a long-term PILL strategy. Several law centres have serious concerns about the adequacy of their own core funding and would seek additional core resources. The terms of reference of this research, however, focus on public interest law and litigation and it is not intended to make general recommendations about access to legal aid or funding of independent law centres (important though these issues may be). However, funders providing specific funding for PILL activities obviously need to have regard to the underlying viability of the funding of independent law centres.
Chapter 1: Introduction and research approach

Introduction

This research project was commissioned by FLAC (Free Legal Advice Centres) and funded by the Atlantic Philanthropies. The purpose of the research was to examine the potential role of public interest law and litigation in improving the position of disadvantaged and vulnerable groups in Irish society.

Terms of reference

The terms of reference (ToRs) of the study, developed by a number of leading experts on PILL from Ireland and abroad, required the research to cover a number of different areas:

**Definitional issues:** Working definitions of public interest law and litigation (see chapter 2.1) and a ‘map’ of the key groupings of interested parties and stakeholders (chapter 2.3).

**Policy and interventions:** An overview of current government and legal profession policy, initiatives and stance towards public interest law and litigation and an audit of civil society interventions and current capacity to pursue a public interest law and litigation strategy (chapter 3).

**Quantitative and qualitative data:** The extent of PILL in Ireland and the demand for such an approach (chapters 3 and 4). In particular, the research was to examine the barriers and opportunities in relation to the development of public interest law and litigation in Ireland. This was to include a comparison of the Irish situation to that of other jurisdictions where there is a culture of public interest law and litigation.

**Development strategy:** The development strategy was to advance public interest law and litigation as a strategy to address specific issues of social disadvantage and exclusion in Ireland, including the identification of key opportunities to utilise public interest law and litigation to address issues of social disadvantage and exclusion; structuring options; strategy to develop the required infrastructure and resources; and next steps.

Research Approach

Based on these requirements, the research, which was carried out between January and September 2005, was structured along the following lines:

1) **Defining public interest law and litigation** – This section is based on

   a) an international literature review of relevant articles and other publications; and
   b) interviews with key organisations and individuals in Ireland to establish their understanding of what public interest law and litigation
means (legal professions, groups involved in public interest litigation such as FLAC, independent law centres, academics, NGOS, relevant statutory bodies, etc.).

2) The potential role of public interest law and litigation – Drawing on international experience, this section included

a) a review of international literature; and
b) interviews to establish best practice in England and Northern Ireland through interviews with key informants (see Appendix II). The focus was on the experience of these jurisdictions given the high degree of commonality in the respective legal systems.

3) PILL in Ireland - This section examined the history of public interest law and litigation in Ireland, the current state of public interest law and litigation, the extent to which key organisations and individuals are involved in public interest law and litigation, the extent to which it has, to date, been successful in improving the position of disadvantaged and vulnerable people, and related issues. This section also examined current government and legal profession policies towards public interest law and litigation. This was based on a review of the limited literature in the area and on interviews with key individuals and organisations (as above). The interviews with key informants explored their views on the key barriers to implementing a public interest law and litigation approach and how these might be addressed and the possible opportunities where such a strategy might be applied.

The draft Terms of Reference for the study of public interest law and litigation in Ireland sought quantitative data on the extent to which the Irish legal profession 'is currently involved in public interest law and litigation'. The best manner to obtain this information would be through a large-scale survey of the legal professions. However, given that the concept of 'public interest law' is not very familiar in Ireland and given that initial consultations indicated that the level of legal involvement in public interest law was quite low, it was decided that it would be inadvisable at this time to proceed with such a study. The lack of familiarity with the concept of public interest law would be likely to lead to low response rates or inaccurate responses. Initial consultations indicated that public interest work was probably concentrated amongst a relatively small number of law firms and practitioners. Again this gave rise to a greater possibility of inaccurate responses from a large-scale survey.

It was decided instead to carry out a range of qualitative interviews with members of the legal profession involved in public interest litigation and to

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1 See the list at Appendix II.
2 The experience of public interest law and litigation in other countries such as the USA and South Africa was also drawn on through the literature review and through internet contact as necessary.
3 It seemed likely, for example, that there would be difficulties in distinguishing public interest law from pro bono work.
carry out a survey of all recent decisions of the superior courts to establish the level of public interest litigation (see Appendix I).

In addition two focus group meetings were held with NGOs - one with 'legal' NGOs and one with 'non-legal' NGO's- to establish the extent to which they see legal resources as being available and where they would see public interest law and litigation playing a useful role in achieving their objectives.

4) Development strategy – Drawing on the evidence collected in the research outlined above and on a comparison of Ireland with other jurisdictions where there is a culture of public interest law and litigation, options were developed to advance public interest law and litigation as a strategy to address issues of social disadvantage and exclusion in Ireland.
Chapter 2: Public interest law and litigation

This chapter looks at what we mean by the term 'public interest law and litigation'. It then looks at the role of and rationale for supporting public interest law and litigation. Finally, we set out a 'map' of the key groupings of interested parties and stakeholders involved in PILL.

2.1 Defining Public Interest Law and Litigation

PILL is not a term which is very familiar in an Irish context. Public interest law is not a field of law in the normal sense of the term (i.e. such as, for example, family or company law). Rather it is a way of working with the law for the benefit of vulnerable and disadvantaged people.\(^4\) In the literature there is no one precise definition of public interest law which is widely accepted. Indeed, the meaning of the term is influenced by the legal and political culture of the society in which it operates.

Drawing on existing literature,\(^5\) public interest law involves

1) *Law reform* – this can include research on issues of concern, developing reform proposals, lobbying and campaigning;
2) *Legal education* – this involves incorporating an awareness of public interest into third level and professional legal education through, for example, the teaching of public interest law or the development of clinical (i.e. practical) legal education as a structured part of the course of education;\(^6\)
3) *Community legal education* – this involves a range of measures to ‘demystify’ the law and to raise awareness of the law amongst disadvantaged and vulnerable people. Examples include the provision of information materials (in print or on-line); community legal education projects, training, ‘Street law’ programmes in the USA and elsewhere which use law students to deliver legal education to members of the public;
4) *Public interest litigation* – this involves the use of litigation (i.e. the process of bringing a case to court) in a strategic manner to advance the position of disadvantaged and vulnerable groups. It involves a wide range of activities from the identification of an issue, identification of potential cases, preliminary advice, bringing of the case itself, and the implementation of the court’s decision.

\(^4\) Public interest law may also apply to working for broader issues, such as, for example, environmental concerns, but for the purposes of this study the focus is on vulnerable and disadvantaged people.
\(^5\) See, in particular, Public Interest Law Initiative *Pursuing the Public Interest*, New York: Columbia Law School.
\(^6\) Clinical legal education involves a system by which students receive academic credit for their work in the wider legal community. In addition to learning the theoretical underpinnings of law in the traditional classroom setting, students earn academic credit by putting their knowledge and skills to work in a variety of “real world” placements with NGOs, practitioners, government agencies and elsewhere.
It should be noted that public interest law is not synonymous with *pro bono* work carried out by the legal professions. Despite the similarity in terms (*pro bono publico* meaning 'for the public good'), *pro bono* work may include 'public interest' work in the sense used here but will frequently be for a mainly private benefit. Conversely, some public interest work may be carried out on a *pro bono* basis but much will be paid.

Thus, for the purposes of this research, we understand 'public interest law' to be a way of working with the law for the benefit of vulnerable and disadvantaged people while 'public interest litigation' is one of the methods of implementing this approach.

### 2.2 Role of and rationale for PILL

Support for public interest law and litigation is premised on the assumption that it is legitimate to use the legal system and the courts to advance the position of disadvantaged and vulnerable groups in Irish society. It is important to ask whether this is a valid assumption. It is sometimes suggested that reliance on the courts undermines the democratic system. However, insofar as PILL is concerned, this is a mistaken argument.

PILL in its broader definition does not specifically involve the courts but rather assists disadvantaged and vulnerable people in having an input into the democratic process through, for example, being involved in a process of law reform or by participating more fully in the outputs of the legislative process (i.e. by being more fully aware of rights and responsibilities created by legislation).

Insofar as public interest litigation does directly involve the courts, the use of the courts to advance the position of disadvantaged and vulnerable groups can be seen as perfecting the democratic process rather than as a challenge to it. Our constitutional system of government is based on the separation of powers between the legislature, executive and the judiciary. An essential part of the separation of powers is the operation of a system of checks and balances between the different arms of government. It is important that the role of the executive in, for example, implementing legislation should be checked both by its responsibility to the legislative branch (the Oireachtas) and by being subject to review by the judiciary. Similarly, the legislation adopted by the Oireachtas must be subject to review by the courts to ensure that legislation complies with the requirements of the Constitution.

An example of the need for such checks and balances is the recent nursing home issue where it was found that certain charges for public nursing home care were unlawful. This practice had gone on over a number of decades leading to a very significant amount of arrears being owed to the individuals affected. A proactive public interest

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7 *Pro bono* work might be defined as legal advice or representation provided without charge by lawyers to individuals and groups who cannot afford to pay for that service.


9 Although perhaps not expressly stated, this has been held to be inherent in article 6 of the Irish Constitution: *Attorney-General v. Hamilton (No. 1)* [1993] 2 IR 250 at 267-8 and 299.
law approach could have led to this issue being highlighted and resolved at a much earlier stage to the ultimate benefit of all concerned.

The operation of this system of checks and balances simply involves the application of our established Constitutional system of government. Other sections of the community, such as, for example, the business community, have ready access to the courts where their interests are at stake. It is essential for the balanced operation of our democracy that all sections of the community (including disadvantaged and vulnerable groups) should also be able to ask the courts to review the actions (or inaction) of the other arms of government or to resolve disputes with other parties.

2.3 Key groupings

Here we set out an overview of the key groupings involved (or potentially involved) in the area of public interest law and litigation. The extent of the involvement of individual organisations is discussed in more detail in chapter 3.

Executive

The Minister for and Department of Justice, Equality and Law Reform has primary responsibility in this area although other departments such as Education and Science and Social and Family Affairs might also have a role on aspects of PILL.

Judiciary

The judiciary are obviously centrally involved in public interest litigation.

Statutory bodies

The Legal Aid Board is the main provider of civil legal aid in Ireland although its direct involvement in public interest litigation is somewhat limited. It should be noted that the Civil Legal Aid Act, 1995, section 28(9)(a) provides that legal aid shall not be granted in respect of (i) proceedings which are brought by the applicant as a member of and by arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest; and (ii) any other matter where the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned. While this clearly limits an active public interest litigation approach by the Board it does not mean that it cannot (and has not) been involved in litigation which would fall within the definition of public interest litigation.

Other organisations such as the Equality Authority, the Irish Human Rights Commission, the Ombudsman and the Law Reform Commission also have an interest in the area.
Legal profession

The representative bodies of the two Irish legal profession are the Law Society of Ireland and the Bar Council. As we will see, the largest group involved in public interest litigation are individual members of both legal professions.

Law centres

There is a range of independent 'law centres'\(^{10}\) or similar organisations in Ireland which are broadly involved in PILL. These include FLAC, Northside Community Law Centre, Ballymun Community Law Centre, ICCL, Immigrant Council, Irish Refugee Council, Irish Traveller Movement Legal Unit and Disability Legal Resource.

These organisations are involved in a wide range of activities including public interest litigation, general litigation, legal advice, law reform and the provision of legal information.\(^ {11}\) A number, including FLAC, NCLC, BCLC and the ITM Legal Unit, have practising lawyers and pursue a litigation strategy. Others employ lawyers but not in a practising capacity and are limited to the provision of legal advice or to involvement in law reform.

Law Schools

Law schools in other common law countries play an important role in PILL and law and human rights departments in universities such as TCD, NUI Cork, UCD and NUI Galway and the University of Limerick have an important potential role to play in this country.

\(^{10}\) In this report the term 'law centre' is used to cover the range of independent NGOs involved in specific legal issues and broadly involved in the area of PILL.

Chapter 3: PILL in Ireland

In this chapter, we look at the current status of public interest law and litigation in Ireland. Having briefly discussed the development of PILL, we outline the current position in the four areas outlined in chapter 2: law reform, legal education, community legal education and litigation. This includes an examination of the level of 'demand' for PILL. Finally, we look at the policy of government and the legal profession towards PILL. This chapter draws on extensive interviews and meetings with lawyers, legal and non-legal NGOs, representatives of government departments and public bodies, and academic experts.

3.1 Background

The development of public interest law and litigation (although the term itself is not widely used) has been extensively documented in Gerry Whyte's excellent publication Social Inclusion and the Legal System.12 This book discusses the theoretical issues underpinning public interest litigation, outlines practical issues concerning such litigation, describes the development of a number of key organisations in the area (including FLAC and Northside Community Law Centre) and provides a detailed exposition of public interest litigation in Ireland.

In his overall evaluation of public interest litigation in a number of different areas, Whyte finds that

- In the area of social welfare, public interest litigation has been 'effective in protecting the procedural rights of welfare claimants and occasionally effective in removing anomalies from the system but generally [did] not improve access to welfare income for disadvantaged individuals or groups in any significant way';13
- In the area of children's rights, 'it has produced beneficial, tangible results, particularly in relation to meeting the educational needs of children with learning difficulties';14
- In relation to Travellers' rights, litigation 'produced some limited gains for Travellers';15
- Finally, 'the pursuit of a litigation strategy to enhance access to legal services … had mixed results' resulting in the significant expansion of the criminal legal aid scheme and arguably being an important factor leading to the introduction of civil legal aid but contributing to the fact that the latter was bereft of any strategic element for tackling social exclusion.16

Whyte emphasised that while 'not a universal panacea for the social problems of our country', public interest litigation could achieve significant results.17 However, he

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14 P. 210.
15 P. 244.
16 P. 264.
17 Chapter 8.
found that 'litigation, in isolation, is rarely sufficient' and that engagement with the political and bureaucratic system, such as lobbying for law reform, is also essential. 

Whyte outlines how the attitude of successive governments to issues concerning 'access to justice' has been cautious (if not hostile) and how the civil legal aid scheme has, over a long period of time, been both narrowly defined in terms of the work it can carry out and inadequately resourced.\(^{18}\)

### 3.2 Current status of PILL in Ireland

In our working definition of PILL in the previous chapter, we outlined four key areas:

i) Law reform;
ii) Legal education;
iii) Community legal education;
iv) Litigation.

In this section, we look at the current position in each of these areas in terms of advancing the position of disadvantaged and vulnerable groups.

1) Law reform

Law reform proposals are generally developed by government departments in response to perceived 'needs' for reform. In some cases, this process may be initiated by more or less organised campaigns by groups or individuals and/or arise from legal cases.\(^{19}\) In some cases, legal proposals may be preceded by a discussion document or a Green or White Paper followed by a consultation period.\(^{20}\) Policy formation, in most areas relevant to the issues considered in this report, is highly centralised in the sense that detailed policy proposals are normally produced by government departments (rather than by Oireachtas committees, private bodies or opposition parties) although the policy makers may have regard to reports and proposals produced by a wide range of bodies.

The Law Reform Commission does have a specific remit in making proposals on law reform. However, the Commission is involved in only a very small number of the total law reform proposals ongoing at any particular time.

Once legislative proposals are published by a government department, following approval by government, these will normally be considered by an Oireachtas committee which can take evidence from interested parties.

Generally speaking, NGOs interviewed reported positively on the current process of law reform. Most reported that departments were prepared to meet with them to

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\(^{18}\)On the latter point, see also the recent decision of *O'Donoghue v. Legal Aid Board* [2004] IEHC 413. It should be noted that there has been a recent significant increase in funding for legal aid. 

\(^{19}\)In other cases, however, legal decisions may inhibit the law reform process.

\(^{20}\)In theory a Green Paper sets out reform options while a White Paper sets out government policy. However, in practice, the development of policy does not follow any highly structured approach and these terms are not necessarily used at all or in a very rigid manner.
discuss issues in the process of preparing law reform proposals.\textsuperscript{21} Equally, NGOs generally commented favourably on the fact that Oireachtas committees (and individual members of the Oireachtais) were prepared to meet with them and to discuss their concerns.

Few NGOs had much (or any) contact with the Law Reform Commission. This is perhaps unsurprising given its limited functions. However, it does appear that the focus of the Commission is very much on the legal - rather than social - aspects of law reform. While the Commission involves a wide range of groups in its deliberations, the focus is very much on legal expertise rather than on consultation with NGOs from a broader policy perspective. The Commission in conjunction with Ballymun Community Law Centre held a public meeting in Ballymun to discuss its proposals on cohabitation and this represents a welcome development of its normal working methods.\textsuperscript{22}

In summary, NGOs reported quite a positive experience of the law reform process from the point of view that they were able to make their views heard in the process - emphasising that this does not necessarily mean that their preferred position was reflected in the final outcome. However, it seems clear that the less well organised and resourced the organisation, the greater the difficulty it will have in developing proposals. While most groups interviewed were well able to identify key issues and to make proposals for reform, these were frequently of a somewhat general nature. Many NGOs, particularly those without legal staff, indicated that they were not necessarily able to analyse an issue from a legal perspective or to prepare detailed legal reform proposals.

2) Legal education

There is a very limited focus on public interest law in many of Ireland's universities and professional law schools. Several law schools do teach subjects in the general area of public interest law. For example Trinity College has a public interest law course while NUI Galway has a particular focus on disability law.\textsuperscript{23} However, in most law schools, the focus on public interest law is quite limited.

UCC is currently beginning a BCL (clinical legal education) in which students who opt to participate will spend a year working externally with organisations including the Legal Aid Board, the DPP and the UNHCR. UCC also plans to set up a disability rights clinic in the coming year.\textsuperscript{24} NUI Galway is also in the process of developing clinical legal education as a structured part of its law degree. It is anticipated that work placements for academic credit will be made available on a pilot basis to 35-40 final year students in BCL in the academic year 2006-07. At present a database of potential employers is being developed which will include NGOs working with disadvantaged groups and solicitors.

\textsuperscript{21} This is not, of course, to say that the views of NGOs were always reflected in the final outcome.
\textsuperscript{22} The South African Law Reform Commission appears to take a much more 'social' and proactive approach to its work and might serve as a useful model. See www.doj.gov.za/salrc.
\textsuperscript{23} NUI Galway is also initiating a masters course in public law.
\textsuperscript{24} UCC has also a longstanding LLM in criminal justice which involves students in placements in the criminal justice system.
The recent report of the Competition Authority on the legal profession also has implications in this area.\textsuperscript{25} The Authority recommends the abolition of the educational monopolies enjoyed by the King’s Inns and the Law Society in respect of professional legal education. If implemented, this recommendation would mean that other educational providers could be involved in the provision of professional legal education and might increase the relevance of the clinical legal education approach.

There are few (if any) structured links between law schools and NGOs involved in public interest law issues. Insofar as such links do exist they are very much of a personal nature with individual law lecturers and, consequently, likely to cease where a lecturer moves on.

Finally, the number of persons from disadvantaged and vulnerable backgrounds who undergo legal studies at undergraduate or professional level is very low.

Overall, this means that the persons qualifying with law degrees or as lawyers tend to be from better-off backgrounds, that they receive very limited exposure to public interest law issues during their third level and professional training; and, conversely, that very few persons from disadvantaged and vulnerable backgrounds qualify as lawyers. In addition, the very significant resources of law schools in terms of ability and expertise (on public interest law) are not made available to the wider community in any structured manner.

Interviewees suggested that there was a need to address all the issues outlined above: first, by taking steps to increase the proportion of people from disadvantaged communities undergoing legal training; secondly by increasing the teaching of public interest law issues within law schools (including professional law schools); and finally, by developing more structured linkages between the law schools and, for example, independent law centres.

There are currently a number of interesting initiatives in this area, including:

- the development of clinical legal education in UCC and NUI Galway,
- the establishment of the LEAP (Legal Education for All Project) involving ITM, Ballymun Community Law Centre, Northside Community Law Centre, the Immigrant Council and Trinity College Dublin.

In addition, one way of providing a co-ordinated response to the different issues discussed in this section would be the establishment of a Centre for Public Interest Law which would:

1) Research public interest law issues, particularly in a comparative legal context;
2) Provide advice and support to independent law centres (and possibly to others involved in the area) on PILL;
3) Further develop links with community groups to support the provision of community legal education;
4) Teach public interest law to law students.

\textsuperscript{25} Competition Authority \textit{Study of Competition in Legal Services}, 2005.
3) Community legal education

Community legal education involves the provision of information and education on the law (including legal rights and responsibilities) to the general public and, in particular, to disadvantaged and vulnerable groups. There is very little provision of community legal education in Ireland at present. Many of the independent law centres are involved in the provision of talks and information leaflets about specific legal topics. In addition, Comhairle and the Citizens Information Centres which it supports are heavily involved in the provision of citizens' information. However, this tends to be general rather than specifically legal information.

The LEAP project, referred to above, is a very interesting example of an innovative project bringing together a range of organisations to provide legal education to disadvantaged groups. A further innovative example is the Participation and the Practice of Rights project in the areas of north inner city Dublin and Belfast. Both projects are practical attempts to increase the legal knowledge and skills of people from disadvantaged and vulnerable communities.

In discussions with NGOs there was a very high level of demand for community legal education in a variety of forms from basic information to more in-depth training courses.

4) Litigation

Finally, we look at the current situation concerning public interest litigation. As set out above, Gerry Whyte's detailed assessment of the outcome of public interest litigation to date finds that this might best be described as one of limited achievement. The terms of reference required an assessment of the current level of public interest litigation in Ireland. This was approached in a number of ways:

i) interviews and a focus group with independent law centres;
ii) interviews and a focus group with non-legal NGOs;
iii) interviews with 20 lawyers involved in the area of public interest law;
iv) interviews with other key experts; and
v) a research study of legal decisions (see Appendix I).

Research study

The research study examined all written decisions of the High and Supreme Courts in 2003 and 2004 to identify the proportion of public interest cases. The definition of public interest cases was adapted from a somewhat similar study carried out in the UK by the Public Law Project:

Cases which raise issues, beyond any personal interests of the parties in the matter, affecting identifiable sectors of the public or vulnerable groups; seeking to clarify or challenge important questions of law; involving serious matters of public policy or general public concern;

26 This is not, of course, to suggest that public interest litigation only takes place at the level of the superior courts. However, such litigation is more likely to be found in these courts.
and/or concerning systematic default or abuse by a public body.\textsuperscript{27}

In total, over the two years, only 33 judgements were found to fall within the definition of public interest litigation as outlined above. This means that only 3.5\% of all written judgements from the High and Supreme Courts in 2003 and 2004 involved public interest litigation (as defined). While the number of public interest cases identified obviously depends on the precise definition chosen, this does indicate a rather low level of public interest type litigation in Ireland. A slightly broader definition of public interest would not significantly increase this level.

This impression of a rather low level of public interest litigation was supported by interviews. Generally speaking, the independent law centres, which have a wide range of other responsibilities, are involved in little public interest litigation. Private practitioners indicated that public interest litigation is concentrated amongst a rather small number of solicitors offices and generally in small to medium size firms.

Unfortunately, there does not appear to have been a comparable study of the level of public interest litigation in other jurisdictions. However, interviews with respondents in the UK and Northern Ireland would suggest that there is a significantly higher level of public interest litigation in neighbouring jurisdictions. A number of factors support this conclusion:

i) the jurisprudence in relation to public interest type issues such as protective costs orders and locus standi is much more developed in the UK; and

ii) the Public Law Project study found that 32 per cent of judicial review \textit{applications} in England and Wales involved a public interest point. While this can not be directly compared with our study of all \textit{judgements}, it does suggest a significantly higher level of public interest issues.

A number of respondents with experience both in Ireland and in neighbouring jurisdictions also expressed the view that public interest litigation was comparatively underdeveloped in Ireland. As a very wide range of issues were raised in relation to public interest litigation, these are discussed in more detail in chapter 4.

As noted in chapter 4, respondents reported that there was widespread individual demand for legal services in public interest areas such as refugee and asylum law. However, the priorities of those non-legal NGOs interviewed were primarily in the area of assistance with law reform and community legal education rather than with public interest litigation.\textsuperscript{28} In general, this was due to the fact that, while groups might have identified a potential legal issue, they did not have the expertise to analyse it and establish whether there might be a legal remedy to the problem and, if so, whether litigation might be a viable avenue.


\textsuperscript{28} A number did raise the issue of access to legal aid for individuals with specific problems.
3.3 Government and legal sector policy

1) Government

Unsurprisingly, given that the concept is not a commonly used one in an Irish context, the Irish government does not have an officially established policy on PILL. Thus policy has to be identified in the different areas coming within the definition. And, of course, policy often varies between government departments and other public agencies.

*Law reform* - Generally, government encourages consultation with and involvement of NGOs in relation to the development of policies (i.e. law reform).²⁹ Based on the generally positive response from NGOs, this policy would appear to be generally implemented in practice. However, government does not generally provide resources for legal research into issues of law reform³⁰ although individual groups may be able to access specific resources under specific headings.

*Legal education* - There is little explicit policy in this area and the content of legal education is largely left to the individual law schools. In recent years, the Department of Education and Science and the Higher Education Authority has emphasised the importance of improving access to third level education for disadvantaged groups, for example, through funding third level access programmes. In general, these are not focused on specific areas such as legal studies.

*Community Legal Education* - As in the UK, there is an absence of any clear or comprehensive policy on community legal education. The provision of 'citizens' information' (which is a related area) has been developed greatly in the last decade through the expansion of Comhairle, the development of a citizen information database (Oasis) and the development of local citizen information services. These are supported by funding from the Department of Social and Family Affairs. However, there is little funding or support for more specifically legal education.

*Litigation* - While there is no specific policy on this topic, the general perception amongst respondents would be that government would be less than enthusiastic about supporting public interest litigation (in part because public bodies are often the defendants in such litigation). The longstanding reluctance to provide adequate funding for civil legal aid (albeit that resources have increased significantly in recent years) and the oft-stated concerns about providing a rights-based approach to the provision of disability services would all suggest that government might be expected to have reservations about public interest litigation. Having said that, a number of public bodies such as the Equality Authority are already involved in public interest litigation and it is likely that the Irish Human Rights Commission will increasingly be involved in such litigation in the future.

³⁰ Obviously the Law Reform Commission carries out detailed legal research on those topics it examines.
2) Legal professions

**Bar Council**

The Bar Council has recently established a *Voluntary Assistance* scheme which has very significant potential to make a major contribution in the area of public interest law and litigation. The Bar has established a list of barristers prepared to provide *pro bono* services. Unlike the traditional *pro bono* approach, however, this is focused on voluntary organisations (rather than individuals). Nor is it confined to legal representation but can also be adapted to meet the needs of NGOs. So, for example, it might involve training in advocacy skills so that the staff of an NGO could represent persons before an administrative tribunal, or the development of law reform proposals. To date it appears that the take-up of this service has been slow. The consultation process indicated that this was a key issue to be addressed if the scheme is to operate to its full potential. NGOs are not aware of the scheme and even when made aware, the lack of any previous experience of direct contact with the Bar Council is likely to inhibit take-up.

**Law Society**

The Law Society has no specific policy on public interest law litigation. It does not have a public interest law committee. A pro bono scheme was considered by a committee in recent years but nothing was agreed. The Society does organise occasional conferences in areas relevant to public interest law such as immigration law.

### 3.4 Capacity to pursue PILL strategy

As set out above, the current provision of and approach to PILL is at an early stage of development. In most cases, there is no clear policy support for PILL from government or the legal profession. The main source of public interest litigation is currently private solicitors (generally from small-medium sized firms). The independent law centres are involved in a variety of activities in the area of PILL but most are small and many have somewhat insecure or inadequate funding. Overall, there is currently limited capacity to pursue a PILL strategy and there is a need for strategic investment in the area if such a strategy is to develop.

**Conclusion**

Overall this chapter finds that public interest law and litigation (and its component parts) are at an early stage of development in Ireland. There is limited explicit public policy in the key areas, although the Bar Council has recently introduced a potentially important *Voluntary Assistance* scheme and individual members of the legal professions make a vital contribution through their *pro bono* involvement in public interest litigation. There is significant demand and support for the further development of the different aspects of a PILL approach from NGOs and individuals.
Chapter 4: Public Interest Litigation

This chapter looks in particular at the issues arising in bringing public interest litigation in Ireland. It draws on extensive interviews with lawyers involved in public interest litigation in both private practice and in independent law centres.

4.1 Background

As discussed in the previous chapter, the level of public interest litigation in Ireland appears to be rather low. While there are a number of high profile cases and 'growth areas' (see below), overall the level of public interest litigation would appear to be significantly lower than in neighbouring jurisdictions such as Northern Ireland or England and Wales.

Insofar as public interest litigation is being carried out in Ireland, the vast bulk of cases are being brought by solicitors in private practice. In general, public interest litigation tends to be brought by a relatively small number of solicitors and is heavily focused on small-medium sized firms. The independent law centres have a wider role than simply litigation and, as we saw in chapter 3, many are involved in wider PILL activities. However, perhaps unsurprisingly given their limited resources, their contribution to the overall level of public interest litigation in Ireland is currently very limited. The state-funded Legal Aid Board also has a limited involvement in public interest litigation due to the fact that its work is focused primarily on individual family law casework.

4.2 Experience of public interest litigation

In this section we look at the experience of bringing public interest litigation based on the interviews with practitioners in the area.

Does litigation have a role in advancing the position of disadvantaged groups?

The overwhelming reaction of interviewees was that public interest litigation could have a role in advancing the position of disadvantaged and vulnerable groups. This is not, of course to say that all cases brought were 'successful'. However, interviewees - who all had considerable practical experience of bringing cases - all felt that the courts did have a role to play in this area and most pointed to areas where they felt there was potential to bring further cases.

Volume of cases

Some respondents reported a dramatic increase in the volume of cases, e.g. in the areas of refugee and immigration law. Others, however, reported that certain cases had declined in recent years in part as a result of the Sinnott case and similar decisions.31

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Type of cases

Lawyers interviewed were involved in public interest litigation in a very wide range of areas including children's rights and education, refugee and immigration law, Traveller's issues, criminal law and prisoners' rights, public housing, right to home births, inquests, rights of homosexual persons and the right to legal aid.

Unmet demand?

Most interviewees felt that there was considerable 'unmet demand' for representation in relation to public interest issues.

4.3 Barriers to public interest litigation

In this section we look at the barriers to bringing public interest litigation. Possible responses to these barriers are discussed in more detail in section 4.4.

Costs

The primary barrier mentioned in bringing public interest litigation was undoubtedly the cost involved. Issues in relation to costs came under a number of different headings including lawyers’ costs, the risk of costs being awarded against the client, difficulties in recovering costs, and costs of expert witnesses.

i) Lawyers' costs - In the case of the private solicitors, clients involved in public interest litigation were generally not in a position to meet the costs involved (or at least not the full costs). Accordingly, solicitors operated either on a pro bono (no fee) basis or charged a relatively nominal amount. The method of operation is clearly financially dependent on achieving a sufficiently high success rate to meet the costs involved in all the cases brought. Accordingly solicitors generally reported that they carefully vetted cases to ensure that they had, in general, some reasonable prospect of success.

In the case of barristers' costs, there was some difference of perception between solicitor and barrister interviewees. In general barristers, and it should be recalled that these were all barristers involved in public interest litigation, considered that barristers were prepared to take on public interest cases without any guarantee of payment. Solicitors generally agreed that it was possible to obtain the services of a barrister for public interest work. However, a number of solicitors suggested that while willing to act, unpaid barristers were perhaps unable to give the same degree of commitment to a case that they would if guaranteed payment. A number suggested that they would like to be able to guarantee some level of payment to a barrister (although not the full commercial rate).
In the vast majority of cases brought by private solicitors, there was no public financial support for the cases.\textsuperscript{32} This is clearly a very significant difference to the position in the United Kingdom where legal aid is available for many public interest type cases.

In the case of independent law centres, the costs of core staff were, in general met from public funds. However, a number of the law centres considered that the level of resourcing which they received was inadequate to meet the demand for their services (including in the area of public interest litigation).

\textit{ii) Client costs} - A number of respondents reported that the prospect of having to meet the costs of the case (in particular the costs of the other side) if the case was unsuccessful was a deterrent to some clients bringing cases. Respondents generally reported that the state was more likely to seek and the judiciary to award costs against an unsuccessful litigant (even where the case was broadly a public interest issue) than they would have been in the past. Given the cost of litigation, this could represent a very significant cost to the individual concerned.

\textit{iii) Issues in recovering costs} - A number of independent law centres expressed concerns that they might have difficulty in recovering costs against the other side even in a successful case. This is on the basis that such law centres would not in general charge their clients for their services and that, therefore, as the client had no exposure to costs, the other side was not responsible for the costs incurred. This concern is based on caselaw in the United Kingdom.\textsuperscript{33} Here the courts held that in a case, which had been brought on a no foal, no fee basis, as the defendant could not have been sued for costs by her solicitors had the action failed, the solicitors could not recover such costs from the defendant simply because the action had been successful. In 2002, the Irish High Court Taxing Master took the same approach when ruling that two bills for costs against a defendant should be taxed as nil as the plaintiff's solicitor had acted on a no foal, no fee basis. According to media reports of his ruling,\textsuperscript{34} the unsuccessful litigant was not obliged to discharge costs for which the other party would not be held liable. Thus a successful litigant has to prove that s/he has a legal responsibility for costs if s/he is to recover costs from his/her opponent. Although, as this decision shows, the issue could also apply to private solicitors, none raised this as a concern.

\textit{iv) Costs of expert witnesses, reports, etc.} - Both private and independent law centre solicitors reported difficulties in arranging for expert witnesses and related issues (e.g. reports, interpreters, etc.). In the case of private solicitors, while prepared to act without payment on a 'no foal, no fee' basis, they were more reluctant to fund additional costs of the litigation. Similarly, while the staff and administrative costs of independent law centres were met, in some cases additional litigation funds were very limited. Respondents reported that the pro bono tradition which exists in the legal profession was not generally to be found in other professions and that the clients involved were often not (or only with great difficulty) able to meet the outlays involved.

\textsuperscript{32} One interviewee had received support under the Attorney-General's scheme but referred to the inadequacy of rates and the difficulties in obtaining support under the scheme. Another operated under the Refugee Legal Service panel for refugee appeals.

\textsuperscript{33} \textit{British Waterways Board v. Norman} [1993] 26 HLR 232.

\textsuperscript{34} \textit{Johnston v. Church of Scientology, Irish Times}, 16 November 2002.
Linking persons with a 'legal' issue to legal services

A number of respondents reported that clients were understandably reluctant to get involved in the somewhat complex, stressful and unfamiliar process of bringing legal proceedings. In addition to concerns about costs, mentioned above, some clients were deterred by the complexity of the process, by concerns that bringing a case against a public body might rebound on them in future dealings with that body and because of legal issues concerning their status (e.g. illegal workers).

In addition, some respondents reported that in some cases where they had identified a legal issue, it proved difficult to find a suitable plaintiff to bring a legal challenge either because possible plaintiffs were deterred from bringing cases for the reasons discussed above, because possible plaintiffs simply moved away (recall that much public interest litigation involves highly mobile groups such as migrants and Travellers), or that the background of potential plaintiffs made them a less than optimum choice for a test case (e.g. persons with a previous criminal record).

One practical difficulty in bringing public interest litigation is that of making the link between the individual or group with a problem and the legal services which could assist in resolving that problem. In the case of private solicitors, it was clear that these links currently operated on a very ad hoc basis. Clients became aware of services largely through word-of-mouth by referral from other persons using the services, from other solicitors or from NGOs. The solicitors interviewed appeared to have little difficulty in finding clients but there may well be other solicitors prepared to offer similar services who were less well able to do so and clients may be unable to find solicitors willing to take their cases.35 There appeared to be limited communication between solicitors working in relatively new areas of law (such as refugee and immigration law) and the Law Society appears to provide limited (if any) support at present.

In the case of independent law centres, referral also appeared to operate on a somewhat ad hoc basis. Some law centres are area-based whereas others focus on specific issues. There is a considerable difference between the situation in this jurisdiction and that in the UK. In the UK, legal NGOs tend to be long established and reasonably well resourced. Organisations interviewed appeared to have clearly defined areas of work in which they would provide advice or assistance and these policies appeared to be known to other legal NGOs. In other words, UK legal NGOs had developed clear policies specialising in specific policy areas and these were widely known.

In Ireland, independent law centres tend to be much smaller, often recently established and less well resourced. Some organisations lack clear policy statements as to their approach to public interest litigation or the areas of law on which they focus. Several provide, at least in principle, very wide ranging services. It is not clear that law centres have a clear idea as to what areas of work each will carry out. Despite the existence of the Independent Law Centres Network, there appeared to be limited communication between lawyers working in the law centres on public interest issues.

35 NGOs interviewed did report that people they came in contact with did have difficulty in obtaining legal assistance but in many cases this related to 'private' litigation.
**Judicial attitudes**

Respondents differed significantly in their views on judicial attitudes. Some felt that judges tended to be strongly pro-defendant (where the defendant was a public body) and to allow flexibility to public authorities which would not be extended to members of the public and/or not to be open to social reform. Others reported no barriers to public interest litigation from judicial attitudes. Others again reported varying attitudes depending on the member of the judiciary encountered.

More broadly a number of respondents referred to the fact that the approach adopted by the Supreme Court in the *Sinnott* case limited the scope of significant public interest litigation.\(^{36}\) Others, however, while acknowledging the limits imposed by *Sinnott* felt that their remained considerable scope within those limits.

**Employment of solicitors**

One issue, which applies only to independent law centres, involved technical difficulties in the employment of solicitors by a law centre. Under current legislation, there are restrictions on the employment of solicitors by a corporate body. This is obviously to protect the existing business structure of the solicitors' profession and is not aimed at law centres. However, law centres are caught by the rule and it has meant that in at least one law centre, the solicitor has had to operate as a sole practitioner i.e. as self-employed person rather than a member of staff of the centre. This can give rise to administrative and accountability issues.

**Procedural issues**

There are a number of potential procedural barriers - such as the absence of anything akin to a class action procedure\(^ {37}\) under Irish law - to bringing public interest litigation. However, these rarely emerged in interviews as being important in an Irish context. This may well be due to the relatively early stage of development of public interest litigation in Ireland. It may well be that if a greater volume of such cases was being brought, then procedural issues might emerge as being of great concern.

One procedural issue which was raised was the possibility of having a moot point determined by the courts. It has been suggested that public bodies may choose to settle a case which they feel they will lose so as to avoid the possibility of a court ruling.\(^ {38}\) Thus although the individual litigant may benefit, the wider benefits of a positive decision are denied to the group of persons affected.

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\(^{36}\) In *Sinnott* the court overturned a decision of the High Court to grant a mandatory injunctions granted by the High Court formulating and directing future policy in relation to the educational needs of the plaintiff. See Whyte *Social Inclusion* addendum for a detailed discussion.

\(^{37}\) This procedure, common in the USA, allows a party or parties to sue on behalf of a class of plaintiffs without the need to involve each person individually in the proceedings.

\(^{38}\) See Whyte *Social Inclusion* pp. 101-3. It has been suggested that several nursing home cases (concerning the deduction of nursing home costs from pensions) were settled before the recent clarification of the legal position on this issue.
A further issue suggested by experience in the UK - although rarely raised by Irish respondents - is the possibility of an NGO having locus standi to bring a case in an area in which it is concerned. This would avoid having to search for an individual litigant who might be reluctant to bring a case for a variety of reasons. An example might be whether the Free Legal Advice Centres would be entitled to bring a case in relation to delays in access to civil legal aid.39

Implementation and Enforcement of decisions

Enforcement of decisions is important from the point of view of public interest litigation. Insofar as the objective of such litigation is to improve the position of disadvantaged and vulnerable groups, the key issue is not whether individual litigation is successful but whether on balance the position of such groups has been improved as a result. It was clear from respondents that public bodies involved in litigation did change policies (and in some cases legislation) as a result of litigation. In some cases, this led to improvements from the point of view of the group involved but in others the law or administrative practice was simply brought into line with the original intention of the public body. Private solicitors, because of the nature of their work, tended to be more concerned with the outcome of individual cases and less concerned with the broader policy context. Law centres were able to be more concerned with the overall policy context and experience in the UK has shown that legal NGOs have the potential to follow issues over time to the benefit of specific groups.

4.4 How to overcome the barriers

Costs

i) Lawyers' costs - The fundamental issue in relation to the legal costs involved in bringing public interest litigation is the absence of a comprehensive scheme of civil legal aid. As we have seen, the Irish legal aid scheme is, in practice, largely confined to family law cases. In contrast, much public interest litigation in the UK is funded through legal aid. Cases which might otherwise be excluded from the scope of legal aid may be funded where they raise an important issue of public interest. In addition, many legal NGOs are funded on a contract basis to provide specialist legal aid and advice.

It seems highly likely that the different availability of legal aid in the UK and Ireland has contributed significantly to the different levels of development of public interest litigation in the respective countries. One option would be for Government to improve the Irish legal aid scheme so as to allow adequate funding for public interest litigation. However, in a situation where access to legal aid for even family law cases remains subject to waiting lists, it seems unlikely that Government would see the funding of public interest litigation as a priority. Accordingly, we look at a number of alternative approaches.

One option is the establishment of a Public Interest Litigation Fund to resource public interest litigation. This is discussed in more detail in chapter 5. The basic idea is that a

39 In a recent judgement the High Court held that the Irish Penal Reform Trust had locus standi to bring a case concerning the rights of prisoners: Irish Times 3 September 2005.
private body (or bodies) might invest resources in a fund which would be used to support public interest litigation.

**ii) Client costs** - There are a number of options in relation to reducing or controlling the client's exposure to costs. One is the increased use of non-court fora such as, for example, Ombudsman schemes where costs are not awarded.

A second issue is to re-examine the basis upon which the courts award costs against a public interest litigant. This issue has received some consideration in a number of recent High Court decisions. In a recent decision, Laffoy J, having considered a number of authorities, held that the exercise of the court's discretion to depart from the normal rule that costs follow the event is governed by two principles:

1) that the plaintiff was acting in the public interest in a matter which involved no private personal advantage; and
2) that the issues raised by the proceedings are of sufficient general public importance to warrant an order for costs being made in his or her favour.

In that case, Laffoy J did award full costs to the plaintiff although he was unsuccessful on any points. However, the second principle is very broad and gives a considerable margin to individual judges to interpret it different ways while the first principle would tend to exclude many public interest litigants where there is some (possibly small) 'private personal advantage'. In practice costs have been awarded in cases involving litigants with a personal interest but the legal basis for this is unclear. In summary, the jurisprudence as to when costs will be awarded in public interest litigation remains unclear. It would be helpful if the approach which will be applied was clarified by the judiciary and, insofar as possible, standardised. The constitutional importance of access to the courts and the absence in practice of legal aid in many cases should be taken into account in such clarification.

In the United Kingdom and other jurisdictions, the device of 'protective costs orders' has been developed. This is a procedure by which a party to proceedings can apply to court in advance of the substantive hearing of a case for an order limiting the party's exposure to costs. The English Court of Appeal has recently reviewed the principles to be applied. The Court restated the principles governing the award of a protective costs order as follows:

1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

   i) The issues raised are of general public importance;
   ii) The public interest requires that those issues should be resolved;
   iii) The applicant has no private interest in the outcome of the case;
   iv) Having regard to the financial resources of the applicant and respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;

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v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

The Irish High Court has held that it does have jurisdiction to grant such an order but it does not appear that such an order has been granted to date by the Irish courts. It would be helpful if the Irish courts clarified the principles upon which such an order would be granted in an Irish context having regard to the English approach and to the differences in terms of access to the courts in the two jurisdictions. However, it would appear necessary, if advance orders are to be made as to costs, that the courts should also clarify the overall basis upon which orders as to costs are to be made in public interest cases (as discussed above).

iii) Recovering costs - One way to address this issue would be for solicitors to make their clients aware, in advance, of their liability for costs irrespective of the outcome of the litigation. Such a practice would protect the solicitor's right to be paid fees by the other side but if the litigation was subsequently unsuccessful, the solicitor might decide not to enforce such a right. However, this is a somewhat artificial arrangement and it only adds to the difficulty of explaining already complex issues to a client (and requires a considerable degree of trust on the part of the client). The Civil Legal Aid Act [s. 33] addresses this issue in relation to persons covered by legal aid and it would appear desirable that similar clarification should be provided for by legislation in relation to non-legally aided persons who are being assisted by a law centre or on a pro bono basis.

iv) Costs of expert witnesses, etc. – Again, in the absence of more comprehensive legal aid, one option would be to meet these costs through a Public Interest Litigation Fund.

Access to legal services

As set out earlier in this chapter, there is a lack of a clear co-ordinated and strategic approach to public interest litigation by the independent law centres. This is not surprising nor is this comment intended as a criticism of the groups involved. However, if (and this is a matter for the individual law centres to decide) they are to adopt a greater emphasis on public interest litigation in the future, it will be important for each law centre to have a clear and realistic statement as to what it plans to do in this area and for independent law centres overall to adopt a co-ordinated approach to this issue (i.e. to avoid duplication of resources, insofar as possible to avoid gaps in provision, and to ensure sharing of resources and referrals). Such a clarification of objectives and approaches by those law centres which wish to be involved in public interest litigation should be an essential pre-condition to the investment of further resources.

The adoption of such a co-ordinated approach would help to identify the additional resources which might be needed to support such an approach. The proposed Centre for Public Interest Law would provide a valuable research resource to such law centres. In addition, if sufficient law centres opted for a strategic approach to public interest litigation, it would appear that the funding of a liaison person would assist in sharing knowledge, publicising activities (perhaps through a newsletter or website) and related activities.\textsuperscript{43}

In relation to private solicitors involved in public interest litigation, the Law Society should play a more pro-active role in identifying and supporting solicitors involved in public interest litigation based on consultations with such solicitors.

A number of NGOs already have formal or informal lists of solicitors interested in a particular area of public interest law to whom they refer persons with legal issues. It is recommended that more NGOs should develop and keep up to date such referral lists.

**Judicial attitudes**

A number of respondents suggested that judicial training in relation to public interest issues - as part of judicial studies organised by the Judicial Studies Institute - would be helpful.

**Employment of solicitors**

The current rules restricting the employment of solicitors by independent law centres clearly inhibit the development of such centres and appear unnecessary to the primary purpose of the legislation. The position should be reviewed at the earliest possible opportunity to allow such employment. It is understood that the Law Society is favourably disposed to addressing this issue.

**Procedural issues**

The issue of class actions is currently under consideration by the Law Reform Commission.\textsuperscript{44} Fortunately this is an area which does not appear to require urgent action at the current stage of development of public interest litigation in Ireland.

The Supreme Court has recently clarified the law in relation to amicus curiae applications in Ireland.\textsuperscript{45} This remains an underdeveloped area in this jurisdiction. In the UK, it is much more common for NGOs to intervene in public interest cases. This allows them to raise public interest issues of importance to them at a much more limited cost (and generally without exposure to other parties' costs). The amicus procedure has important potential in an Irish context.\textsuperscript{46} However, the limited number of public interest cases going before the Irish courts mean that this potential is currently limited in practice.

\textsuperscript{43} Law centres might also consider organising a seminar with NGOs from NI and the UK with experience in this area such as the Public Law Project and the Law Centre NI.
The issue of moot cases is also one of more immediate importance. In the UK, the House of Lords has held that it has the discretion to hear an appeal concerning an issue involving a public authority as to a question of public law where this was in the public interest even where the issue was strictly moot.\textsuperscript{47} A similar approach might usefully be adopted in this jurisdiction.\textsuperscript{48}

In relation to locus standi for NGOs, the UK courts have in a number of cases held that NGOs may have locus standi to raise public interest issues.\textsuperscript{49} Until recently the Irish courts had been much less prepared to grant locus standi (albeit that this may simply be a function of the limited number of cases which have come before them).\textsuperscript{50} However, in a recent judgement the High Court held that the Irish Penal Reform Trust had locus standi to bring a case concerning the rights of prisoners.\textsuperscript{51}

\textbf{Enforcement of decisions}

In relation to the enforcement of judgements, it has been suggested that public bodies should be under a legal obligation to review persons affected by the outcome of a judicial decision (where this is possible based on the files which they hold). In practice, such an approach has been adopted in a number of cases in Ireland, e.g. in relation to claims for 'equality' arrears under the social welfare code and the Ombudsman encourages public bodies to adopt a similar approach to ensure the full enforcement of her decisions.\textsuperscript{52}

\textbf{Issues to be pursued}

Respondents were asked to suggest an area in which they felt public interest litigation could be pursued. A very wide range of areas were suggested. In most cases, respondents felt that there was further scope to bring cases in the areas in which they specialised such as refugee and immigration law; children's and prisoners' rights, and Travellers' rights. Other areas mentioned included

- equality issues under article 40.1 of the Constitution and equality legislation;
- issues concerning the European Convention on Human Rights;
- public housing issues;
- inquests concerning persons who die in custody;
- transparency in local authority decision making;


\textsuperscript{48} Although it is not clear whether, in practice, a public authority which wishes to avoid a binding decision by settling a case will agree to settle a case in circumstances where the point might still be adjudicated on by the courts.

\textsuperscript{49} See, for example, R v. Secretary of State for Social Services ex parte CPAG unreported, 30 July 1984.

\textsuperscript{50} See Whyte op. cit. pp. 62-7 and, most recently, the Supreme Court decision in Construction Industry Federation v. Dublin City Council [2005] IESC 16.

\textsuperscript{51} Irish Times 3 September 2005.

\textsuperscript{52} See Whyte pp. 108-9.
Chapter 5: Conclusions and Development Strategy

This chapter sets out a development strategy to advance public interest law and litigation so as to address specific issues of social disadvantage and exclusion in Ireland.

5.1 Current situation

Overall this study finds that public interest law and litigation (and its component parts) are at an early stage of development in Ireland. There is limited explicit public policy on and support for the key components of a public interest law strategy although the Bar Council has recently introduced a potentially important Voluntary Assistance scheme. As discussed in previous chapters, there is significant demand and support for the further development of the different aspects of a PILL approach from NGOs and individuals involved in this area.

5.2 Development strategy

Overall approach

When reference is made to PILL, many people immediately focus on the litigation aspect. However, the experience in this country and in neighbouring jurisdictions indicates that a public interest litigation strategy works best when it is part of a broader public interest law approach involving issues such as law reform and legal education.

It is recommended that a development strategy to advance public interest law and litigation should adopt a comprehensive approach to PILL and should provide an integrated range of supports to measures in different areas.

Law Reform

The key issue identified in this area is the need for NGOs representing disadvantaged and vulnerable groups to be able to identify legal issues and prepare detailed law reform proposals. The Voluntary Assistance scheme introduced by the Bar Council provides the opportunity to avail of legal expertise. However, it seems unlikely that this opportunity will be fully taken up unless specific steps are taken to bridge the gap between the groups who need advice and assistance and the barristers who can provide this.

One option is that a legal policy officer be appointed whose role might include:

i) meeting groups with law reform issues to help them to address the precise nature of the issue and possible approaches; and

ii) putting them in contact with a barrister under the Bar Council scheme.
There is currently a lack of specific funding to support law reform and this could be addressed if a legal research fund was established to facilitate NGOs in carrying out legal research.

**Legal education**

The development of a strategy in this area might include the following measures.

1) Law schools should examine the extent to which their intake of students includes persons from disadvantaged and vulnerable backgrounds and should work closely with access programmes to increase the proportion of law students from disadvantaged backgrounds. This should include working with specific local secondary schools to improve the legal education of young people from disadvantaged areas/groups and encourage interest in the law.

2) Professional law schools should similarly examine the extent to which students from disadvantaged backgrounds are represented on their courses and should examine what needs to be done (including the operation of existing scholarship schemes) to increase uptake.

3) Law schools should examine the concept of clinical legal education and consider whether it (or some aspect or variation of this approach) would be appropriate to them. This may require additional financial support to allow the employment of a person to co-ordinate such courses.

4) A Centre for Public Interest Law should be established in a university with the remit of carrying out research on public interest law issues, particularly in a comparative legal context; providing advice and support to independent law centres (and possibly to others involved in the area) on PILL; further developing links with community groups to support the provision of community legal education; and teaching public interest law to law students.

**Community Legal Education**

In the area of community legal education, there is currently very little happening. There is a need to resource innovative approaches to see what works and how policy in this area might be developed.

One option is that a fund be established to resource innovative and important initiatives in the area of community legal education (similar to the LEAP and Participation and Practice of Rights initiatives). This fund would provide support to innovative projects over a five year period (on a once-off or ongoing basis).

The operation of such a fund should be discussed with key players including the Legal Aid Board, Comhairle and the Department of Social and Family Affairs. Measures funded should be evaluated.

**Litigation**

Overall, as discussed in chapter 3, the capacity to pursue a public interest litigation strategy is somewhat limited. It is recommended that development in this area should aim to expand capacity in a measured way over the medium term (i.e. say five years) rather than aiming for a dramatic increase over a short period.
Costs

The fundamental issue in relation to costs is the lack of a comprehensive scheme of civil legal aid. The following options can only go part of the way to addressing the costs issues in the absence of such a scheme.

Options include

1) A Public Interest Litigation Fund be established to help to meet the costs of certain public interest cases and to help to develop a greater body of litigation. The modalities of such a fund are discussed in more detail in annex 5.1.
2) Public interest litigation should seek to clarify the legal position on costs including that concerning protective costs orders. The judiciary should be open to an interpretation which will support public interest litigation having regard to the constitutional importance of access to the courts and the limitations of the existing legal aid scheme.
3) The law concerning recovery of costs should be amended to ensure that costs can be recovered in pro bono and law centre cases.

Procedures

Public interest litigation should seek to clarify the legal position on procedural issues including the locus standi of NGOs and the possibility to adjudicate on important moot points.

Employment of solicitors

The rules concerning the employment of solicitors should be amended at the earliest possible opportunity to allow independent law centres to employ solicitors.

Referral lists

A number of NGOs already have formal or informal lists of solicitors interested in a particular area of public interest law to whom they refer persons with legal issues. It is recommended that more NGOs should develop and keep up to date such referral lists.

The Role of Law Centres

While most public interest litigation is currently engaged in by private solicitors, a network of independent law centres committed to PILL will be essential to the development of a long-term PILL strategy. Inevitably, private solicitors will focus on litigation rather than the broader aspects of public interest law. Only independent law centres, working with law schools and the proposed Centre for Public Interest Law, can develop a broader strategic approach.

At present, many independent law centres, individually and collectively, understandably have not developed a clear statement of their priorities in this area.

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53 This does not mean that all law centres need to prioritise this area.
The development of such a shared collective vision - as to what each centre will seek to do and how they will co-operate - should be an essential precondition of further development and resourcing in this area. Each law centre should develop a clear and realistic statement as to its plans in this area and law centres overall should adopt a co-ordinated approach to this issue. This need not be an elaborate or lengthy statement but should clarify what (if anything) each centre will seek to do in this area and how they will co-operate to maximise resources.

Given the limited number of independent law centres, it makes sense to share resources and knowledge to the maximum extent possible. However, given the busy workload of existing law centre staff, it will be difficult to find the time to organise this without additional resources. One option is that a public interest law officer be appointed to facilitate sharing of resources and knowledge. This person's workload could include organising of co-ordination meetings, development of a website and data resource, development of an (e)newsletter on current developments, etc. Insofar as possible private solicitors and LAB solicitors involved in public interest litigation should also be involved in this networking.

Several independent law centres have serious concerns about the adequacy of their own core funding and would seek core funding. The terms of reference of this research, however, focus on public interest law and litigation and it is not intended to make general recommendations about access to legal aid or funding of law centres (important though these issues may be). However, funders providing specific funding for PILL activities obviously need to have regard to the underlying viability of the funding of independent law centres.

**Identification of key opportunities**

It is clear from consultation that there are a range of policy areas in which public interest law and litigation might be used to address issues of social disadvantage and exclusion. Amongst the areas identified are:

- The interpretation of the habitual residence test under the social welfare code;
- The right to nursing home care under the Health Acts;
- Educational services for children with disabilities;
- Equality issues under article 40.1 of the Constitution and equality legislation;
- Issues concerning the European Convention on Human Rights;
- Public housing issues;
- Inquests concerning persons who die in custody;
- Transparency in local authority decision making.

Given the fluid nature of such issues (old issues are resolved and new issues arise) and the long time periods involved in litigation and law reform, decisions in relation to priority areas (within the parameters of social disadvantage) are best left to those directly involved without the intervention of funding bodies.
Next steps

Further development of an appropriate strategy to advance the required infrastructure and resources depends significantly on the extent to which private funders, foundations, the legal profession and statutory agencies are prepared to commit resources to this area and the extent to which they are prepared to play a key role in developing the strategy.

In relation to the legal profession, in the case of the Bar Council, the priority should be to maximise the use of the Voluntary Assistance scheme. The Law Society might consider a pro bono scheme focused on NGOs but this might best be done after the Bar Council Voluntary Assistance scheme has become more firmly established. A priority should be for the Society to consult with solicitors working in the area of public interest law to see how they can best be supported. This might, for example, involve the giving of greater prominence in the system of Continuing Professional Development to PILL activities and related matters.

A complementary approach would be for the Independent Law Centres Network (or some of the law centres) to approach a number of the larger law firms to seek direct assistance from them, possibly in the form of secondment of junior solicitors for a period of time. This would enhance the litigation experience of such solicitors and, on the other hand, they would bring their training and access to the resources of large legal firms. However, for this to work, it would be essential that the law centres be clear about their objectives and to have the resources to manage staff who might be seconded to them.

In relation to statutory agencies, individual components of a development strategy might well be supported by individual departments or bodies. For example, the LAB, the Department of Social and Family Affairs and Comhairle might consider the provision of funding for (or co-operation in) innovative community legal education projects. The LAB is currently not greatly involved in PILL. However, the persons with which it works are very much those targeted by a PILL approach and it has significant resources both financially, in the experience of its legal staff, and the data which it holds. The LAB should be encouraged to focus more on PILL by being involved in the initiatives mentioned in other parts of this chapter.

The future development of public interest law and litigation in Ireland can only succeed though the co-operation of a number of key interest groups. It is the objective of this report to act as a starting point for discussion and debate leading to such co-operation amongst the key organisations.
Annex 5.1: Public Interest Litigation Fund

One of the main proposals set out in chapter 5 is the establishment of a public interest litigation fund (PILF) to assist in funding public interest litigation. This annex looks at a number of key issues in relation to the establishment of such a fund.

1. Objective

The objective of the PILF should be stated in such a manner as to obtain charitable status from the Revenue Commissioners, for example, it might involve the relief of poverty through the provision of support to public interest litigation which would advance the position of disadvantaged groups in Irish society.

2. Structure

The Fund would be established as a trust but should also be legally incorporated either as a company limited by guarantee or as an incorporated scheme under the Charities Act 1974.

3. Board and management

The Fund would be managed by a small board of trustees. These would have a knowledge of the issues concerning public interest litigation but would not, in general, be personally involved in public interest litigation (to avoid conflicts of interest). They might, for example, include academics, lawyers, etc. Major funders might also wish to be represented on the board. As a charitable body, the PILF's constitution will require that the board not benefit personally from their involvement (although payment of expenses is allowed).

4. Scope of work to be funded

a) Type of case

The main priority is that the case be public interest litigation. One definition, developed by the Public Law Project, is

Cases which raise issues, beyond any personal interests of the parties in the matter, affecting identifiable sectors of the public or vulnerable groups; seeking to clarify or challenge important questions of law; involving serious matters of public policy or general public concern; and/or concerning systematic default or abuse by a public body.

The reference to 'beyond any personal interests' requires that the case raise issues which are broader than the parties personal interests. It should not be understood to exclude cases in which the parties have a personal financial interest as, by definition, many PI cases will involve a financial or other benefit to the person bringing the case, e.g. entitlement to welfare benefit, education services, legal aid, etc.
In terms of the type of case (i.e. area of law), the board might wish to prioritise particular areas or to deprioritise types of case (e.g. involving conflicts between two different disadvantaged groups). In general the intention is that the PILF would assist in bringing cases rather than be a litigator itself. It is recommended elsewhere that independent law centres should be required to develop their own litigation strategy (or framework plan) and it might be unnecessarily bureaucratic and give rise to conflicts if the PILF also had a very specific case strategy of its own.

b) Type of body bringing case

Law centres (and similar NGOs) would obviously be included. A question arises as to whether private solicitors might also be allowed to apply to the fund. On the one hand, it could be argued that private solicitors are involved in a commercial business and may (unlike independent law centres) make a profit from some public interest litigation cases. The issue might arise of private solicitors subsidising loss-making cases from the PILF while taking the profit from successful ones. On the other hand the vast majority of current public interest litigation is brought by private solicitors and there seems no reason in principle to totally exclude private solicitors from the scope of the PILF. The board should obviously have regard to the different issues involved in considering applications from private solicitors (including repayment of funds where a case is successful).

c) Type of costs

i) Out of pocket costs such as medical or other reports and witness expenses should obviously be included.

ii) Barrister fees - on the one hand barristers currently act on a no foal no fee basis and to provide funding for this might seem to involve dead-weight (i.e. paying money to achieve a result which will arise anyway). On the other hand a number of respondents suggested that while willing to act, unpaid barristers were perhaps unable to give the same degree of commitment to a case that they would if guaranteed payment. A number suggested that they would like to be able to guarantee some level of payment to a barrister (although not the full commercial rate).

iii) Solicitor fees - in the case of independent law centres, core funding is already provided by the primary funder. To fund core solicitors’ fees and office expenses would involve the PILF in funding law centres per se and might involve duplication with other funders. In the case of private solicitors, while one can argue that 'additional' costs should be met from the PILF, it does not seem unreasonable that solicitors should carry their own costs. It is recommended that solicitors’ costs and administrative expenses should not be met from the Fund.

iv) Indemnity for costs - one of the big issues raised in consultations was that the fear of costs being awarded against a person can act as a deterrent to bringing a case. It is recommended that it should be open to the PILF to provide an indemnity against costs. This should be subject to the rule that
the case will not (or is unlikely to) proceed in the absence of an indemnity and that alternative efforts to secure appropriate protection (e.g. protective cost order) had been fully explored.

d) Jurisdiction - It would seem inadvisable to exclude any court or tribunal per se from the scope of the PILF (including international tribunals). Rather the focus should be on the definition of public interest litigation and the importance of the issues raised.

e) Merits test - It would seem advisable that there should be some 'merits' test in the consideration of applications. The focus should be on the objectives of the PILF, i.e. will the litigation advance the cause of disadvantaged groups rather than on a narrow legal definition of the merits. Conversely the PILF should not feel bound to support a case in which the legal opinion was that there was a strong legal case if it formed the view that - for whatever reason - the case would not be likely to advance the overall position of disadvantaged people.

f) General approach - The general rule in considering applications should be that the litigation will not proceed (or be unlikely to proceed) in the absence of support and that other avenues of support have been fully explored (e.g. personal contributions, legal aid, AG's scheme, etc.). In general, it would seem advisable that support be provided only in relation to the immediate case (i.e. if an appeal was lodged, a further application would be required).

5. Procedures

In addition to the voluntary board, the PILF would need some administrative support. The volume of work would obviously depend on the number of cases seeking and being supported. Given the current small number of cases, it is difficult to see this being a full-time post. The Fund would need an address and part-time staff member to receive applications, provide information and advice, provide administrative support to the board, organise publicity, etc.

Applications would be required to set out

- the facts of the case and issues in dispute;
- manner in which the case would advance the position of disadvantaged groups;
- legal opinion on the merits of the case;
- reasons why PILF support was required (including full details of alternative sources of support);
- the supports sought; and
- any other relevant information.

When an application is received it would be forwarded to the board (assuming all relevant information was provided). The board would then meet and consider the

55 However, the courts might look unfavourably on cases being brought where there was no 'reasonably stateable claim' and such proceedings might be held to be contrary to the doctrine of maintenance, see below.
application. It might seek further information if necessary. The board could reject the application or accept it in part or in full. The board would meet on a regular basis to consider applications and conduct other business, e.g. publicity, administrative work and reports, etc.

6. **Funding**

The most obvious source of funds for the PILF would be a charitable body but alternative and complementary sources of funds should also be explored. Funding would be required for

1) Running costs, e.g. part-time administrative staff, office costs, board expenses, publicity, etc.
2) Disbursements to meet legal costs.

The level of funding required would depend primarily on the scope of costs paid and the volume of cases supported. While it would be relatively easy to assess (or set maximum limits to) the applicant's costs, it is much more difficult to assess the costs arising from indemnities (e.g. in how many cases would this arise, what might costs run to, etc.).

The Board should consider requiring repayment of advances where these are successfully recovered from the other party. This would contribute to some extent to the sustainability of the fund.

7. **Evaluation**

The impact of the PILF in supporting public interest litigation should be evaluated after, say, three years looking at the level of expenditure against the estimated benefits arising from the cases supported.

8. **Legal issues**

One issue which might arise in relation to the PILF is its status vis-à-vis the doctrines of maintenance and champerty. Maintenance and champerty are torts and can also provide the basis for a stay of proceedings. Prima facie, support by the PILF might seem to be contrary to the doctrine of maintenance which involves 'the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by law as justifying his interference'.

However, as Whyte points out, the UK courts have permitted the maintenance of actions in the public interest and for charitable purposes while the Irish courts have held that maintenance and champerty should not be extended to deprive people of...

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56 On these issues see Whyte *Social Inclusion and the Legal System* pp. 114-5. Champerty does not appear to be so relevant as it involves an agreement to recover property in return for a share in the property recovered.

57 It would appear that maintenance and champerty are still crimes in this jurisdiction although prosecutions appear to be unknown in recent years.

their constitutional right of access to the courts to litigate reasonably stateable claims. In addition, assuming the PILF to have been recognised as a charity on the basis of its objectives (set out above) this would provide a specific 'motive recognised by law' which would arguably justify 'interference' by the PILF through the provision of financial support to a litigant. However, the PILF would, both from a policy and a legal point of view, need to have regard to the type of case being supported as it might be that the courts would be more likely to hold that support for cases where there was no stateable claim was in breach of the doctrine of maintenance.
Acknowledgements

A very wide range of people contributed to the research on which this publication is based. I would like to thank all those - too numerous to mention individually - who gave of their time to take part in interviews and focus groups and to provide vital information.

I would like to thank, in particular,

- Catherine Hickey and Noeline Blackwell of FLAC and Brian Kearney-Grieve of the Atlantic Philanthropies who were heavily involved in the ongoing research;
- Gerry Whyte, as always, was a mine of information and was ready to discuss ideas and supply important comments;
- Roger Smith and Geoff Budlender made many useful suggestions in their capacity as members of the advisory committee;
- Last but not least, I must thank Karen Dowling and Mary O'Sullivan who provided excellent research assistance on many aspects of this study (in particular the research on the level of public interest litigation which is included as Appendix I).
PUBLIC INTEREST LAW AND LITIGATION IN IRELAND

Quantitative Study

of the Level of

Public Interest Litigation

before the Superior Courts in Ireland

Report to FLAC

Friday, 29 April 2005
Background and terms of reference

The draft Terms of Reference for the study of public interest law and litigation in Ireland sought quantitative data on the extent to which the Irish legal profession 'is currently involved in public interest law and litigation'. The best manner to obtain this information would be through a large-scale survey of the legal professions. However, given that the concept of 'public interest law' is not very familiar in Ireland and given that initial consultations indicated that the level of legal involvement in public interest law was quite low, it was decided that it would be inadvisable at this time to proceed with such a study. The lack of familiarity with the concept of public interest law would be likely to lead to low response rates or inaccurate responses.\(^{59}\) Initial consultations indicated that public interest work was probably concentrated amongst a relatively small number of law firms and practitioners. Again this gave rise to a greater possibility of inaccurate responses from a large-scale survey.

It was decided instead to carry out a range of qualitative interviews with members of the legal profession involved in public interest litigation and to carry out a survey of all recent decisions of the superior courts to establish the level of public interest litigation. This report outlines the results of that study.

Methodology

The study examined all written decision of the Irish High Court and Supreme Courts given in 2003 and 2004. These are published in summary form in an annual index by the Law Society and Bar Council [the Pink Sheets]. In total almost 1,000 written judgements were given in the relevant period.\(^{60}\)

The definition of public interest cases was adapted from a somewhat similar study carried out in the UK by the Public Law Project:

\[
\textit{Cases which raise issues, beyond any personal interests of the parties in the matter, affecting identifiable sectors of the public or vulnerable groups; seeking to clarify or challenge important questions of law; involving serious matters of public policy or general public concern; and/or concerning systematic default or abuse by a public body.}^{61}\]

The above definition, along with the operational indicators derived from it and subsequently amended and the examples of cases contained in PLP study, were used as the basis for determining whether the cases should be classified as public interest cases.

\(^{59}\) It seemed likely, for example, that there would be difficulties in distinguishing public interest law from pro bono work.

\(^{60}\) It should be noted that all data refer to judgements rather than cases. In a proportion of cases, judgements were given both in the High Court and, on appeal, in the Supreme Court. In practice, some cases from the previous year appear in the index (e.g. some 2003 cases appear in the 2004 index and some 2004 cases will not appear until 2005).

Each case listed in the 2003 and 2004 indices was examined and, where necessary, the full written judgements of the courts were scrutinised to establish whether or not it fell within the definition of public interest litigation as outlined above.

**Research findings**

In total, over the two years, only 33 judgements were found to fall within the definition of public interest litigation as outlined above. This means that only 3.5% of all written judgements from the High and Supreme Courts in 2003 and 2004 involved public interest litigation (as defined).

1 **Numbers of Cases**

The following table refers to the numbers of Supreme Court and High Court written judgements in 2004 and 2003. Further details of the individual cases are set out in an appendix to this report.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Judgements</th>
<th>Public Interest Judgements</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>503</td>
<td>14</td>
</tr>
<tr>
<td>2003</td>
<td>453</td>
<td>19</td>
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In considering the numbers of cases, it should be borne in mind that some cases appear more than once in the indices, sometimes because both a High Court and a Supreme Court judgement are referred to and sometimes because the case may be listed under more than one heading. A case may also appear in both the 2003 Index and the 2004 Index. However, there is not a great deal of duplication of cases in the indices.

2 **Categories of Public Interest Cases**

The following categories of public interest cases were identified among the above written judgements. As can be seen, the largest body of casework involving public interest issues was in the area of immigration law.

- Immigration (14)
- Public Health (4)
- Prisons (3)
- Traveller accommodation (3)
- Education (1)
- Costs and Legal Aid (1)
- Legal Representation (1)
- Bail (1)
- Offenders (1)
• Freedom of Information (1)
• Miscellaneous (2)

It should be noted that while some public interest litigation may be carried on in the lower courts and administrative tribunals, it is likely that the bulk of their work is of a more routine nature and that public interest litigation features most strongly in the High and Supreme Courts. Focusing on written decisions is thus likely to overstate the level of public interest litigation in the courts as written judgements are less likely to be given in routine non-public interest litigation type cases (e.g. personal injury). Thus one would expect that this survey gives an upper bound estimate of the amount of public interest litigation carried out by the Irish legal profession. Given that this upper bound is below 5%, this would confirm the view obtained from consultations to date that the degree of public interest litigation in Ireland is quite low.

The findings are not directly comparable with the Public Law Project research which focused solely on judicial review application (and found that 34% raised issues of public interest). We are not aware of a comparable study of the level of public interest litigation in another jurisdiction.
Appendix: Details of Public Interest Cases

In the tables below, details of solicitor and counsel are provided for the reported judgements. Such information is not readily available for unreported judgements and any details provided are extracted from references made in the judgements themselves.

2.1 Public Health

<table>
<thead>
<tr>
<th>Case</th>
<th>Solicitor/Counsel</th>
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<tbody>
<tr>
<td><em>Walsh v Mid-Western Health Board</em> SC, 2/5/03 (Home birth service) Michael Forde SC</td>
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<tr>
<td><em>Tierney v North Eastern Health Board</em> HC, Ó Caoimh J, 30/7/04 (Discontinuation of maternity services) Eoghan Fitzsimons SC</td>
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2.2 Traveller Accommodation

<table>
<thead>
<tr>
<th>Case</th>
<th>Solicitor/Counsel</th>
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<tbody>
<tr>
<td><em>O’Donoghue v Clare County Council</em> SC, 6/11/03, 2003 43 10400 (also HC, Smyth J 25/7/03, 2003 43 10408) (Emergency traveller accommodation) Michael Houlihan &amp; Partners Mark de Blacam</td>
<td></td>
</tr>
<tr>
<td><em>Jeffers v Louth County Council</em> HC, 19/12/03 (Requirement to consult on development of temporary halting site) John Devane John B Peart SC Michael A Maloney</td>
<td></td>
</tr>
<tr>
<td><em>O’Donoghue v Limerick Corporation</em> [2003] 4 IR 93 (Suitable traveller accommodation)</td>
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2.3 Education

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<tr>
<th>Case</th>
<th>Solicitor/Counsel</th>
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<tr>
<td><em>Cronin (a minor) v Minister for Education and Science</em> HC, Laffoy J, 6/7/04 (Special needs and entitlement to primary education) Ernest J Cantillon &amp; Co Frank Callanan SC</td>
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2.4 Immigration

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<thead>
<tr>
<th>Case</th>
<th>Solicitor/Counsel</th>
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<tr>
<td><em>A (OEW) v Minister for Justice, Equality and Law Reform</em></td>
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<tr>
<td>Case</td>
<td>Solicitor/Counsel</td>
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<td>---------------------------------------------------------------------</td>
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<tr>
<td>2004</td>
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<tr>
<td><strong>Case</strong></td>
<td><strong>Solicitor/Counsel</strong></td>
</tr>
<tr>
<td>HC, Peart J, 26/5/04 (Internal relocation as a factor in determining refugee status)</td>
<td></td>
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<tr>
<td><strong>D (M) and D (G) v Minister for Justice, Equality and Law Reform</strong></td>
<td><strong>HC, Finnegans P, 15/4/02, 2002 6 1310</strong></td>
</tr>
<tr>
<td>(Whether a fixed policy in determining refugee status)</td>
<td><strong>James Watters &amp; Co</strong></td>
</tr>
<tr>
<td><strong>F (P) and F (C) v Minister for Justice, Equality and Law Reform</strong></td>
<td><strong>HC, Murphy J 23/1/04</strong></td>
</tr>
<tr>
<td>(Whether marriage to an Irish citizen gives right of residency)</td>
<td><strong>James Watters &amp; Co</strong></td>
</tr>
<tr>
<td><strong>G (OE) v Minister for Justice, Equality and Law Reform</strong></td>
<td><strong>HC, Laffoy J, 27/05/04</strong></td>
</tr>
<tr>
<td>(Balancing the asylum process and family rights)</td>
<td><strong>Seamus Ó Tuathail SC</strong></td>
</tr>
<tr>
<td><strong>K (N) v Refugee Appeals Tribunal [2004] 2 ILRM 550</strong></td>
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<tr>
<td><strong>Leontjava v DPP; Chang v DPP [2004] 1 IR 591</strong></td>
<td><strong>James Watters &amp; Co</strong></td>
</tr>
<tr>
<td>(Constitutionality of the Aliens Order 1946 and power of Minister to impose restrictions on aliens)</td>
<td><strong>Gerard Hogan SC</strong></td>
</tr>
<tr>
<td><strong>M (O) v Minister for Justice, Equality and Law Reform</strong></td>
<td><strong>HC, Peart J, 14/7/04</strong></td>
</tr>
<tr>
<td>(Balancing the asylum process and family rights)</td>
<td><strong>Seamus Ó Tuathail SC</strong></td>
</tr>
<tr>
<td><strong>S (A) v Minister for Justice, Equality and Law Reform</strong></td>
<td><strong>HC, Herbert J 24/2/04</strong></td>
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<tr>
<td>(Grant of work permit giving rise to legitimate expectation that person would be allowed to remain in State)</td>
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<tr>
<td>2003</td>
<td></td>
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<tr>
<td><strong>Case</strong></td>
<td><strong>Solicitor/Counsel</strong></td>
</tr>
<tr>
<td><strong>G (GA) v Minister for Justice, Equality and Law Reform [2003] 3 IR 442</strong></td>
<td><strong>(Europe Agreement nationals claiming right to stay in State while seeking to establish themselves as self-employed)</strong></td>
</tr>
<tr>
<td><strong>L (D) v Minister for Justice, Equality and Law Reform [2003] 1 IR 1</strong></td>
<td><strong>(Right to remain in the State with a child who is a citizen)</strong></td>
</tr>
<tr>
<td><strong>M (T) v Minister for Justice, Equality and Law Reform</strong></td>
<td><strong>HC, Finlay Geoghegan J, 25/7/03, 2003 33 8051</strong></td>
</tr>
<tr>
<td>(Right to remain in State with spouse)</td>
<td><strong>Richard Humphreys BL</strong></td>
</tr>
<tr>
<td><strong>O (BF) v Governor of Dóchas Centre HC, Finlay Geoghegan J, 8/5/03, 2003 43 10437</strong></td>
<td><strong>(Whether pregnancy after deportation order gives right to remain in State)</strong></td>
</tr>
<tr>
<td><strong>P (B) v Minister for Justice, Equality and Law Reform [2003] 4 IR 200</strong></td>
<td><strong>(Internal relocation as a factor in determining refugee status)</strong></td>
</tr>
<tr>
<td><strong>S (EM) v Minister for Justice, Equality and Law Reform</strong></td>
<td><strong>HC, Finlay Geoghegan J, 8/10/03</strong></td>
</tr>
<tr>
<td>(Decisions to which statutory limitation of right to appeal applies)</td>
<td><strong>Mr. McDonagh SC</strong></td>
</tr>
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### 2.5 Costs and Legal Aid

<table>
<thead>
<tr>
<th>Case</th>
<th>Solicitor/Counsel</th>
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<tbody>
<tr>
<td><strong>McEvoy v Meath County Council [2003] 1 IR 208</strong>&lt;br&gt;(Entitlement of Circuit Court to award costs on appeal from Director of Equality Investigations)</td>
<td>Claffey, Gannon &amp; Co&lt;br&gt;Michael O'Higgins SC&lt;br&gt;Michael P O'Higgins</td>
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### 2.6 Legal Representation

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<tr>
<th>Case</th>
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<tbody>
<tr>
<td><strong>Leonard v Garavan [2003] 4 IR 60</strong>&lt;br&gt;(Right of mentally unstable person to legal representation at criminal hearing despite desire to represent herself)</td>
<td>Michael Campion &amp; Co&lt;br&gt;Ian Finlay SC&lt;br&gt;Colm MacEochaidh</td>
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### 2.7 Bail

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<tr>
<th>Case</th>
<th>Solicitor/Counsel</th>
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<tbody>
<tr>
<td><strong>Maguire v DPP SC, 30/7/04</strong>&lt;br&gt;(Whether delay in prosecution includes delay in the Courts)</td>
<td>Edward Walsh SC</td>
</tr>
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</table>

### 2.8 Prisons

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<tr>
<th>Case</th>
<th>Solicitor/Counsel</th>
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<td><strong>Holland v Governor of Portlaoise Prison HC, McKechnie J, 11/6/04</strong>&lt;br&gt;(Right of prisoners to access the media directly)</td>
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<td><strong>D (J) (a minor) v Connellan [2004] 1 ILRM 202</strong>&lt;br&gt;(Definition of unruliness and detention in prison)</td>
<td>John Quinn &amp; Co&lt;br&gt;Gerard Durcan SC&lt;br&gt;Gráinne Mullan</td>
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### 2.9 Offenders – Post-release Sanctions

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<th>Case</th>
<th>Solicitor/Counsel</th>
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<tr>
<td><strong>Enright v Ireland [2003] 2 IR 321</strong>&lt;br&gt;(Post-release sanctions (here, convicted sex offender to inform Garda of his address) are part of the penalty for a criminal offence only if punitive in nature.)</td>
<td>MacGuill &amp; Co.&lt;br&gt;Gerard Hogan SC&lt;br&gt;Shane Murphy SC&lt;br&gt;Siobhán Phelan</td>
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### 2.10 Freedom Of Information

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<th>Case</th>
<th>Solicitor/Counsel</th>
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<tr>
<td><strong>McK v The Information Commissioner [2004] 1 IR 12</strong>&lt;br&gt;(Parent's right of access to child's medical records)</td>
<td>Anthony Murphy&lt;br&gt;Gerard Hogan SC&lt;br&gt;Andrew Kelly</td>
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</tbody>
</table>
## 2.11 Miscellaneous

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<th>Case</th>
<th>Solicitor/Counsel</th>
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</table>
| *Foy v An tArd-Chláraitheoir* HC, McKechnie J, 9/7/02, 2003 22 5126  
(Right to have birth registration details amended) |  |
| *I (H) v Minister for Justice, Equality and Law Reform*  
[2004] 1 ILRM 27  
(Court's jurisdiction to appoint *amicus curiae*) | For Applicant  
(UNHCR):  
Hayes & Son  
Bill Shipsey SC  
Patrick Dillon Malone  
For Appellant:  
Niall Sheering & Co  
Killian McMorrow BL |
Appendix II: List of interviewees and advisory committee

1. Interviewees

Statutory

Bob Browne and Billy Byrne, Department of Justice, Equality and Law Reform
Moling Ryan, Legal Aid Board
Eilis Barry, Equality Authority
Liam Herrick, Irish Human Rights Commission

Legal Profession

Alma Clissman, Law Society
Michael Cush and Jeanne McDonagh, Bar Council

Legal NGOs/Law centres

Catherine Hickey, Noeline Blackwell, Donncha O’ Connell FLAC
Colin Daly; Kevin Quinn; Moya de Paor, Northside Community Law Centre
Frank Murphy, Ballymun Community Law Centre
Sinead Lucey; Davy Joyce Irish Traveller Movement
Catherine Cosgrave, Immigrant Council of Ireland
Mary Gordon, Disability Legal Resource
Aisling Reidy, Irish Council for Civil Liberties
Cabrini Gibbons, Irish Refugee Council

Non-legal NGO’S

Aftercare Recovery Group
Age Action Ireland
Catholic Youth Council
Disability Federation of Ireland
ICON
National Women's Council of Ireland
Open
Outhouse
People with Disabilities Ireland
Salvation Army
Soilse
Threshold
St. Vincent de Paul

Academics

Prof. Gerry Whyte, Law School, TCD
Prof. Gerard Quinn, and Laurence Donnelly, NUI Galway
Gerard Murphy, UCC
England and Northern Ireland

Les Allamby, Law Centre Northern Ireland
Roger Smith, Justice
Conrad Halley, Public Law Project
Nony Ardill, Legal Action Group
Steve Hynes, Law Centres Federation
Stewart Wright, Child Poverty Action Group

A number of members of the legal profession requested that their names not be used for reasons of confidentiality and accordingly it was decided not to publish any of the names of the 20 solicitors and barristers interviewed in their role as members of the legal profession.

2. Advisory committee

Catherine Hickey, FLAC
Michael Farrell, FLAC
Donncha O'Connell, FLAC
Brian Kearney-Grieve, The Atlantic Philanthropies
Roger Smith, JUSTICE
Geoff Budlender, advocate of the High Court of South Africa
Prof. Gerry Whyte, TCD