

# Editorial

In a recent interview, the writer Iain Banks, expressing strong criticism of senior British politicians, said that they were ‘very good at standing up to the weak and poor, and utterly pathetic at standing up against the rich and powerful; they roll over every single time’ (*The Guardian*, 8 September 2009). As we in Ireland watch measures being unfolded to deal with the banking crisis and the deficit in the public finances, we too may have cause to wonder if our decision-makers, and those who influence them, favour an approach of being ‘strong with the weak’ and ‘weak with the strong’.

In the opening article of this issue of *Working Notes*, Peter McVerry SJ explores the very different realities experienced by those at the top and those at the bottom of Irish society in terms of income, employment, housing, education and health. He points out that most of the decisions are made by those at the top, and that the imbalance in the influence of different sectors is evident in the proposals being made to address the shortfall in the public finances. He points to the cumulative impact of proposed cuts in social welfare and support services, highlighting that it is the same people who will be hit by cuts in different areas of expenditure. He challenges the use of ‘social solidarity’ to mean that everyone should share the pain of addressing the crisis, and says that social solidarity means, rather, that those who can afford to make sacrifices willingly do so in order to protect those who cannot afford a drop in income or cuts in services.

In a reflection on the challenges facing the Catholic Church in the aftermath of the Ryan and other reports on child abuse, Aileen Walsh says that in addition to responding to the needs of those who were abused we must try to understand the forces that shaped the context within which abuse occurred. We must, in particular, examine the factors within the institutional Church itself – including the theology that predominated at the time, the attitudes to sexuality, and the question of how power was exercised by Church authorities internally as well as externally in interactions with the wider society and with the State.

Much has changed for the better in the Church

over the past few decades, Aileen Walsh says; nonetheless, many institutional features remain unchanged. In particular, the implementation in practice of a collaborative approach to ministry has been extremely slow. The reports on abuse, she suggests, should become a catalyst for change and for a renewed commitment by the whole People of God to the task of proclaiming the Good News with integrity.

Questions regarding access to legal services form the theme of the remaining two articles in this issue. Elizabeth O’Rourke of the Jesuit Refugee Service Ireland highlights the significant gap between the number of asylum applicants in Ireland who are granted protection at the point of first decision and the number who are successful after all avenues of appeal have been accessed. A lack of adequate legal services at the early stages of the asylum process is widely considered to be an important factor contributing to this situation. She puts forward the case for ‘frontloading’ legal services – that is, making available adequate legal information, advice and representation at these early stages. Such a change in practice would, she says, result in a fairer and more efficient system, with benefits for both asylum seekers, who would be spared lengthy delays and the stress of navigating complex processes without adequate assistance, and for the asylum system itself in terms of financial savings and greater efficiency.

Patrick Hume SJ looks at pro bono legal work and shows that the long tradition of lawyers offering services without charge is still alive today and is being actively promoted in many countries and through international cooperation. He points out that although pro bono service is an established feature of the legal profession in Ireland, this country does not have a formally structured pro bono system.

He suggests that now may be an opportune time for Ireland’s legal professional bodies and legal education institutions to explore the possibilities for a more structured approach to pro bono, and he draws attention to the resource available in the experiences of other countries which have set up systems and initiatives to support and promote pro bono work.

# ‘Frontloading’: The Case for Legal Resources at the Early Stages of the Asylum Process

*Elizabeth O’Rourke*

## Introduction

In 1992, fewer than fifty people came to Ireland seeking asylum. From 1995, however, there was a rapid increase in the numbers applying for asylum, reaching a peak of 11,634 in 2002. Following the Citizenship Referendum of 2004 and subsequent legislative changes, and consistent with underlying trends internationally, the number of asylum applications fell significantly. By 2008, applications had declined to a total of 3,866 for the year, representing a 2.9 per cent decrease on the total of 3,985 in 2007, and a 200 per cent reduction on the 2002 figure.<sup>1</sup>

At any given time, the asylum system will include not just ‘new’ applicants – those whose claim has not yet been subject to an initial decision – but others whose application was initially rejected and who are now availing of the appeals procedures that are provided.

Over the years, many concerns have been expressed about the fact there exists a significant disparity between the number of asylum applicants granted refugee status following their original application (or ‘at first instance’) and the numbers granted refugee status after all appeal mechanisms have been used. This disparity points to problems in regard to the quality of decision-making, particularly in the early stages of the process.

One factor that has been highlighted as potentially contributing to this situation is the quality of legal assistance provided to applicants in the initial stages of the asylum process. This article explores whether the situation could be improved upon through the ‘frontloading’ of legal services within the asylum application process. ‘Frontloading’ refers to the provision of increased legal services to asylum applicants at the very early stage of the process. Several commentators and organisations have highlighted the benefits of frontloading legal advice and legal representation and have argued for the adoption of this approach.<sup>2</sup>

In this article, the case for frontloading is made on the grounds of both fairness and efficiency. It is contended that better quality decision-making at

the initial stages of the determination system would result in a greater number of positive decisions earlier in the process and in negative decisions that are better reasoned and more sustainable. People seeking asylum would be better informed and supported and less likely to feel that they were on their own, navigating a complex and alien legal process. From the point of view of the asylum system itself, frontloading of legal services could result in a reduction of costly and protracted proceedings at later stages in the determination of applications.

## The Asylum Procedure

As a signatory to the 1951 United Nations Convention Relating to the Status of Refugees (Geneva Convention) and its 1967 Protocol, Ireland has accepted clearly-defined international legal obligations towards people seeking asylum. A central commitment is the undertaking to admit to the country any person who arrives at its frontier and asks for asylum. As the United Nations High Commissioner for Refugees (UNHCR) has pointed out, for a person to have the right to be admitted to a State that is party to the Geneva Convention and make an application for asylum in that State, it is sufficient that she or he simply intimates their request, without necessarily expressing it in clear or accurate words.

These obligations are recognised in the 1996 Refugee Act (Amended) which provides that a person who arrives at the frontiers of the Republic of Ireland seeking the protection of the State shall be given leave to enter (Section 9 (1)). A person seeking entry and asylum is subject to a preliminary interview with an immigration officer. The Refugee Act specifies that the interview ‘shall, where necessary and possible, be conducted with the assistance of an interpreter’ (Section 8 (2)). The person must subsequently report to the Office of the Refugee Applications Commissioner (ORAC) which has responsibility for processing applications for asylum.

The legislation also provides that an application for asylum may be made by a person already in

the State (Section 8 (c)); in practice, most applications are made in this way.<sup>3</sup> In such cases, the application is made directly to ORAC and the preliminary interview is conducted by a designated official of ORAC.

Every person seeking asylum must complete a lengthy questionnaire; this requires him or her to provide biographical information, details of his or her journey to Ireland and the reasons for seeking the protection of the State. Prioritised applicants must return their questionnaires to ORAC within six working days and non-prioritised applicants within seven working days of their preliminary interview.<sup>4</sup> A longer and more in-depth interview (the 'substantive' interview) is then arranged. This interview is carried out by an ORAC caseworker.

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The ORAC caseworker prepares a report on the application, drawing on the information obtained from the preliminary interview, the completed questionnaire, the substantive interview, and any relevant documentation, including country of origin information. This report will include a recommendation as to whether or not refugee status should be granted, as well as the reasons for this recommendation. Where a positive recommendation is made – i.e., that the person be granted refugee status – ORAC notifies the Minister for Justice, Equality and Law Reform.

A person who receives a negative recommendation is entitled to appeal to the Refugee Appeals Tribunal. Generally, an appeal must be made within fifteen working days of the sending of the negative decision and the applicant is entitled to request an oral hearing for his or her appeal. In certain circumstances, specified in the Refugee Act (Section 13), the period within which an appeal must be made is shorter (ten, and in some cases four, working days) and the appeal will be dealt with by the Tribunal without an oral hearing. In cases where an applicant withdraws or fails to participate in the process (for instance, does not attend the interview), the application is deemed withdrawn and a negative

recommendation is issued. There is no appeal against this decision.

## Access to Legal Assistance

Asylum applicants may access free legal assistance through the Refugee Legal Service (RLS), a specialised service of the Legal Aid Board. A RLS caseworker, who is usually not qualified in law, is assigned to provide legal information to the asylum applicant. The RLS provides only general legal assistance to an asylum applicant before he or she fills out the detailed questionnaire. Normally, it is only in the case of vulnerable applicants, such as minors, that the RLS will advise on specific details of the claim or provide direct assistance with filling in the questionnaire. A RLS solicitor does not usually accompany an applicant to her or his substantive interview, except in cases where the applicant is considered to be vulnerable.

ORAC encourages asylum applicants to seek professional legal advice.<sup>5</sup> However, a Customer Survey by ORAC in July 2007 found that 40 per cent of applicants had not consulted a solicitor or the RLS *before their substantive interview*.<sup>6</sup> The number of applicants who do not consult with RLS or a private solicitor *before filling out the questionnaire* is presumably much higher. In short, many applicants do not have any legal advice pertaining to their case at the critically important early stages of the asylum process.

## Asylum Decisions

As noted in the Introduction, concerns have been frequently raised in regard to the quality of decision-making at all stages of the asylum procedure. In recent years, for example, questions have been asked about the fairness of decisions reached by the Refugee Appeals Tribunal.<sup>7</sup>

Critics have pointed to the high number of Judicial Review cases taken following negative asylum decisions as evidence of systemic problems in the asylum process. Judicial Review is an option whereby applicants can challenge the legality of the process by which their application was determined by ORAC or the Refugee Appeal Tribunal.<sup>8</sup> Judicial Reviews can be both protracted and costly.

Official figures do not provide a breakdown which would allow applications for Judicial Review to

be related to the specific statutory agencies that may be involved in the process. However, figures published by *The Irish Times* in early 2008 showed that 440 of the Judicial Review applications in 2007 related to ORAC and a further 378 related to the Irish Naturalisation and Immigration Service (INIS) and/or the Department of Justice, Equality and Law Reform.<sup>9</sup>

*The Irish Times* estimated that the balance (206 applications) related to decisions made by the Refugee Appeals Tribunal, and that the Tribunal paid out €4.29 million in respect to 190 cases in 2007, a cost significantly higher than that incurred, as a result of Judicial Review, by ORAC or INIS in the same period.<sup>10</sup>

Essentially, the available figures indicate that a significant number of asylum seekers are initially refused asylum but are accepted after appeal or resort to a Judicial Review – at considerable financial cost to the State and human cost to the individuals involved. It is this situation that has given rise to the concerns about how the earlier stages of the process operate and the calls for adequate legal advice and assistance at these stages.

## The Use of Case Studies

Behind the statistics relating to the asylum system are people with names and faces. Important insights can be gained from a qualitative assessment of individual applicants' experiences of each stage of the asylum process. It is acknowledged that the use of such case studies can be criticised on the grounds of 'case selection' – the cases chosen will obviously affect the findings obtained. Nonetheless, case studies can be a valuable complement to quantitative analyses of the asylum process. Through the case studies below, this article aims to offer an understanding of the human experience of how the asylum process operates in practice from the point of view of the asylum applicant.

### Case Study I

Barat is from Afghanistan and has been in Ireland for two and a half years. He is from one of the ethnic groups targeted by the Taliban. When he first attempted to escape, he was arrested in the country to which he had fled and was returned to Afghanistan, where he was imprisoned and tortured by the Taliban.

*I think some people don't know the situation of refugees ... People don't come to Ireland for fun ... They are escaping torture and death, and they come here to feel safe ... When my parents were killed it was the end of everything... Sometimes I wish I had died with them, sometimes I think 'why I am even here?' ... That's very negative ... Just sometimes when I'm in a bad mood.*

When he first arrived in Ireland, Barat went to the Department of Justice, Equality and Law Reform to apply for asylum and then to RLS to apply for a solicitor. He met a caseworker before his interview and met his solicitor at the Refugee Appeals Tribunal.

*I came to the Justice and they told me to fill out a form ... You never get to talk to the solicitor... always the reception take your number and say 'I'll get back to you' ... I haven't met him [the solicitor] till I was refused ... I say to him 'why I haven't seen you before?'*

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## *Behind the statistics relating to the asylum system are people with names and faces.*

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Barat received little assistance during the preliminary interview and when completing the asylum questionnaire:

*When [I went] to the Legal Aid, the person I got wasn't a solicitor; it was a caseworker... Maybe a solicitor would help you but the caseworker can't do anything; they just write down what you say ... I didn't know what the questionnaire was ... I didn't even know I needed to go to court – I was, like, 'Why do I need to go to court? I haven't done anything wrong'.*

It was difficult for him to complete the questionnaire and in particular to tell his entire story:

*That was crazy... They give me few days to fill out the form ... I can't do that ... my life, you know ... it's twenty years experience ... I need to write a book about it ... They have fifteen lines maybe ... even ten years you need to write a novel ... I couldn't fill it in.*



Reflecting on what he had written, he said:

*I didn't know ... I put down what I thought and now I think ... I don't know ... I should've written something else.*

After the questionnaire was filled out, Barat went to a direct provision centre to await a call for the substantive interview. The interview was difficult:

*Interview was scary 'cos they say – 'what happened to you?' ... very depressing for me that I had to talk about my family ... it was like a flashback ... it only happened one month ago or maybe two months ago ... it was there in front of my eyes ... a two-hour interview ...*

Referring to a difficulty which arose because he was not able to produce the death certificates of his parents as supporting evidence, he said:

*If they wanted death certs of my parents that was no problem at all; I just need to get them.*

Seven months after the interview Barat was told that his application had not been accepted. He took his case to the Refugee Appeals Tribunal but the solicitor who had previously worked on his case was away. A report which Barat needed to provide to the hearing was not available.

The Appeal was denied and Barat has now applied for Judicial Review of his case. He has employed a private solicitor to represent him:

*... Legal Aid doesn't do Judicial Review so I got a private solicitor to go to the High Court ... They say your case is finished; we don't wanna see you again ... But I can't ever go home ... I don't want to say all of them are bad, some take your case seriously, but most don't ... They get paid if you win or lose.*

### **Issues Highlighted**

This case exemplifies a number of concerns that are frequently voiced about the current procedure:

*Duration of process:* The interval between the initial application and the substantive interview and between each subsequent stage in the process is a very difficult time for applicants. The fact that they may not be given any information about how long they will have to wait until the next stage is a source of great frustration. In the case of applications to the Refugee Appeals Tribunal, the average time taken to process and complete substantive appeals is around thirty weeks.<sup>11</sup>

*Burden of proof and case preparation:* The late identification of issues that may be in dispute, and a consequent requirement to produce proof of certain aspects of the claim, can present significant difficulties for applicants. Had Barat been told at an earlier stage that he needed the death certificates of his parents, he would have contacted someone at home to send them to him. Good communication between solicitor and client and the timely assembly of all necessary papers and reports could result in fewer delays and perhaps less need for recourse to Judicial Review.

*Access to legal services:* ORAC caseworkers are not required to have legal qualifications and cannot be expected to have the legal expertise that may be vital to a person in the initial stages of their application for asylum. Access to legal services should mean the opportunity to have advice and representation from a qualified legal practitioner with specialised training in relation to refugee law and practice.

*Complexity of the questionnaire:* The questionnaire is a complicated and lengthy document, currently running to forty-eight questions. A claim can be rejected if information is missing or if the questionnaire is found to contain contradictory statements. The most critical question is number 21 where the applicant has to explain why he or she came to Ireland. This is the question in respect of which Barat felt he would have needed to write a book in order to explain all the relevant events in his life, the situation in his country and the various internecine conflicts therein.

The questionnaire provides thirteen lines to answer this question. Space is available at the end of the questionnaire for the purpose of providing additional information but this is not always clearly understood by applicants. Some asylum seekers have a low level of formal education and struggle to express themselves in writing. Indeed, even a person with a high level of educational qualifications could be daunted by the prospect of having to complete such a lengthy, critically important, questionnaire with no guidance as to what information to include or exclude.

### **Case Study II**

Reem came to Ireland from a Middle Eastern country with her sisters and mother. Her father had obtained asylum here nine years earlier but was not eligible for family reunification. Reem

came here in September 2006 and was granted refugee status in mid-2009.

*First we have a problem and second there was a really big war ... We ran away to [another country] ... My father left in 1998 ... Things were bad all this time he was gone ... but then they got worse ... when there is no government everyone can kill you ... they don't understand it here ... it's like in Iraq too ... a thousand people are dying and they just say 'close the case'.*

She was confused when she first arrived:

*When I came here I didn't know what I had to do ... first time in Europe it was a strange for us; it was in Ramadan time which means we are fasting. We had to apply on the same day but we didn't ... we stayed one month and then went to Justice ... when I did apply they asked – 'why did you wait for one month?' ... and they didn't believe me ... Because we didn't see our father for nine years we stayed with him.*

Speaking of the importance of advice, she said:

*Even though my father was here we were still confused ... What about the people in the hostel who have no-one? ... They came from SPIRASI<sup>12</sup> and told us what we have to do ... what were our rights and that was very good ... they told us in Ireland you must look at a person in the eyes ... this means you respect the person ... in the interview he didn't look at me one time ... and I thought this person doesn't like me ... I felt bad.*

Reem met her solicitor only after her application for asylum was refused by ORAC and her case was pending before the Refugee Appeals Tribunal.

She felt it would have been helpful to have had the assistance of a solicitor from the beginning of her case:

*If the solicitor helped you ... would've been very good ... If your solicitor was with you he can say don't write that ...*

Overall, however, she was very dissatisfied with the service available and commented:

*... the people are saving their money to pay for a private solicitor.*

She believes that the ORAC looked for small inconsistencies to refuse her claim:

*They always want to look for small things to*

*refuse you ... that's all the interviewer wants ... he did not believe me ... they say in which year did you do this? I forgot what I had for breakfast yesterday ... And when I am stressed I forget things.*

She was finally able to prevail in her claim after a complicated process before the Refugee Appeals Tribunal:

*I went to court three times ... The first three times they did not look at my father's file ... And again I say ... 'please look at my father's file; I came here because of my father' ... then they sent a form for them to say – yes, the judge can see your case ... fourth time I went to the Tribunal then they accept me ... all this is wasting time ... in the end my father explained everything ... from the start I said 'it's not my problem ... in our country it's very secret with politics ... they get revenge on the children ... And they will scare the family just because the person is not there'.*

### **Issues Highlighted**

Reem's experiences draw attention to several concerns regarding features of the current process:

**Investigation Procedure:** This case illustrates that there can be a determination of a claim by ORAC before all relevant evidence is made available. The initial decision on Reem's application was made before the details of her father's case were brought forward. There was no one representing Reem who could argue forcefully the necessity of referring to her father's case. It took three years until the centrality of her father's successful claim was recognised and a decision was then made based on this, but the delay had cost both sides a great deal of time and money.

**Relevant Information:** Deciding what is relevant to the application presumes a full understanding of many legal concepts, including the definition of a refugee. Applicants generally lack this knowledge which is why early advice can be so crucial to getting to the important and relevant elements of someone's claim. Reem did not know what to include in the questionnaire because she did not have the relevant legal knowledge.

**Information Sharing:** Lack of communication and cooperation between legal representatives and decision-makers can have serious consequences for applicants and involve costs for the system. In Reem's case, the decision which was eventually arrived at after three years could have been made much earlier if all parties involved in the process,

including the interviewer, worked together before and during the process of initial decision-making.

*Adversarial Approach:* It is intended that the asylum process be ‘non-confrontational’ or ‘non-adversarial’. However, this is not the common experience of people seeking asylum in Ireland. In what is supposed to be an inquisitorial rather than an adversarial process, Reem felt intimidated and as if she were being automatically disbelieved.

## Proposed Single Procedure

The Immigration, Residence and Protection Bill 2008 provides for a ‘single procedure’ for dealing with applications from those seeking protection. The Bill specifies that the Minister for Justice, Equality and Law Reform should assess, in order, (1) whether someone is entitled to protection on the grounds that they are eligible for refugee status; (2) whether they are eligible for subsidiary protection; (3) whether the principle of *non-refoulement* under the Geneva Convention requires that they should not be returned to a country where their life may be in danger, and (4) whether there are other ‘compelling reasons’ they should be granted protection.



*Ensuring the balance of justice within the asylum system*

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At present, applications for refugee status and for subsidiary protection are determined separately in a two-stage process: a person has the right to apply for subsidiary protection only after his or her application for refugee status has been turned down. The single procedure will end this two-stage process, meaning that protection applications are likely to be determined more quickly. This is to be welcomed.

However, the single procedure will be more demanding and complex for decision-makers since the claim for protection on Convention grounds

and on other grounds will be considered at the same time. The information contained in the questionnaire will therefore form the basis upon which eligibility for all four protection possibilities outlined above will be considered.

As a consequence, adequate completion of the questionnaire becomes even more important than under the current system, since applicants need to ensure that they are providing information that is relevant not only to a Convention claim but to all the protection possibilities. Looking to this future development, the case for frontloading legal advice to protection applicants becomes all the more pressing.

## The Case for Frontloading of Legal Advice

There are several grounds for arguing that earlier and better legal advice and representation would lead to improved outcomes from the asylum process.

*Efficiency:* access to expert legal advice in completing the questionnaire would assist in assembling the information that could show the grounds, if any, for a protection claim. The involvement of solicitors at this stage would mean that they would be in a position to provide advice as to whether the applicant’s circumstances would be likely to meet any of the grounds on which protection can be granted. A clearly completed and factual questionnaire should provide better quality information and thus facilitate a quicker and fairer decision at first instance. Better decision-making at this point would result in significant savings, as proceedings at the later stages incur significant financial costs and add greatly to the duration of the process.

*Fairness:* The substantive interview is a pivotal moment in the asylum process. Fairness and the need to ensure protection of applicants’ rights require that access to legal representation should be provided at this stage of the process. Furthermore, the availability of legal services should mean less need for Judicial Review as many of the alleged deficiencies in the process that are later challenged could be dealt with as they arise by legal representatives.

*Improved Communication and Information:* Complicated legal and technical definitions and concepts could be adequately explained if legal advice were available at an early stage, which should mean that applicants would be better



equipped to provide relevant information in completing the questionnaire, during the interview and throughout the whole application process. The provision of legal advice should also mean that applicants would be adequately informed about what is involved in each stage of the process.

*Genuine Non-Adversarial Approach:* Applicants would be likely to feel less intimidated and fearful if they were accompanied during the interview and court proceedings by a legal representative who was working with the interviewer and judges to determine the facts of the situation. Having quality legal representation means not just having a lawyer present during the process but having one who is committed and has expertise and experience in the relevant areas of law.

*Future Proofing:* The anticipated introduction of a single procedure will mean that the questionnaire will be even more detailed and the potential grounds for protection more technical. Legal assistance will be necessary to ensure that applicants do not exclude facts that would be relevant to complementary forms of protection but not to a Convention claim.

### **ORAC Frontloading Pilot Project**

It is not only advocates of asylum seekers who see merit in frontloading legal advice. ORAC itself has stated:

*It is considered that direct guidance with the completion of the questionnaire and the provision of all other relevant information will greatly improve the quality of information available to ORAC caseworkers, enhance the quality of pre-interview preparation and interviews themselves as well as ensuring that ORAC's decision makers have as much of the necessary information as is available in order to make informed decisions on the cases concerned. All of this is seen to be in the applicant's best interest and should also result in the more effective and efficient use of resources both in ORAC and in the RLS.<sup>13</sup>*

In light of this, ORAC and RLS have implemented a frontloading pilot project on the enhanced and earlier use of legal support and assistance provided by RLS to asylum applicants. The pilot project began in the first quarter of 2009 and was due to be reviewed in October 2009 by RLS and ORAC. The results of the review will be considered in the context of the planned single procedure proposed in the Immigration, Residence

and Protection Bill 2008, and will be used to inform staff in the relevant statutory agencies how best to prepare for the implementation of the single procedure.

### **Conclusion**

Clearly, getting to the facts in an asylum case is not a straightforward process. It is an unenviable task for those responsible for making and implementing policy to try to strike the right balance between border controls and the right of individuals to protection. It is, however, crucial that this balance be found. There appears to be a compelling case for frontloading legal advice to asylum applicants; such a change would have long-term benefits not only for asylum seekers but for the institutions charged with implementing asylum procedures. The potential value of frontloading legal services is coming to be recognised not only by asylum seeker advocates but by decision-making bodies such as ORAC.

To be effective, frontloading should mean that:

- All persons applying for asylum in Ireland would be informed in a language they understand of their right to legal advice and representation and how this can be accessed.
- All asylum applicants would have access to a legal representative before filling out the questionnaire and would receive legal advice in completing the questionnaire.
- A legal representative would attend the substantive interview and play an active role within it.
- Appropriate training for legal representatives would be provided in order to ensure that they are in a position to adequately represent protection applicants. Such training would be particularly important in the context of the expanded protection framework provided for in the Immigration, Residence and Protection Bill 2008.

From the point of view of decision-makers, frontloading should mean that the best quality information would be available at the earliest juncture in the asylum process. While providing legal assistance at the earliest stages of the process would mean an initial financial investment by the State, this would be offset by a reduction in costs at the later stages, since fewer financial and



human resources would be needed for appeals and Judicial Review proceedings.

## Notes

1. It is also worth remembering that more than 85 per cent of refugees in the developing world find a safe haven in neighbouring countries, putting huge strains on these countries, which are already limited in resources. Applications for asylum in Ireland constitute just 1.5 per cent of all applications to the countries of the developed world.
2. See in particular, Brian Barrington, *The Single Protection Procedure: A Chance for Change*, Dublin: Irish Refugee Council, 2009; *Manifestly Unjust: Summary of a Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determinations*, Dublin: Irish Refugee Council, 2001; *Good Practice in the Provision of Services to Asylum Seekers: Recommendations of Seminar*, 28th May 2008, funded by SONAS Mainstreaming Group (available at [www.integratingireland.ie](http://www.integratingireland.ie)).
3. The website of the Office of the Refugee Applications Commission can be found at [www.orac.ie](http://www.orac.ie)
4. See [www.orac.ie](http://www.orac.ie)
5. See ORAC, *Application for Refugee Status Questionnaire, Guidelines for Completion of Questionnaire*, at p. 2, para. 5. However, it is not clear that applicants are advised to obtain legal advice before they fill out the questionnaire.
6. See ORAC, *Statistical Breakdown of Figures from the Customer Service Survey, July, 2007*, Question 8 ([www.orac.ie](http://www.orac.ie)). The figure for 2008 may be somewhat higher: RLS has advised that in 2008 the equivalent of 56 per cent of asylum seekers registering with ORAC applied for RLS services at the pre-interview stage, compared to 49 per cent in 2007.
7. 'Call for Review of Up to 1,000 Rejected Asylum Applications', *The Irish Times*, 10 March 2008; 'Evidence of Disharmony among Members of Refugee Appeal Process', *The Irish Times*, 4 March 2008 (available at [www.irishtimes.com](http://www.irishtimes.com)).
8. Judicial review is not concerned with the substance of decisions, but with the decision-making process. See: Corona Joyce, *Annual Policy Report on Migration and Asylum 2008: Ireland – Research Study Prepared for the European Migration Network*, Dublin: ESRI, 2009.
9. There was a decrease of almost 30 per cent in the number of legal challenges against recommendations of ORAC in 2008, with 266 legal challenges taken, as against 378 during 2007. See Office of the Refugee Applications Commissioner, *Annual Report 2008*, Dublin, 2009, p. 14.
10. '1,000 Asylum Review Cases Last Year', *The Irish Times*, 10 March 2008 (available at [www.irishtimes.com](http://www.irishtimes.com)).
11. Corona Joyce, *op. cit.*
12. SPIRASI is an Irish NGO which works with 'asylum seekers, refugees and other disadvantaged migrant groups, with a special concern for survivors of torture' (see [www.spirasi.ie](http://www.spirasi.ie)).
13. Correspondence between JRS Ireland and ORAC, 3 September 2009.

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# Pro Bono: Still Relevant for Access to Justice

Patrick Hume SJ

## Introduction

A call to justice for the poor and marginalised is to be found in the three major monotheistic faith traditions. The Hebrew tradition specifically mentions the need for justice for the poor in their lawsuits.<sup>1</sup> In Christian scriptures, scribes or lawyers were encouraged to foster justice, especially among the poor and widows. A similar call to justice can be found in the *Quran*,<sup>2</sup> alongside calls to charity.<sup>3</sup> Each tradition is intimately linked to law, and emphasises the need for its careful application with justice and mercy.<sup>4</sup>

These traditions are among the forces that have influenced the long-established practice of lawyers undertaking work *pro deo*, or *pro bono publico* (for the public good). What is now generally called ‘pro bono’ refers to work done by a solicitor or barrister without expectation of a fee.<sup>5</sup>

There is no definition of pro bono that is common to all jurisdictions.<sup>6</sup> One simple definition is: ‘Lawyers providing free legal services to persons of limited means’.<sup>7</sup> Broader definitions encompass not just work on behalf of individuals but work on behalf of organisations and communities. For example, in the *Pro Bono Declaration for the Americas*, the definition used is:

*Pro bono legal services are those provided without a fee, or expectation of a fee, principally to benefit poor or underprivileged persons or communities or the organizations that assist them. They may include representation of persons, communities or organizations in matters of public interest who otherwise could not obtain effective representation. In addition, pro bono legal services can also benefit civic, cultural and educational institutions serving the public interest who otherwise could not obtain effective representation.*<sup>8</sup>

This article first looks briefly at some high-profile pro bono activity and principles in various jurisdictions which have developed pro bono in a modern, proactive manner. Next, some features of international declarations concerning legal pro bono are outlined. Finally, a brief examination of pro bono activity in Ireland leads to some

proposals for a more integrated, proactive approach to the provision of pro bono services in this country.

## Pro Bono in other Jurisdictions

### United States

The level of interest in pro bono work in the United States is reflected in the wide range of articles and books that have been published on the topic.

The American Bar Association (ABA) and several local bar associations strongly support pro bono initiatives. Within the ABA, there is a ‘Center for Pro Bono’ and a ‘Standing Committee on Pro Bono and Public Service’.<sup>9</sup>

The ABA Model Rule 6.1, ‘Voluntary Pro Bono Publico Service’, states: ‘Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.’<sup>10</sup> Meeting this target is, of course, not mandatory but Deborah L. Rhode, who has written extensively on pro bono, has drawn attention to the fact that ‘most profitable firms often have high participation levels’. She adds: ‘Some evidence suggests that, at least for large firms, pro bono participation may be positively correlated with financial success.’<sup>11</sup>

Pro bono services can range from very small-scale initiatives upwards to significant levels of legal assistance – from the provision of web-based information to education via the net or in classes, to advice by para-legal assistants, to assistance before the courts with various levels of expertise from law students to senior attorneys. This variety of services is referred to as Mixed Model Delivery.<sup>12</sup>

Rhode points to research findings on lawyers’ perceptions of the positive influences of pro bono: they ranked ‘personal satisfaction’ as number one and ‘professional obligation’ second.<sup>13</sup> It is interesting that among the influences mentioned was ‘religion’.<sup>14</sup>

One well-developed area of pro bono service in

the United States is that provided by law schools across the country. Most of the major law schools (including, for example, Harvard, Georgetown, Fordham, Boston College, and Seattle University<sup>15</sup>) have some provision for offering volunteer work or pro bono service opportunities; some law schools make pro bono work a requirement.

The standards and experience provided in law school placements vary considerably. Rhode states that for such programmes to be effective, ‘placements should provide meaningful work, offer opportunities to be involved in problem solving and decision making; supply adequate support and feedback; and enable individuals to develop skills and assume increasing responsibility’.<sup>16</sup>

A different aspect of pro bono educational work is legal education for a wide range of groups through a programme called Street Law. Arising from an initiative of law students in Georgetown University, Washington D.C. in 1972,<sup>17</sup> Street Law programmes and materials were developed and systematised and they have been widely used in a variety of settings in the United States. Internationally, Street Law projects have been undertaken in over thirty countries, including the UK and South Africa.<sup>18</sup> The Street Law Programme Handbook describes the approach used with community groups:

*Under this scheme [law] students work with community groups to identify legal concerns. The students then research the relevant material and present their findings to the partner groups in a user-friendly form. Through discussion, rôle-play and other inter-active methods, students and the community group members both learn about the law.*<sup>19</sup>

### **England and Wales**

LawWorks is the operating name of the Solicitors Pro Bono Group; it was set up by a group of solicitors concerned about access to justice. It provides free legal help (including legal advice, mediation and casework assistance) to individuals who are unable to access legal aid. It also provides legal assistance to small charities, not-for-profit, voluntary and community organisations. The membership of LawWorks includes ‘almost all the major law firms in the UK’. The organisation seeks to encourage ‘the widespread involvement of law schools and their students in pro bono activity’ and it is actively engaged in policy work

in relation to pro bono service.<sup>20</sup>

The Law Society of England and Wales has held a Pro Bono Awards ceremony each year since 1998. The awards celebrate outstanding pro bono work undertaken by trainees, in practice or on course work, as well as that of newly-qualified solicitors with up to five years experience. These awards recognise both individual pro bono activities and participation in team projects.<sup>21</sup>

Since 2001, there has been a National Pro Bono Week, with events organised by various groups involved in the provision of legal aid and advice and legal education.<sup>22</sup> In 2008, there were seventy events on the theme of public legal education and partnership between the professions and the voluntary sector. A committee, formed from the Law Society, Bar Council, LawWorks and others, plans the events for the week.<sup>23</sup> During the 2008 Pro Bono Week, the Law Society highlighted the value of the work done by lawyers on a pro bono basis, estimating this to be the equivalent of nearly £350 million or 2 per cent of gross income.<sup>24</sup>

### **European Pro Bono Forum**

In the broader European context, the European Pro Bono Forum is a major international conference organised by the Public Interest Law Institute (PILI). The Forum, which was first held in 2007, aims to provide a platform for the exchange of information relating to pro bono activities in Europe, and for networking among lawyers, academics and NGOs committed to pro bono work. The 2009 Forum, held on 5–6 November 2009, considered the impact of the global economic crisis on pro bono practice.<sup>25</sup>

### **Canada**

The Canadian Bar Association (CBA) is active in encouraging pro bono work, and has established a Pro Bono Committee to foster such service among the bar (the Canadian Bar is now unified, each lawyer qualifying as both a solicitor and barrister).<sup>26</sup> The Committee provides practical aid to law firms in setting up a pro bono policy and in deciding whether to accept a pro bono file.

In practice, the implementation of some of the principles of pro bono service is managed at province level by a pro bono law group, such as Pro Bono Law Ontario.<sup>27</sup> These provincial bodies provide a system to enable lawyers become involved in pro bono work and to link skills to needs. They supply resources such as online tools and advice, and also provide a special insurance



for lawyers who give their services pro bono.

### **Other Countries**

In Australia, a 2007 report, *Mapping Pro Bono in Australia*, looked at existing provision and made proposals in regard to principles and practice for the future development of pro bono work.<sup>28</sup>

Interestingly, the report noted that sole practitioners appeared to engage in more pro bono work than did solicitors in large firms.<sup>29</sup>

In outlining the constraints on the delivery of pro bono, the report drew attention to the fact that there is often a mismatch between client needs and the skills of the lawyers willing to undertake pro bono work.<sup>30</sup> It also noted the various factors which contribute to lawyers being reluctant to engage in litigation, including uncertainty as to the size, scope, length, and complexity of the case, and the adverse costs that may be involved.<sup>31</sup>

Regarding future strategy in relation to pro bono, the report focuses on greater co-ordination, with service providers working together. There was recognition that single pathways for accessing services help avoid confusion among potential clients. One organisation indicated as enabling enhanced coordination was the Public Interest Law Clearing Houses, which facilitate the connecting of clients and relevant lawyers.<sup>32</sup> Other issues which the report suggested needed to be addressed were: training of volunteers; promotion of law school volunteer programmes, and provision of courses which address the legal needs of poorer clients.

In recent years, the Israel Bar Association has been active in developing a pro bono legal aid programme for the poorer sections of society.<sup>33</sup> The programme, called 'Schar Mitzva', has been described as the social flagship project of the Israel Bar.<sup>34</sup> It operates a hotline staffed on a volunteer basis by students. The programme also operates in thirty-four 'rights centres', providing pro bono counselling by professional and certified lawyers. The President of the Israel Bar has commented that an initial concern that the programme would hurt the livelihoods of lawyers 'has gradually faded away from the arguments of opponents'.<sup>35</sup>

An interesting recent development in pro bono internationally is a new requirement in the Philippines that all practising lawyers provide mandatory free legal aid service in all cases involving marginalised and poor litigants.<sup>36</sup>

The rule, introduced on 1 July 2009, requires each practising lawyer to undertake a minimum of sixty hours of free legal aid work per year, with a minimum of five hours each month. Continuation in practice depends on being issued with a certificate attesting to hours given in pro bono service. Furthermore, lawyers who fail to comply with the free legal aid requirement for three years will face disciplinary proceedings.

### **National and International Instruments**

Several bar associations have some form of explicit pro bono rule,<sup>37</sup> policy, protocol<sup>38</sup> or declaration which is intended to guide this form of service.<sup>39</sup> LawWorks in England, for example, has a Pro Bono Protocol which sets out the 'core values' of pro bono work, and which aims to assist 'both those who undertake it and their clients'.<sup>40</sup>

Pro bono declarations tend to be more comprehensive – often including specific goals for hours spent in pro bono work as well as minimum standards to guide the service.

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*'Members of the legal profession have a responsibility to provide pro bono legal services. This responsibility stems from the profession's role and purpose in society ...'*

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Lawyer associations of several countries in the Americas produced the *Pro Bono Declaration for the Americas*. This declares: 'Members of the legal profession have a responsibility to provide pro bono legal services. This responsibility stems from the profession's role and purpose in society, and from its implicit commitment to a fair and equitable legal system.'<sup>41</sup> The Declaration suggests a minimum of twenty hours service per year, a focus on support for NGOs and the promotion of pro bono as an ethical obligation.

The International Bar Association (IBA), of which both the Bar Council of Ireland and the Law Society of Ireland are members, approved the *IBA Pro Bono Declaration* in October 2008.<sup>42</sup>

This international agreement is 'inspired by the

vision of a better, more just world'. It points out that access to justice is, for all individuals, a human right, that barriers to justice should be dismantled, and that the legal profession has 'the duty and opportunity to provide pro bono legal service'.<sup>43</sup>

It calls on *lawyers* to specify a proportion of their time and resources for pro bono, on *firms* to promote and value this work, and on *governments* to support the provision of services by various means, including reduced court fees. Moreover, it urges the promotion of broad educational activities to foster pro bono service.

## Pro Bono in Ireland

### Current Situation

Not much has been written on pro bono law in Ireland. Yet pro bono service has long been feature of the legal profession in Ireland, and the tradition has continued despite the introduction of a system of civil legal aid in the late 1970s.

Personal conversations reveal that many solicitors and barristers give free legal assistance. Most of this voluntary work is *ad hoc*, and depends on a pre-existing relationship, with the client being perhaps a family member, friend, associate, neighbour, club or work colleague. However, some pro bono work is carried out in a more formal way, through FLAC (Free Legal Aid Centres) or in a community law centre, such as Ballymun Community Law Centre or Northside Community Law Centre.

The Bar Council of Ireland has explicitly commended its members to offer assistance pro bono.<sup>44</sup> Furthermore, the Council recognises pro bono service as fulfilling some of the requirements for Continuing Professional Development.

Writing in the *Law Society Gazette* in 1998, John Costello, solicitor, drew attention to the tangible benefits to lawyers arising from engaging in pro bono work; he suggested that personal development, training, staff morale and public relations are all seen to improve when firms implement pro bono schemes.<sup>45</sup> He pointed to a number of specific areas in which there were needs not being met by the statutory legal aid service; these included, employment appeals; environmental law; copyright law for young artists; housing and tenancy law; health law; community law; public interest law, which might

include constitutional law.<sup>46</sup>

This identification of a broad spectrum of need is still valid today, more than ten years later. One other area of concern might be added – that is, social welfare law. This is an area which affects in particular those who are financially deprived, yet it is an aspect of law rarely addressed in law schools or in the very practice-oriented courses provided by the Law Society of Ireland and King's Inns in the training of lawyers in Ireland.

Given the type of needs outlined above, how does a lawyer in Ireland make available his or her skills to those in need of a legal service without seeking out clients, or soliciting custom? This question focuses attention on the issue of a formal, organised approach to the provision of pro bono legal services in Ireland.

### Pro Bono Task Force

In 1999, the Law Society established a Pro Bono Task Force, chaired by John Costello. The Report of the Task Force was published in 2001.<sup>47</sup>

The Report acknowledged the pro bono work being done in Ireland but argued that it should be provided in a more organised manner. Ireland is, it noted, 'one of the few common law countries without a properly organised Pro Bono Scheme'. The Report argued that there was need to move beyond the existing 'piecemeal and *ad hoc*' approach to pro bono activity and that official support by professional bodies was necessary for pro bono to flourish. In effect, the Task Force seemed to hold that pro bono work is not an optional 'work of charity' but a professional responsibility.

The key recommendation of the Task Force was that a formal pro bono scheme be established. This, it emphasised, would not replace the existing work of solicitors or the work done by the Legal Aid Board but would augment what was already being provided. The Task Force highlighted in particular the need for free legal advice, noting that the potential demand for this far exceeded the capacity to respond of the existing statutory service.

The Task Force suggested that the key steps towards establishing a pro bono scheme included:

(i) *Joint Action by the Law Society and Bar Council*: In light of the fact that Ireland is a small jurisdiction with limited financial resources, it was essential that the Law Society and the Bar Council

should act together in establishing one limited pro bono scheme.

(ii) *Establishment of a Pro Bono Charity:* An ‘urgent practical step’ was the establishment of a ‘Pro Bono Charity’. This would be ‘a Company Limited by Guarantee whose board would comprise both solicitors and barristers’ (Recommendation 8).

This proposal envisaged the Pro Bono Charity providing services for FLAC, Citizen Information Centres, NGOs and community groups. Initially, it was suggested, individuals would not have direct access to the Pro Bono Charity but in time such access might be possible under strict criteria to be established during the early development of the charity.

(iii) *Appointment of Pro Bono Co-ordinator:* The Law Society ‘should appoint a co-ordinator to represent the Society in liaising with the charity to identify areas in which solicitors/apprentices could assist with the work of the charity’ (Recommendation 11). The Pro Bono Co-ordinator or some member of the Council would have special concern for the development and fostering of pro bono.

While the Report of the Task Force was widely welcomed at the time of publication, its recommendations have yet to be implemented.

### **Indemnity and Adverse Costs**

Two obstacles to the provision of pro bono services were not the subject of recommendations by the Task Force but both are crucial: these are indemnity and adverse costs.

The question of indemnity – professional liability insurance – constitutes a major barrier to lawyers who would like to assist NGOs on a pro bono basis. The issue of adverse costs arises because, in Irish law, costs follow the event, which means the final legal bill must be borne entirely by the losing party, unless a judge makes no order as to costs and lets each side pay its own way. Pro bono litigants, therefore, could be liable for any costs ordered in favour of the opponent. While it is possible to apply to the High Court for a protective cost order, such orders do not seem to have been granted in practice. A resolution of the difficulties in relation to both indemnity and costs would be essential for the development of pro bono in Ireland.

### **FLAC and PILA**

The establishment of FLAC by law students in 1969 was a key moment in pro bono legal provision in Ireland. FLAC was set up to provide free legal advice to those who could not afford legal services and to campaign for the establishment of a system of civil legal aid. The organisation still provides ‘basic free legal services to the public’, as well as campaigning on a range of legal and human rights issues.<sup>48</sup>

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*Ireland is ‘one of the few common law countries without a properly organised Pro Bono Scheme’.*

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Early in 2009, FLAC established a new initiative, Public Interest Law Alliance (PILA), ‘to facilitate and promote the use of the law in the public interest’.<sup>49</sup> One of the aims of this project is to establish a register of lawyers available to undertake public interest/pro bono work and develop pro bono initiatives amongst law firms and with practitioners. This new initiative raises the question of the desirability, and feasibility, of the Law Society and Bar Council establishing a pro bono/public interest law officer in their respective associations.

### **Pro Bono and Legal Education**

In other jurisdictions, law schools play a significant role in the provision of legal services for free. This is in part due to the fact that the law schools undertake not only legal education but the training of lawyers in legal skills. However, it may be noted that some pro bono work is organised in UK law schools, which do not have responsibility for legal training.

The fact that it was law students who were responsible for the founding of FLAC should inspire those currently involved in legal education in Ireland to seek new ways of providing pro bono services to meet present needs. In the circumstances of today, there is room for developing forms of clinical legal education in law schools in Ireland, and in the professional training schools at the Law Society and at King’s Inns.



NUIG has already begun to provide placements for some students with statutory and voluntary bodies (such as the Equality Authority, the National Federation of Voluntary Bodies, Rape Crisis Network Ireland) and with practitioners throughout the country.<sup>50</sup> This is a start. Law schools might be encouraged to actively and formally promote pro bono by students and to appoint a pro bono officer to promote this service.

Australia actively encourages the establishment of Pro Bono Student Associations [PBSA]<sup>51</sup> with the provision of relevant material to set up associations in law schools. The primary features of the PBSA programme are:

- The programme matches law students to a need;
- Each student is assigned a project that has achievable goals;
- Each student is supervised by a lawyer;
- Students are introduced to the workings of the legal profession;
- The student must undertake the project without fee;
- The primary focus of the programme is community service.

## Conclusion

This article has sought to highlight the importance and value of the tradition of pro bono legal service and the desirability of looking again at the need and scope for a more organised approach to pro bono work in Ireland.

The current recessionary times may seem, at first sight, to provide an unfavourable backdrop against which to explore how pro bono might be developed in Ireland. Yet, it is precisely such times which draw attention to the need for, and potential value of, structured, well-organised pro bono legal services. On the one hand, a range of problems consequent on the economic crisis will, for some people, mean a need for legal advice and support – but the cost of such services may be well beyond what they can afford. On the other hand, a widespread rise in unemployment will inevitably mean that a significant number of well-qualified lawyers will find themselves without work. Many would welcome the opportunity to utilise and develop their skills in a structured pro

bono system during this temporary interruption in their professional life.

It is interesting to note that the American Bar Association Center for Pro Bono has drawn attention to the fact that both newly-qualified and experienced lawyers may be unable to obtain employment during the current economic crisis, and it has sought to encourage firms and lawyers to consider the possibilities offered by pro bono work in the face of this difficult situation.<sup>52</sup>

This, then, is an opportune time for Ireland's professional legal bodies, and institutions involved in legal education, to seriously examine the possibilities for establishing pro bono service on a more organised basis, which could provide supports and back-up for practitioners and safeguards for clients and lawyers. The findings of the 2001 Task Force Report are a very useful starting point for discussion of how Ireland might move towards a more structured approach to the provision of pro bono services.

We in Ireland also have the advantage of being able to mimic and adapt the various structures and initiatives existing in countries which have an established framework for supporting pro bono work. The task might be summed up as building on our tradition of charity and solidarity, in the context of current circumstances, in order to respond to the never-ending challenge of ensuring access to justice for all.

## Notes

1. Exodus 23:6: 'Do not deny justice to your poor people in their lawsuits'; Leviticus 19:15: 'Do not pervert justice; do not show partiality to the poor or favouritism to the great, but judge your neighbour fairly' (International Bible Society, *Holy Bible, New International Version*, 1984).
2. 'Stand out firmly for justice ...' *Quran*, 4:123; 'Be just, that is next to Piety', *Quran*, 5:8.
3. Shamia Ahmend, 'Charity in Islam', *New Statesman*, 29 April 2009.
4. Micah 6:8.
5. Pro Bono Law Alberta at <http://www.pbla.ca/about/>
6. See 'General Observations' on definitions at International Bar Association website on pro bono at: <http://www.internationalprobono.com/resources/>
7. Pro Bono Law Alberta at <http://www.pbla.ca/about/>
8. Pro Bono Declaration of Americas at <http://www.internationalprobono.com/resources/>. See a commentary on definitions in National Pro Bono Resource Centre, *Mapping Pro Bono Law*, Sydney: National Pro Bono Resource Centre, May 2007. See: <http://www.nationalprobono.org.au>
9. See American Bar Association website at: <http://www.abanet.org/legalservices/probono/>; many State Bars in the US explicitly refer to pro bono activities in their websites.

10. American Bar Association, Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, *ABA Model Rule 6.1: Voluntary Pro Bono Publico Service*, at <http://www.abanet.org/legalservices/probono/rule61.html>
11. Deborah L. Rhode, *Pro Bono in Principle and Practice*, Stanford Law School Research Paper, No. 66, June 2003, see fn. 163 and fn. 164.
12. Jeanne Charn and Richard Zorza, *Civil Legal Assistance for All Americans*, Bellow-Sacks Access to Civil Legal Services Project, 2005, p. 41ff (available at: <http://www.courtinfo.ca.gov>).
13. Deborah L. Rhode, *op.cit.*, pp. 66–7.
14. *Ibid.*
15. See <http://www.law.harvard.edu/academics/clinical/probono/index.html>; <http://www.probonoinst.org/about.php>; Public Interest Resource Center <http://law.fordham.edu/pirc.htm> and Feerick Center for Social Justice <http://law.fordham.edu/ihtml/>; <http://www.bc.edu/schools/law/services/academic/programs/probono/requirements.html>; Access to Justice Institute <http://www.law.seattleu.edu/x1864.xml>
16. Deborah L. Rhode, *op.cit.* p.19, fn. 96.
17. See website <http://www.streetlaw.org/>
18. See David McQuoid Mason in 'Teaching Social Justice to Law Students through Streetlaw', 2002 (published on web [http://snap.archivum.ws/dspace/bitstream/10039/6560/8/David\\_McQuoid+-+Teaching+Social+Justice.pdf](http://snap.archivum.ws/dspace/bitstream/10039/6560/8/David_McQuoid+-+Teaching+Social+Justice.pdf)). See also, 'Teaching Social Justice to Law Students through Community Service: The South African Experience', in F. Iya, N.S.Rembe and J Baloro (eds.), *Transforming South African Universities: Capacity Building for Historically Black Universities*, Pretoria: African Institute of South Africa, 2000.
19. *Streetlaw* Programme Handbook, 2006, p. 5. This is a generic text to be adapted to local situation; see: [www.probonogroup.org.uk/lawworks/law\\_schools/Streetlaw%20Handbook.doc](http://www.probonogroup.org.uk/lawworks/law_schools/Streetlaw%20Handbook.doc)
20. See LawWorks website at <http://www.lawworks.org.uk>
21. See: <http://juniorlawyers.lawsociety.org.uk/pro-bono-2008>
22. *Law Society Gazette* (UK), 13 November 2008.
23. Personal conversation with Law Society of England and Wales.
24. Paul Marsh, 'Pro Bono Week', *Law Society Gazette* (UK), 6 November 2008.
25. For further details, see <http://www.probonolawyer.eu>
26. See CBA website at <http://www.cba.org/CBA/groups/probono/>
27. See websites of following provinces: British Columbia, at <http://www.probononet.bc.ca/> ; Ontario, at <http://www.pblo.org/> ; Saskatchewan, at <http://www.pblsask.ca/>
28. National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, Sydney: National Pro Bono Resource Centre, 2007; see: <http://www.nationalprobono.org.au>
29. *Ibid.*, p. 81.
30. *Ibid.*, p. 102.
31. *Ibid.*, p. 104 ff.
32. At <http://www.pilch.org.au/>
33. Yori Geiron, President of the Israel Bar, 'Pro Bono in Israel', presented at The Madrid Meeting, 'The Legal Profession in a World without Borders', 3–4 October 2008, College of Advocates, Madrid, at [http://www.icam.es/docs/ficheros/200810030007\\_6\\_2.pdf](http://www.icam.es/docs/ficheros/200810030007_6_2.pdf)
34. *Ibid.*
35. *Ibid.*
36. *PILN Bulletin*, 7 May 2009 (Bulletin on Public Interest Law issued by FLAC); see also [http://www.lawphil.net/courts/bm/bm\\_2012\\_2009.html](http://www.lawphil.net/courts/bm/bm_2012_2009.html)
37. American Bar Association, Rule 6.1 at <http://www.abanet.org/legalservices/probono/rule61.html>
38. See website of LawWorks at <http://www.lawworks.org.uk/>
39. See: <http://www.internationalprobono.com/resources/>
40. See website of LawWorks at <http://www.lawworks.org.uk/>
41. 'Pro Bono Declaration for the Americas', <http://www.internationalprobono.com/resources/>
42. Access at <http://www.internationalprobono.com/resources/>
43. *Ibid.*
44. See <http://www.lawlibrary.ie>
45. John Costello, 'Why We Need Solicitors' Pro Bono Scheme', *Law Society Gazette* (IRL), Vol. 92 (7) August/September 1998, pp. 5–6.
46. *Ibid.*
47. *Law Society Pro Bono Task Force Report June 2001*, Dublin: Law Society of Ireland, 2001.
48. See <http://www.flac.ie>
49. See <http://www.flac.ie/publicinterest/>
50. See NUIG Law School website at <http://www.nuigalway.ie/law>
51. National Pro Bono Resource Centre (at: <http://www.nationalprobono.org.au>). Other details considering placements, supervisions and benefits of pro bono within a university setting are found at University of Western Australia, Pro Bono Students Australia [http://uws.clients.squiz.net/law/sol/associated\\_bodies/pro\\_bono\\_students\\_australia](http://uws.clients.squiz.net/law/sol/associated_bodies/pro_bono_students_australia)
52. <http://www.abanet.org/legalservices/probono/home.html> (accessed 4 November 2009).

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# The Challenges Facing the Church in Ireland in the Aftermath of the Ryan Report

Aileen Walsh

## Introduction

The mission of the Church in every age and context is to proclaim the Good News of Jesus Christ. The Church always needs to be prepared to read ‘the signs of the times’ and to enquire how it can renew itself to be faithful to that mission. The Ryan Report published in May 2009, the Ferns Report published in 2005, and undoubtedly the issues which will emerge from the report into sexual abuse in the Archdiocese of Dublin, raise very serious challenges for the whole People of God in Ireland now and in the immediate future.

The challenges relate to the question: How can the Gospel be proclaimed with any integrity, given this very painful and dark history? I see two challenges emerging. Firstly, it is impossible to move forward without embarking on some attempts to heal our past. I believe that we need to create a climate within which we can arrive at some understanding of the factors that contributed to an environment in which such abuse was possible and could go unchallenged.

We need to do this in a way that acknowledges the complexity of the aetiology of the problem and avoids simply ‘scapegoating’ or resorting to what Marie Keenan refers to as the dominant discourses on child sexual abuse.<sup>1</sup> We need to have wide-ranging conversations, and to hear in particular the stories of those who have suffered most, survivors here in Ireland but also those who went abroad. We also need to hear from religious sisters and brothers, the vast majority of whom dedicated their entire lives to a caring role but are now devastated, confused and in despair.

Secondly, as John Waters has pointed out,<sup>2</sup> there is a danger in smugly condemning the past instead of asking questions about the present. While we are aware that the power of the Catholic Church in Ireland during the period covered by the Ryan Report was a major factor in allowing abuse to happen, the question we need to ask is whether the systemic forces in the present organisation of our relationships in the Church exhibit some of these same toxic dynamics. I am not at all convinced that this question is being faced within the Church today.

## Different Generational Responses

Before developing those two points further, I do want to acknowledge the reality that the Ryan Report and the other reports may be received differently by different age groups.

This had not struck me so forcibly until I read a very insightful article by Joe O’Riordan, a twenty-seven year old teacher – an article published in the collection edited by Tony Flannery, *Responding to the Ryan Report*.<sup>3</sup> O’Riordan speaks about feeling detachment from the Report; this, he explains, does not mean he does not care but simply that the events it recounts are beyond the limits of his experience. He goes on to ask the appropriate questions about the factors and circumstances prevailing in Ireland at the time which allowed the abuse to continue without anyone shouting, ‘halt’.

Reflecting on his own experience of the Catholic Church today, O’Riordan describes it as authoritarian, out of touch, talks too much and does too little, does not practice what it preaches and is in danger of becoming irrelevant to the younger generation, particularly in relation to sexuality. However, for me his most telling sentence was when he said that the relationship between the Church and its ‘followers’ needs to become a dialogue of equals.

What is revealed to me here, and in further statements he makes, is the author’s identification of the Church with priests and hierarchy. He does not make reference to the theology of Vatican II and the concept of the Church as the People of God but what he is naming for us is the reality he experiences on the ground today. He obviously sees no evidence of collaborative ministry.

I cannot say how representative this reflection is; however, having family of that age-group myself I find it rings true. So among some in the young adult population it is clear the various reports on abuse are further confirmation that the Church is irrelevant; that it is uncaring, authoritarian, not prepared to listen and, therefore, not worthy of being presumed to provide authentic moral leadership. This is a very difficult atmosphere in which to proclaim the Good News and it is an

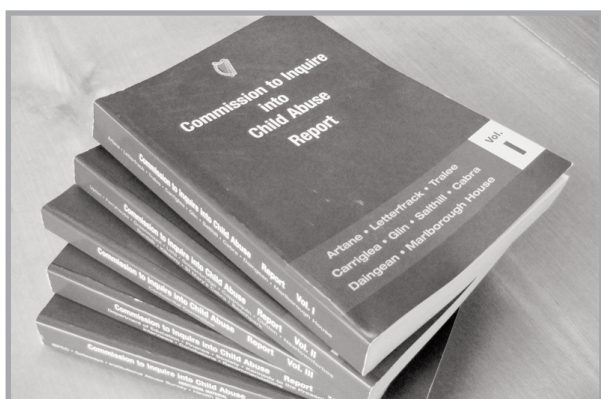


especially serious challenge at a time when there is such great need for our younger people to find tangible and meaningful anchors.

## Understanding the Past

While that is one element of the challenge, I am aware of a much more complex challenge faced by the Church in the aftermath of the reports. What is clear from other articles in the publication, *Responding to the Ryan Report*, is that detachment is not the experience of many. It is in this cohort I place myself.

When I was invited to write an article on this topic I was initially very reluctant. Reflecting on this, I became very aware that I knew I was incapable of detached analysis and I thought that might be a problem. Actually, there can be no other way. I am now convinced that those of us above a certain age who knew at some level of our being what was happening need to have conversations.



*The five volumes of the Ryan Report*

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We need to come to some understanding of the collective, traumatic and very complex history that is ours and is embedded in our psyche. While our faith and hope as Christians encourages us to bring the healing light of Christ to this dark history, we cannot fast-forward the process; we need first of all to respect the integrity of the experiences.

This healing, like the healing of any wound, has to be allowed to take time and has to happen from the inside out. It cannot be choreographed by any promises or guidelines for the future. Peoples' stories need to be listened to. This is certainly not the time for blaming, scapegoating, or simplistic analysis. Marie Keenan, who has considerable experience of working with victims and

perpetrators of sexual crime, argues that if we want to help children and create a safer society for all men, women and children in Ireland today then we need to get beyond a blaming stance and move towards more preventative, as well as rehabilitative and restorative, perspectives.<sup>4</sup> I believe that is true.

From many years experience of working with groups representing different traditions in Northern Ireland I am aware how slow the healing process is. If we are to respond to the challenges thrown up by the various reports, we need to embark on that journey together. One of the challenges facing us is to be truthful about that time in Ireland; otherwise, it is like a dark spectre where various shadowy figures of good and evil, grace and disgrace, intertwine and ultimately paralyse, leaving us unfree to live the fullness of life and to relate to one another in a loving way.

## Control and Deference

Many factors contributed to the catalogue of events outlined in the Ryan and other reports. It is very difficult to explain to people who have not experienced it how powerful and controlling the Catholic Church in Ireland was right throughout this period. The authority of the Church in matters of Church and State was almost total. The majority held the Church in deference. Those who dared to challenge this suffered the consequences.

My sense is that it was only in the general worldwide paradigm shifts starting in the 1960s that our critical faculties woke up and we began asking questions about the Church. Vatican II was itself an expression of that new critical awareness and represented major changes in theological thinking which one could argue still remain aspirational rather than operative.

## Theology

The Church's own poor theology was an important factor in producing psychologically unhealthy human beings during that period. Theology at that time focused on a judgemental God and the redemption of the soul, ignoring the reality of mind, body and heart. Sean Fagan argues that it was the Church's own bad theology which was largely responsible for the abuses that have now come to light.<sup>5</sup> He refers to centuries long negative understanding of sexuality.

From my work as a counsellor and spiritual director, I have no doubt this theology was psychologically damaging to very many human beings and left them extremely vulnerable when

placed in a caring role. The rigid and controlling models of formation characteristic of this period displayed little or no knowledge of healthy psychological development.<sup>6</sup> From our perspective today, this seems amazing, but it is not surprising given that when I studied psychology in the late 1960s psychology as a profession was in the early stages in Ireland. We must also remember that it was not until the mid to late 1970s that child sexual abuse acquired its present terminology and understanding.

### ***Social and Economic Conditions***

The historical period covered by the Ryan Report was one of real poverty in Ireland. There were large families, small incomes and very poor standards of living. That these familial and social conditions resulted in widespread child deprivation is evident in the sheer numbers who ended up in institutions. Institutions were part of our landscape. As others have pointed out, we *did* know of their existence.<sup>7</sup> We also knew the children when they came to our homes for a break in the summer or when we saw them out walking.

Even as ‘knowers’ (although I don’t think any of us could have known the extent of the abuse), a range of factors prevented us acting and that, I believe, is part of the collective guilt we are left with in this contemporary climate of critical awareness. The State appears to have been quite happy at the time to renege on what we today would consider to be its responsibility in the eyes of our Constitution – to care for all its citizens equally.

In truth, a huge part of our history in Ireland is the dedicated work of so many religious women and men in the fields of education, nursing and care and we must give voice to that. My first employment as a psychologist in the early 1970s was in the area of learning disabilities. The facilities in this field in Ireland at the time were extremely poor and children often ended up in Dickensian mental hospitals. I experienced the heroic and pioneering work done by religious orders together with parents’ and friends’ groups in this field.

### ***Hearing the Voices of those Abused***

Against a background of economic and social deprivation, and a culture of deference to authority, it is clear that terrible abuse happened. One could not remain unmoved by the harrowing stories told by those who suffered most in these institutions. We hear these voices in the Ryan

Report. We heard them very movingly in the recent TV3 documentary on the forgotten Irish which told the stories of those who ended up in England and, of course, we have heard them through reports and documentaries over the last number of years.

I found Daire Keogh’s reflection on Peter Tyrell’s memoir particularly harrowing.<sup>8</sup> Through his reflections, I could sense a child’s vulnerability but also the sheer psychological poverty of the institutional climate. The impact of this moving memoir is heightened by the tragedy of Peter’s suicide on Hampstead Heath in 1967. As I write this, I am aware of the voices that will be added to this number when the long-awaited report on the Archdiocese of Dublin is published.

It is right that these voices, silenced for so long, have priority at this time. Long-term, however, justice demands that we must also listen to other voices. Many elderly religious men and women are also really struggling to understand the past. In time, we need to bring compassion and understanding to this broader canvas.

### ***The Church Today***

Can we say that the climate within the Church today is more healthy and that we can preach the Gospel with integrity? I feel we have not begun to tackle the issues that are at the heart of the problem. Many of the same institutional factors which proved to be key in the aetiology of abuse in our Church in the past are still in place.

I would draw particular attention to the issue of power and the way we manage our relationships within the Church. The other related issue is that of sexuality – including the lack of a developed contemporary theology of sexuality informed by both psychology and the word of God, and the question of a continued requirement of compulsory celibacy for clergy.

### ***Sexuality and Human Relationships***

Looking at the issue of compulsory celibacy, my experience working with priests over the years has been that while celibacy is discussed in the seminary and a free and informed commitment is made to it at ordination, nothing prepares priests for the living out of it in day-to-day life. Different men cope with the challenge in different ways, but given the reality that a healthy expression of their sexuality in the context of a committed

relationship is not an acceptable part of clerical life, problems of one sort or another may arise. Only very rarely are there opportunities for honesty and open discussion. This leads to a climate of silence, secrecy, collusion and denial.

Lurking in the background to all of this is the subtle implication that celibacy is the spiritually superior way of life. This climate is not conducive to developing a healthy understanding of sexuality. When I was studying theology I did so alongside clerical students. I am now aware that my presence as a married woman provided a good balance. We had open conversations about the meaning of sexuality and the challenges associated with various ways of responding to that gift in our lives.

I would suggest that this is a healthier model of formation than that provided in an all-male clerical environment. Such honest, open and inclusive conversations are urgently needed in our country at this time, particularly if we are to offer a credible sexual ethic to our younger generation.

While I fully understand the context within which the current policies on child protection have been introduced, I have some reservations about the direction they have taken in practice. Of course, we need to protect our children and vulnerable adults – that is essential. But I believe we do so primarily by providing a context designed to foster healthy human beings who can relate in mature and honest ways rather than introducing requirements governing relationships. Such an approach has the effect of creating more anxiety, artificiality and isolation and is a denial of the fact we are relational beings.

### ***Power Relationships within the Church***

The issue of power and how we manage our relationships as the whole People of God is more difficult to process and articulate but this issue is at the heart of the challenge to the Church as it seeks to emerge from the aftermath of the various reports. We preach the Good News far more effectively by the way we *are* than by what we *say*. The question we need to ask ourselves is: What message is being conveyed by the way we are as Church in Ireland today? I would suggest that the impression of the Church outlined by Joe O’Riordan would not be uncommon.

The theology of Vatican II is particularly rich in relation to the Church. The first chapter of *Lumen Gentium* (Dogmatic Constitution on the Church), puts before us a profound understanding of the

Church as communion.<sup>9</sup> As Leahy points out, communion is the fundamental dimension of Church, which reflects the ‘triune, dialogical, community-mystery of God, the mutually giving, receiving, being-for-one-another God’.<sup>10</sup>

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*We preach the Good News far more effectively by the way we are than by what we say.*

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Of particular note in *Lumen Gentium* is that the chapter on Church as ‘People of God’ appears ahead of that on hierarchy. The significance of this organisation of the chapters was the recovery of the full share in the life and mission of the Church arising out of Baptism. The 1985 Synod of Bishops, held to celebrate and reaffirm Vatican II, outlined the ecclesiology of communion. It concluded that the structures and relations within the Church must express the communion in a new style of collaboration between lay people and clergy so as to enable the carrying out of the Church’s mission.

### **How Much Has Changed?**

I would love to say that we have enthusiastically received the theology of Vatican II and that this is evident in the way we are and in how we relate within the Church.

Much *has* changed for the better since the 1950s and 1960s. There is plenty of evidence that the theology of Vatican II has come alive in pastoral initiatives all over the country. Pastoral councils are an emerging feature of our landscape and there are some communities where a genuinely collaborative style of ministry is happening.

Collaborative ministry is a way of relating and working together in the life of the Church that expresses the communion which the Church is given and to which it is called. The quality of the relationships is as important as the task. Therefore, one would imagine that our relationships in the Church would feel like a dialogue of equals. In practice, I believe, we have a very long way to go. I will mention just a few indications of that.

For the last fourteen years I have had the privilege



of being involved in training people for ministry. There is absolutely no shortage of vocations in Ireland. Each year, many men and women, lay and religious, full of gifts and life experience, respond to their baptismal call and embark on training programmes at some considerable personal cost. They are filled with a generosity of spirit and a burning desire to share in the mission of the Church.

Excited by the possibilities for ministry, they return to their communities. More often than not, however, they are deeply disillusioned when they find their gifts and training are not welcomed. It is hard to pinpoint who or what stands in the way, but caught in a web of systemic institutional forces the energy that is of the Holy Spirit is trapped and dissipates in human frustration.

I experienced a very tangible and painful expression of this disillusionment at a workshop on ministry held in Maynooth in early summer 2007. This gathering was organised at the request of the Bishops' Conference by the Commission for Clergy, Seminaries and Permanent Diaconate and the Commission for Pastoral Renewal and Adult Faith Development. Many people – lay, religious and ordained – who are engaged in ministry in parishes and communities all over Ireland gathered. There were various presentations on ministry and the document, *The Permanent Diaconate: National Directory and Norms for Ireland*, was presented.<sup>11</sup>

In the group work and discussion that followed the overwhelming sense was one of frustration. While people did not object to the permanent diaconate *per se*, they felt it was not the direction to go in Ireland just now. The general feeling was that permanent diaconate was being introduced without any discussion with the whole People of God. This was experienced as a denial of the reality on the ground that so many are willing to take their place in an integrated approach to ministry. This response was politely listened to – but the diaconate has been introduced.

Genuine collaborative ministry is really difficult and I am conscious it is asking of the clerical members of the Church a way of being together in ministry for which they have not been trained. But it is essential this issue be tackled immediately.

## Conclusion

The truth revealed by all the reports on abuse in

the Catholic Church is that we have failed miserably in our relationships and as a consequence there has been enormous suffering and damage. Together, we need to use our gifts and expertise to bring healing and reconciliation in relation to our past in whatever way we can.

But I believe the real challenge emerging from the various reports is about the present. As I have argued throughout this reflection, the use of power and the style of relationships within the Church in Ireland were major factors in allowing abuse to happen and go unchallenged. These reports must be a catalyst for us to come together to commit ourselves as the whole People of God to be a true sign of God's life and an instrument at the service of that relational reality. It is only then we can begin to preach the Good News with integrity.

## Notes

1. Marie Keenan, "Them and Us": The Clergy Child Sexual Offender as 'Other', in Tony Flannery (ed.), *Responding to The Ryan Report*, Dublin: Columba Press, 2009.
2. John Waters, 'In Denial Then, In Denial Now', *The Tablet*, 30 May 2009.
3. Joe O'Riordan, 'A Young Person Reflects on the Ryan Report', in Tony Flannery (ed.), *op. cit.*
4. Marie Keenan, *op. cit.*, p. 220.
5. Sean Fagan, 'The Abuse and Our Bad Theology', in Tony Flannery (ed.), *op. cit.*, pp. 14–24.
6. Margaret Lee, 'Searching for Reasons: A Former Sister of Mercy Looks Back', in Tony Flannery (ed.), *op. cit.*, pp. 44–54.
7. John Waters, *op. cit.*; Mary Condren, 'Clerics Dodge Responsibility to Claim Moral High Ground', *The Irish Times*, 12 June 2009.
8. Daire Keogh, 'Peter Tyrell, Letterfrack and the Ryan Report', in Tony Flannery (ed.), *op. cit.*, pp. 56–81.
9. *Lumen Gentium, Dogmatic Constitution on the Church*, Promulgated by Pope Paul VI, 21 November 1964, in Walter M. Abbott SJ (ed.), *The Documents of Vatican II*, London: Geoffrey Chapman, 1966.
10. Brendan Leahy, 'People, Synod and Upper Room: Vatican II's Ecclesiology of Communion', p. 49 in Dermot Lane and Brendan Leahy (eds.), *Vatican II: Facing the 21st Century – Historical and Theological Perspectives*, Dublin: Veritas, 2006.
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# ‘Up Stairs, Down Stairs’ Whose Interests are Being Protected?

*Peter McVerry SJ*

## **The Parable**

John and Jane are tenants in the same house. John lives in a flat on the top floor. At 8 o’clock in the morning he pulls the curtains; the sun shines in. He looks out the window at the mountains in the distance rolling down to the sea. The mountains are beautiful; sometimes in winter they are covered in snow; mostly, though, they are a luscious mixture of greens and browns. He sees the ships coming in and out of the harbour and the yachts on the sea. The sun shows the scene in all its beauty. He says: ‘It is a beautiful day. It is great to be alive’.

Jane lives in the basement flat of the same house. At 8 o’clock in the morning she pulls the curtains; nothing happens. The sun cannot get in. She looks out the window but she cannot see the mountains, or the sea or the yachts or the sun. All she sees is a stone wall, yards from the window. She hardly knows what sort of day it is.

Here you have two people, looking out of the same house, at the same time of day. But they have two totally different views. There is a view from the top and a view from the bottom. Both views are equally valid – although one is admittedly much nicer than the other!

## **The Reality**

### ***The View from the Top***

Conor has a very good job in a large company. He has a substantial salary, generous pension entitlements, and though in recent times there are fewer bonuses than there used to be and the share options are not as attractive, his financial position is still secure. He works very hard, often having to travel abroad to attend meetings, and frequently working at home till late in the evening. He lives in a fine house in a very fashionable neighbourhood. His children went to the same fee-paying school as he did and have secured places in the college courses they wanted. His family are, of course, enrolled in private health insurance. Conor takes his family on holiday twice a year.

Conor’s view is the view from the top. For him,

Ireland has been a good place in which to live:

- The educational system was very good to him; it gave him an excellent education, allowing him to compete with the best of his international competitors, and it is now doing the same for his children.
- The housing opportunities open to him were excellent; he now has a lovely house in a lovely area and when his children are grown-up and have moved out, he can sell the house and buy a nice little bungalow for himself and the wife in another nice area.
- The job market has always offered him good opportunities; with his excellent qualifications, he had a choice of several jobs when he started work and since then there have been many options for moving upwards in his career. At some point in the future, when the economy picks up again, he will probably seek a new challenge and, given his qualifications and experience, he doesn’t expect much difficulty in finding a suitably rewarding and satisfying position in another company.
- The health service is excellent. He and his family have never experienced anything but ready access to the family GP and to specialists, and when they have needed in-patient hospital treatment there has never been any significant delay.

All Conor’s neighbours and friends also have the view from the top. Those whom he invites for dinner, whose weddings he attends, whom he plays golf with, all share the same view. Their conversations about what is happening in the world, and all the decisions they make, which affect not only themselves but also many others, reflect this view from the top.

### ***The View from the Bottom***

Jim is unemployed. He had held an unskilled manual job, but with the growth of technology, and changes in the labour market, he was no longer needed. He was too old to retrain and now there are few manual jobs left for which he could

apply. He lives in a flat in a local authority complex. His flat is beautiful, but the common stairwells and balconies are covered in graffiti and smell of urine. His neighbours are alcoholics and frequently have fierce drunken rows in the middle of the night which keep them all awake. Drug dealing goes on all day and most of the night and he can see it all happening from his window. He is scared that his children will end up taking drugs.

He would love to leave this area but he doesn't have enough points in the housing waiting list system to get a house of his own. His children left school when they were fifteen. They wanted the money they could make in the local supermarket, since their father was unable to give them much from his dole money. He couldn't persuade them to stay on in school. They told him that they would never get employment with good prospects as long as they were living in this estate so they might as well take whatever job they could get.

Jim has the view from the bottom:

- The educational system taught him to read and write, but otherwise it was of little benefit to him. Few children in his neighbourhood completed second-level education and nobody he knew ever went to college.
- The housing system is awful. He is stuck in a flat he doesn't want to live in but there is a dire shortage of local authority accommodation and long waiting lists.
- The job market for someone like him holds out few, if any, prospects; he hasn't worked for ten years and he has given up hope that he will one day work again. His children are stuck in dead-end jobs that will not last.
- The health service is at best patchy. He has access to GP services but if he or any of his family need to see a consultant they will wait a long time for an appointment and wait still more if a non-emergency admission to hospital is needed. Meanwhile, they worry that their symptoms may mean they have a serious illness, one which is getting progressively worse as they wait.

All Jim's friends have the view from the bottom. Those whose homes he visits, whose weddings he attends, whom he watches football with, all share the same view. Their conversations about what is happening in the world all reflect this view from the bottom. Jim is not in a position to make

decisions that affect anyone outside his family.

Both Conor and Jim live in the same country, have gone through the same educational system, have sought employment in the same labour market. But they have two totally different views of Irish society; there is a view from the top and a view from the bottom.

All the decisions in our society are made by those with the view from the top – and they have no understanding of the views or experiences of those at the bottom. They *feel* they know the views and experiences of those at the bottom: they have read reports, have visited the places in which people at the bottom have to live, have a concept of what their experience is. But they have no understanding of that experience. These are two different worlds, side by side, but light years apart.

## **Commission on Taxation and An Bord Snip**

### ***Commission on Taxation***

The Commission on Taxation was established in February 2008 and issued its report in early September 2009.<sup>1</sup>

The members of the Commission on Taxation were:

Frank Daly  
Former Chairman of the Revenue Commissioners  
Chairman

Tom Arnold  
CEO, Concern

Julie Burke  
Solicitor, JMB Tax Solicitors

Micheál Collins  
Department of Economics  
Trinity College Dublin

Frank Convery  
Heritage Trust Professor of Environmental Policy  
University College Dublin

Tom Donohue  
Partner, Russell Brennan Keane  
Chartered Accountants

Eoin Fahy  
Chief Economist  
KBC Asset Management

Brendan Hayes  
Vice President, SIPTU

Colin Hunt  
Managing Director  
Macquarie Capital Group

Sinead Leech  
Director, Integral Finance and Technology Ltd

Con Lucey  
Former Chief Economist  
The Irish Farmers' Association

Danny McCoy  
Director General, IBEC

Feargal O'Rourke  
Partner, PricewaterhouseCoopers

Mary O'Sullivan  
Chartered Accountant (formerly Irish Banking  
Federation)

Mark Redmond  
CEO, Irish Taxation Institute

Willie Soffe  
Chairman, Dublin Transportation Office

Mary Walsh  
Chartered Accountant

Deirdre Somers  
CEO, Irish Stock Exchange (resigned September  
2008)

### **An Bord Snip**

The Special Group on Public Service Numbers and Expenditure Programmes (often irreverently called An Bord Snip Nua) was established in late 2008. Its report, which is generally referred to as The McCarthy Report, was issued in mid-July 2009.<sup>2</sup>

Its members were:

Colm McCarthy  
School of Economics  
University College Dublin  
Chairman

Donal McNally  
Second Secretary General,  
Department of Finance

Pat McLoughlin  
Chief Executive,  
Irish Payment Services Organisation and former

Deputy Chief Executive of the Health Service  
Executive

Maurice O'Connell  
Former Governor of the Central Bank of Ireland  
and former senior official in the Department of  
Finance

William Slattery  
Executive Vice-President  
Head of European Offshore Domiciles  
State Street Corporation

Mary Walsh  
Member of the Commission on Taxation and  
former Partner, PricewaterhouseCoopers

The sort of society we build depends on the decisions that *some* people make. Those who make the decisions are almost always upper or middle-class, comfortably off and well-educated. They understand the culture from which they have come, or at least of which they are now a part – the view from the top. Decision-makers have, inevitably, a stronger affinity with some groups than with others, and so the concerns of those groups will be much more easily felt and understood than the concerns of others. They are largely unaware of the problems, feelings and struggles of those at the bottom of society. Hence, the views of those at the bottom ought to be represented at the tables where decisions are made – decisions that will affect them. The onus is on decision-makers to reach out, to understand, to befriend, to listen to the views, feelings and concerns of those who are at the bottom.

It is significant that the only representative of workers on the Commission of Taxation, Brendan Hayes of SIPTU, refused to sign off on the report. In a letter to the Chairman of the Commission, Hayes expressed a profound disagreement with the premise on which the Commission had been asked to approach its work – that Ireland should remain a low-tax economy. He said that the application of this policy 'is fundamentally flawed and is inhibiting economic growth, exacerbating social and economic inequality, and inequitably distributing the tax burden'.<sup>3</sup>

### **Difficult Times, Difficult Decisions**

2009 has been a difficult year for many people. 2010 promises to be even more difficult. A deficit of over €20 billion in the public finances is, to say the least, challenging!



As the Government tries to find ways of reducing the deficit, there has been little discussion of the values that should underpin the difficult decisions to be made. Indeed, the very suggestion that values should have anything to do with cutting expenditure seems foreign to many who will make the decisions.

What are the parameters that ought to influence the decisions to be made? The most important, the one which should be widely accepted, and the one which should be non-negotiable, is that the poorest and most vulnerable in our society should be insulated from any cuts that need to be imposed. During the Celtic Tiger years, the poorest and most vulnerable got the crumbs that fell from this rich nation's table. Some of the decisions already taken, and some of the proposals now being considered, will mean the whole loaf of bread being confiscated from some people.

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*There has been little discussion of the values that should underpin the difficult decisions to be made.*

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The poorest in our society are not just another interest group, alongside many other interest groups such as employers, farmers, third-level students, trade unions. They are *the* interest group of all interest groups. While other interest groups lobby to minimise the effects on their members of decisions being proposed, this sector of our population should be immunised, on ethical and moral grounds, against any further hardship.

### **Cutbacks Implemented**

Some of the cutbacks already implemented are:

- The drastic curtailment of the school book grant: this has meant that the scheme is now available only to children attending schools in the Delivering Equality of Opportunity in Schools (DEIS) programme, even though most children from low-income families are in schools outside this programme. This change has pushed many families into the hands of money lenders;
- Reduction in Rent Supplement for those on social welfare who are living in private rented accommodation: the changes over the past

year have significantly increased the sum which tenants must allocate to rent from their basic social welfare payment – for all such tenants, this amounts to at least €11 *extra* per week, but for many it means as much as €20 extra (this from a weekly basic social welfare payment of around €204).

- Abolition of the Christmas bonus for social welfare payments: this change will make Christmas a misery for many families as they face having to meet all their Christmas needs from their regular – inadequate – income.

### **Cutbacks Proposed**

Among the cutbacks suggested by the McCarthy Report are:

- Further re-examination of the level of Rent Supplement payments and a limit on the time a person may receive this allowance: if implemented, this will result in some people becoming unable to pay their rent and ending up homeless;
- Reduction in social welfare payments of 5 per cent;
- Reduction in Child Benefit payments of 20 per cent;
- Restriction of Medical Card entitlement by lowering the income threshold for eligibility;
- Imposition of a charge of €5 when a Medical Card prescription is being filled in the pharmacy;
- Restrictions on eligibility for Exceptional Needs payments<sup>4</sup> under the Supplementary Welfare Allowance scheme.

Aside from the direct assault on the income of those who are poorest and the increased expenditures imposed on them which these proposals represent, many of the suggested cuts in funding for services would disproportionately affect people in this group. Among the cutbacks proposed by McCarthy are:

- Reduction in funding for Drug Task Force projects;
- Abolition of the Family Support Agency and most of its programmes;
- Reduction in capitation support for all primary and post-primary schools, which will

affect most heavily schools in disadvantaged areas;

- Reduction in funding for community and voluntary sector projects, which will have greatest impact on those living in disadvantaged communities;
- Reduction in funding for community services programmes, again disproportionately affecting disadvantaged communities;
- Discontinuation of the RAPID Scheme, which operates in the most disadvantaged communities;
- Reduction of 2,000 in the number of Special Needs Assistants in schools;
- Slowdown in the planned recruitment of additional psychologists in schools.

### ***The Cumulative Impact***

While any one of these reductions or cutbacks might be manageable, with difficulty, for those whom it will affect, the really serious issue is the cumulative impact of the cuts – the reality that it is the same individuals and families, people already in a precarious financial and social situation, who will experience multiple cutbacks across a range of income supports and social services.

For example, a single parent living in private rented accommodation may find their welfare payments reduced by 5 per cent; Child Benefit reduced by 20 per cent; some Exceptional Needs payments ended and their Christmas bonus abolished. At the same time, the demands on their income are increasing: they may be already paying an extra €20 towards their rent; paying for school books that were previously subsidised, and they may be faced with new charges, such as the €5 for a Medical Card prescription.

As well as all that, cutbacks in funding for community services which this family might use and find support from will add to their problems. Children will grow up in homes where money is desperately short, attend schools with significantly reduced resources, and go without the kind of supports they and their parents need.

### ***Closing-off Routes out of Poverty***

The absence of any recognition of this cumulative impact is disturbing. The fundamental option that appears to have been taken will bring severe hardship to many, resulting in some cases in

family stresses or break-up, health deterioration and homelessness. While savings will be made in the short term, the financial costs to our society in terms of additional demands on housing, health, justice and social welfare systems will, in the medium and long-term, far outweigh the savings.

Many of the cutbacks in education will in practice target marginalised groups of children and young adults. Despite repeated promises to reduce class sizes (already amongst the largest in the EU), class sizes have increased and this will disproportionately affect academically weaker children; special teacher posts which provide support for disadvantaged pupils have been abolished in many schools; capitation funding for Traveller children in many schools has been withdrawn; language support teachers for many schools with a large immigrant enrolment have been drastically reduced; the implementation of the Education for People with Special Educational Needs Act, which gives a statutory right to a suitable education for young people with special needs, has been put on hold; 100 places have been cut in Senior Traveller Training Centres – the list goes on.

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*The really serious issue is the cumulative impact of the cuts – the reality that it is the same individuals and families who will experience multiple cutbacks.*

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Cuts have also occurred in the Back to Education Initiative, which helps those who left school early to return to education; in Adult and Further Education programmes which particularly benefit those with little formal education; in grants for Transition Year and Leaving Certificate Applied programmes which can benefit less academic students. Such cutbacks in supports within the education system, which so disproportionately affect poorer children and young people, will lessen and even close off the possibility that education can be a route out of poverty.

### ***New Impoverishment***

Many people who were living reasonably comfortable lives are having those lives turned upside down by unemployment. Some will never

before have experienced life without work and the impact of what will possibly be long-term unemployment on their self-esteem and quality of life will be devastating. Unacceptably long delays in getting Jobseekers' Benefit from the Department of Social, Community and Family Affairs have already added to their distress. The reduction, announced in the Budget of October 2008, of the duration of Jobseekers' Benefit from fifteen to twelve months means that many are already facing the expiration of this payment and the reality of what means-testing means in practice, as they go through the process of applying for Jobseekers' Allowance.

Some families will lose their homes. Unable to pay the more than €1,000 per month required to meet mortgage repayments, they will experience their home being repossessed by a bank that was bailed out by billions of taxpayers' money, to which the family contributed while working. They will then have to seek accommodation in the private rented sector, where the rent, which is likely to be in excess of €1,000 per month, will have to be subsidised by Rent Allowance.

Most of the focus of political concern for several months has been on the banks and NAMA, with little discussion of the consequences for individuals and society of rising unemployment. There is no sense of urgency about trying to tackle the problem of unemployment which has grown so alarmingly that the rate is now twice what it was a year ago and is back to a level we last experienced in 1996. The Government continues to tell us that it is imperative that we restore the banks to credit, and €54 billion had to be found to do so, but no such imperative to tackle unemployment exists. (Admittedly, a €100 million fund was set up to protect jobs!)

### **No Hardships for Some**

While many have seen the collapse of their incomes and prospects, some of those who were responsible for the mess we are in have sailed off into the sunset with golden handshakes and fat pensions. There was some public outrage at the time, but no decisions were taken to ensure that the taxpayer would recover this money. (In the US, when bankers refused to return their bonuses, after their banks had been bailed out by the taxpayer, President Obama brought in a bill, within days, specifically taxing those bonuses at 80 per cent.) Others who have made their money

during the good times can now afford to pay lawyers to ensure that it is safeguarded from future decisions that might be made by the Government or courts.

Some who became very wealthy during the Celtic Tiger years may now be experiencing a drop in their income, and have seen a fall in the value of their shares and other assets. Essentially, though, the recession will not substantially affect their lifestyles.

Many continue to earn salaries that are astronomical, compared to the single parent above. Chief Executives at the banks have had their salaries capped at €500,000, still earning *in one week* almost as much as a single parent dependent on social welfare receives in a full year. There will be no hardship there during the recession.



*One of many protests against cuts*

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Only 50 per cent of judges have signed up for the voluntary scheme – introduced after it emerged that judges would be exempt from the public service pension levy announced in the October 2008 Budget – whereby they can give up a portion of their salary; none of university heads, all of whom are on salaries of over €200,000, has so far agreed to a reduction in salary.

In the area of public sector pay generally, proposals now being mooted to reduce the salaries of the top earners by 8 to 15 per cent represent a minimalist approach in the context of the current state of the public finances – reductions on this scale in relation to salaries of €150,000 or more are derisory.

The cutbacks that will affect so disproportionately the people who are poorest are being proposed by politicians who remain amongst the best-paid in the world and who enjoy lavish expense accounts.



Some of the proposals in the McCarthy report would make savings estimated at €100,000. We could add another proposal: reduce the Taoiseach's salary by €100,000 – he would still, at €157,000, be paid the same as the Swedish Prime Minister (€158,000), but a little less than the German Chancellor (€190,000) or the British Prime Minister (€221,000). TDs receive a salary of €2,000 per week, plus expenses, mostly unvouched, of €1,000 per week – amounting to a total that is the same as a single parent reliant on social welfare has to live on for three months.

There was an outcry from some TDs when it was announced in the April 2009 Supplementary Budget that their expenses would be reduced by 10 per cent! Some were outraged at the suggestion that they should have to provide receipts in order to recoup expenses, as everyone else in work must do. Most TDs who also receive pensions for previous Ministerial positions refused to give them up. There was resistance also to the suggestion that the number of Oireachtas committees should be reduced and the extra payments (on top of their salaries and expenses) for committee chairpersons, vice-chairpersons, whips and convenors should be reduced or abolished.

Indeed, the McCarthy Group made no recommendations on the pay and conditions of Oireachtas members, stating that 'pay and pension levels of Members of the Oireachtas are beyond its core remit'.<sup>5</sup> The McCarthy report did suggest a possible reduction in the number of TDs and/or the abolition of the Senate, but these are proposals that will only be implemented well into the future, if at all. As long as those who are demanding that the poorest should 'share the pain' display such reluctance to themselves take any pain, it is a demand that will rightly be resisted.

## The Role of Taxation

The Government has made it clear that it sees the solution to the problems of our public finances in the cutting of expenditure. The possibility that increased taxation should have a role to play seems to be off-limits in the debate. The approach proposed is endorsed publicly by many influential voices – and has, no doubt, been advocated in quiet lobbying by powerful sectors intent on ensuring that different means of addressing the problem, which might affect their interests, are not pursued.

The fundamental approach to taxation of this Government and its predecessors over the boom years was reflected in the terms of reference given to Commission on Taxation. These required that the Commission should 'have regard to' the commitment of the *Programme for Government* of June 2007 'to keep the overall tax burden low'.<sup>6</sup> In the face of the drastic deterioration in the state of the public finances throughout 2008 and 2009, the Government did not see it necessary to go back to the Commission to ask it to consider the scope for increasing the tax take – even though it was starkly evident that the alternative was severe cuts in public services.

The Commission recommended that an annual property tax should be introduced (a recommendation made also by the OECD in its latest report on Ireland<sup>7</sup>). The Commission's proposal was the focus of considerable public attention in the immediate aftermath of the publication of its Report. However, the political reluctance to implement such a tax was soon evident and the proposal was quickly sidelined.

In examining the question of whether a wealth tax should be introduced, the Commission set out a series of reasons why the collection of such a tax would be difficult. However, it did not explore ways of overcoming these problems. It pointed out that the wealth tax that existed between 1975 and 1977 had yielded 'only' £16 million.<sup>8</sup> Strangely, it did not give a calculation of what that might amount to in today's money.

Even more interesting, the Commission made no reference to the evidence of the vast increase in wealth-holding that occurred in Ireland over the years of the Celtic Tiger. The 2006 report, *The Wealth of the Nation*, which referred to 2005 figures, suggested that net wealth had grown 350 per cent in ten years.<sup>9</sup> An update, published in 2007, giving figures for 2006 showed that over this one year net wealth had grown by €126 billion, giving a total net wealth of €804 billion.<sup>10</sup>

The report also showed that the asset base, *excluding residential property*, of the top 1 per cent of the population had grown from under €25 billion in 1995 to €100 billion in 2006, an annual average growth rate of 13.7 per cent.

Some might point out that some of the wealth that existed in 2006 has now disappeared, given the drop in property prices, but even with that Ireland remains vastly more wealthy than it was just over a decade ago.



(*The Wealth of the Nation Report* also showed the enormous inequality in the distribution of wealth in Ireland: in 2006, the top one per cent of the population held 20 per cent of the wealth; the top two per cent held 30 per cent and the top five per cent held 40 per cent. However, if wealth in the form of residential property were excluded, the top one per cent held a staggering 34 per cent of wealth.)

The Commission on Taxation's examination of the vast array of tax expenditures (i.e., provisions to reduce tax liability) identified more than 100 such measures. It noted the lack of transparency in relation to them, finding 'many instances where basic cost and benefit data were not available for tax expenditures'.<sup>11</sup> Its detailed analysis showed that a great number of the existing measures exemplified the acknowledged tendency of tax expenditures to redistribute resources upwards to the better-off. The Commission recommended the discontinuation of some tax expenditures and the modification of others but these proposals have so far received little or no attention, even though such action would help rectify problems in the public finances.

## Conclusion

There is more than sufficient wealth in our society to solve the mess that we are in. Justice and fairness would demand that those who benefited so enormously from the Celtic Tiger years should, now that the good times have ended, dig deep into the pockets that those good times have lined.

However, the reality appears to be that the wealth, which is highly concentrated in the hands of a small sector of the population, is going to remain largely untouched. The argument is repeatedly made that increases in taxation on the wealthiest would raise only small sums, amounting to a fraction of what it needed – yet there is no hesitation in considering cuts in expenditure that may be only a small proportion of a government agency's overall budget but will have a devastating impact on those affected.

There is, then, a clear lack of political will to pursue those who could afford to make a major contribution to our revenue deficit. They are often friends and associates of those who make the political decisions in our society. Pursuing them may lead to questions being asked about the contribution being made by these decision-makers themselves.

Social solidarity is a term we hear a great deal about these days. Funny how we never heard it used during the years of the Celtic Tiger! Social solidarity is being used to suggest that it is reasonable that everyone should share the pain. But the meaning of social solidarity is *not* that everyone should share the pain – it is, rather, that those who can afford to make sacrifices should do so in order to protect those who cannot. Social solidarity was, in fact, almost destroyed by the Celtic Tiger; it is maybe too much to expect that it can now be resurrected.

## Notes

1. Commission on Taxation, *Report 2009*, Dublin: Stationery Office, 2009.
2. *Report of the Special Group on Public Service Numbers and Expenditure Programmes*, Volume 1, Dublin: Stationery Office, 2009.
3. Commission on Taxation, *op. cit.*, p. 474.
4. These are additional payments made under the Supplementary Welfare Allowance Scheme to meet essential or urgent expenditures which cannot be met from a person's usual income.
5. *Report of the Special Group on Public Service Numbers and Expenditure Programmes*, *op. cit.*, p. 60.
6. Commission on Taxation, *op. cit.*, p. 36.
7. OECD, *OECD Economic Surveys: Ireland*, Paris: OECD, 2009.
8. Commission on Taxation, *op. cit.*, p. 130.
9. Bank of Ireland Private Banking Limited, *The Wealth of the Nation*, Dublin, 2006.
10. Bank of Ireland Private Banking Limited, *The Wealth of the Nation: 2007 Update*, Dublin, 2007.
11. Commission on Taxation, *op. cit.*, p. 240.

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