AN BORD UM CHÚNAMH DLÍTHIÚIL

LEGAL AID BOARD

Submission to the Review of the Administration of Civil Justice
16th February 2018

1. Background

1.1. The Legal Aid Board is a statutory body established under the Civil Legal Aid Act 1995, responsible for the provision of legal aid and advice to persons of insufficient means in civil cases and for family mediation services. The Board consists of a chairperson and twelve ordinary members appointed by the Minister for Justice and Equality. The Board employs approximately 480 staff in thirty law centres, two specialist offices and seventeen mediation offices throughout the country, as well as its Head Office in Cahirciveen, County Kerry and its Dublin support offices at Smithfield and Montague Street.

1.2. The Board is a significant provider of civil legal services in the jurisdiction. In 2017 the Board received over 17,000 applications for civil legal aid and advice and provided services through its law centres in a similar number of cases. Private solicitors provided services in over 6,000 further cases. Mediation was provided to approximately 2,800 couples.

1.3. At the same time, it should be noted that the Board's business is primarily focussed on the family law sphere. Approximately 80% of applications received by the Board related to either family law or child care matters. The Board only provides mediation in family disputes. The Board notes at the outset that the family justice area is excluded from the Review's terms of reference.

1.4. Nonetheless the Board does provide legal aid in a significant number of civil (non-family) cases. It received almost 1,500 applications for legal aid in civil (non-family) law cases, most of which related to torts matters. It provided services in approximately 2,900 non-family civil cases during 2016 (this figure includes matters which commenced prior to 2016 and continued into that year). The Board therefore welcomes the opportunity to input into the Review of the Administration of Civil Justice.

1.5. This submission proposes to address each of the Review's Terms of Reference in turn, ie:

a) Improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure;
b) reviewing the law of discovery;
c) Encouraging alternative methods of dispute resolution;
d) reviewing the use of electronic methods of communications including e-litigation and possibilities for making court documents (including submissions and pleadings) available or accessible on the internet;
e) Achieving more effective outcomes for court users, particularly vulnerable court users.

2. Improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure

2.1. The Board's remit can be summed up in the words "access to justice". Although the Board provides access to justice through the provision of a solicitor or barrister, it is important to note that a significant amount of lay litigants access the justice system daily.

2.2. The rules of court may be seen as relatively archaic. As noted in the terms of reference the administration of civil justice in Ireland is broadly derived from 19th Century legislation (in particular the Supreme Court of Judicature Act (Ireland) 1877) which has been added to or adjusted in a largely piecemeal way over the years. The Board notes that the current rules of court for the superior courts, the Rules of the Superior Courts 1986 (the "RSC"), are ultimately linear descendants of the Rules of the Supreme Court (Ireland) 1908. Likewise the Circuit Court Rules 2001 (the "CCR") replaced previous broadly similar rules. The District Court Rules (the "DCR"), on the other hand, underwent a significant degree of modernisation in 2014.

2.3. As noted there are three different sets of rules for each of three different jurisdictions. In the High Court, it is noted that proceedings are generally issued by way of an originating summons out of the Central Office and then serving a Statement of Claim on the Defendant. The Summons commences the proceedings and compels the Defendant to answer, while the Statement of Claim sets out the nature and particulars of the plaintiff's claim. In the Circuit Court, however, there is a combined summons and claim, the Civil Bill. As mentioned the District Court rules underwent significant change in 2014. Prior to 2014 there were no pleadings other than the issuing of a Civil Summons. Since 2014 a claimant issues a Claim Notice. This is but one example of the differing procedures in the different courts. Another example is that proceedings may be served by registered post in the Circuit Court but not

in the High Court.

2.4. It should also be noted that since the Civil Liability and Courts Act 2004 was commenced, there is a distinct mode of proceeding in personal injuries proceedings (which must first be authorised by the Personal Injuries Assessment Board in any case). There is a Personal Injuries Summons used in all of the civil courts which, like the Civil Bill and Claim Notice combines both the summons and the claim. Even here there are differences in the detail of what should be contained in the summons between the three jurisdictions.

2.5. In England and Wales, civil procedure underwent a significant reform in 1999 when the Rules of the Supreme Court 1965[1] and County Court Rules 1981 were replaced by a single set of Civil Procedure Rules 1998 covering both High Court and County Court jurisdictions. That being said, the other UK jurisdictions have not followed England and Wales' example in creating a combined set of rules. The recent Northern Ireland Civil Justice Review appeared to reject combining the Rules of the Court of Judicature (NI) 1980 and the County Court Rules (NI) 1981 based on the length of time and complexity that would be involved[2]. Another bearing may have been that Northern Ireland does not have pleadings in the county court (other than the issuing of a Civil Bill), only in the High Court, and did not want to go down the road of introducing pleadings.

2.6. Notwithstanding the above it is unclear as to why there needs to be three sets of different rules for different jurisdictions, particularly as pleadings have effectively been introduced into the District Court since the 2014 rules, where they were formerly not a feature. A single set of civil procedure rules would simplify access to justice for unrepresented litigants. The rewriting of the rules to modernise procedure would likely require new rules in any event, so that the opportunity could be taken to introduce a standard set of rules for the three jurisdictions.

2.7. In recent years the public service has increasingly committed to the use of plain language. It was a feature of the previous Public Service Reform Plan (2014-2016) and on foot of that plan a Plain English Style Guide for the Public Service was published. The Government's most recent public service reform plan, *Our Public Service 2020,* contains the following statement:

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[1] Note: the "Supreme Court" referred to in the title of the Rules is not the current Supreme Court of the United Kingdom, but the former "Supreme Court of Judicature in England and Wales", i.e. the Court of Appeal and the High Court. For similar reasons the Rules of the Supreme Court (Northern Ireland) 1980 are now referred to as the Rules of the Court of Judicature.

[2] Review Group of Civil and Family Justice in Northern Ireland (2017) *Review of Civil Justice in Northern Ireland.* Belfast: Office of the Lord Chief Justice of Northern Ireland, at pp61-62

"All public services should be easily accessible by all members of the public, including those with diverse needs regardless of language, culture, literacy or ability and also migrants and people in vulnerable situations"

It also commits to:

"use plain language as set out in Plain English Style Guide for the Public Service prepared by the RDO in the Department of Public Expenditure and Reform to improve customer experience and reduce the need for repeated contact."

2.8. As a a public service, the Courts should embrace the move towards plain English. Legal terminology can be intimidating to those who are not legally qualified. For example it would be unclear to a lay person what a "civil bill" (the initiating document in the Circuit Court, which combines a summons and a statement of the plaintiff's claim) is. Likewise terminology such as "appearance", "judgement in default", "affidavits", "plaintiff" etc are unlikely to be easily understood. In the District Court the terms "Plaintiff" and "Defendant" have now been replaced by "Claimant" and "Respondent". It may be worthwhile reviewing legal terminology in general to make it more accessible. The Civil Procedure Rules 1998 in England and Wales introduced a general change in terminology in that jurisdiction (though as noted, Northern Ireland has not yet followed suit and retains similar terminology to this jurisdiction, while Scots law has its own separate terminology).

2.9. Aspects of terminology might be particularly regarded as unfriendly and archaic. For example there is the phrase "under a disability" referring to children and persons of unsound mind (itself a problematic phrase). It should be considered whether certain phraseology should be eliminated.

Recommendations:

a. Consider introducing a simplified, standard set of civil procedure rules covering the High Court, Circuit Court, and District Court
b. Consider introducing more lay-friendly terminology, for example, replacing "Plaintiff" with "Claimant".

3. Reviewing the law of discovery

3.1. Discovery, now renamed "disclosure" in England and Wales and some other jurisdictions, is that process by which a litigant obtains prior to trial a list of documents in the possession or control of the other party to the case. It can be one of the most time consuming parts of litigation. Although discovery

strictly speaking only entitles the party seeking discovery to an "affidavit of discovery" which lists in its schedule the documents, it is inevitably followed by either voluntary inspection or an application for inspection of the documents being "discovered" or disclosed.

3.2. Discovery in the High Court is governed by Order 31 Rule 12 RSC. This provides that an application to the Court for discovery, which must be preceded by a letter to the other party seeking voluntary discovery, is made by way of notice of motion which specifies the precise category of documents in respect of which discovery is sought. It must be grounded upon an affidavit of the applicant averring that the discovery sought is necessary for disposing fairly of the matter or for saving costs and the reasons why each category of documents is required to be discovered. In addition there is extensive case law which requires the documents being discovered to be relevant to the matter in issue (see in particular the judgement of Lord Justice Brett in *Compaigne Financiere du Pacifique v. Peruvian Guana Company* (1882) 11 QBD 55).

3.3. Broadly similar principles govern discovery in the Circuit Court (Order 32 Rule 1 CCR) save that general discovery may still be sought. In the District Court Order 45B DCR governs discovery. The District Court Rules are notable in that (since 2014) there are provisions effectively allowing the Respondent to seek disclosure of all documents listed in the Claimant's Claim Notice and likewise for the Claimant to seek disclosure of documents listed in the Respondent's Appearance and Defence. Failure to comply with this process may lead to the party in question being unable to put these documents in evidence.

3.4. Discovery is very time consuming in certain litigation. In the Board's experience this is particularly notable in medical negligence cases. In such cases a large number of medical records may be obtained (perhaps in some cases the plaintiff's entire medical history). The case may turn on a fraction of these records. It may be worthwhile therefore examining how discovery could be simplified.

3.5. In England and Wales the Civil Procedure Rules 1998 introduced a system of "standard disclosure" (prior to the introduction of the rules, the system of discovery was similar to this jurisdiction). This is in the context of a system of "pre-action protocols" which the rules introduced, placing requirements on parties to intended litigation which must be complied with before the action is brought. Effectively standard disclosure places on parties a duty of search and disclosure, and a right to inspection. It replaces the test of necessity and relevance and instead states that a party shall disclose:

"(a)the documents on which he relies; and
(b) the documents which
(i) adversely affect his own case;
(ii) adversely affect another party's case; or
(iii) support another party's case; and
(c) the documents which he is required to disclose by a relevant practice direction." (Rule 31.6 CPR).

3.6. Section 219 of the Legal Services Regulation Act 2015, which is not yet commenced, would insert a new Part 2A into the Civil Liability and Courts Act 2004 providing for certain provisions relating to medical (renamed clinical) negligence actions, including the introduction of a pre-action protocol. Prospective section 32B(6)(a), which would be inserted into the 2004 Act, would provide that a pre-action protocol for clinical negligence should include the disclosure of medical and other records relating to persons enquiring into or alleging possible clinical negligence (including charges for disclosure). It is the Board's view that section 219 should be commenced as soon as such a protocol is drafted and finalised.

3.7. The Board is of the view that the concept of standard disclosure as operated in England and Wales should be examined, with a view to considering whether it is appropriate to introduce it in this jurisdiction. It is understood that there is a desire to prevent "fishing expeditions", i.e. the seeking disclosure of documents with a view to establishing a cause of action, and that standard disclosure might lend itself more readily to this. Changes to the RSC in 2009 were intended to limit applications for discovery in the High Court to specific categories of documents. In such circumstances it might not be felt that introduction of standard disclosure would be appropriate. As noted however general discovery is still allowed in the Circuit Court.

3.8. In the absence of same, it is worthwhile monitoring the introduction and implementation of the pre-action protocol in clinical negligence with a view to introducing other pre-action protocols, which would include and provide for pre-action disclosure in certain cases.

3.9. It is also perhaps worthwhile considering the proposals by the Northern Ireland Civil Justice Review[3] that effectively seeks to implement in that jurisdiction elements of English style standard disclosure while continuing to permit applications for discovery where standard disclosure is inadequate or that the case is one where something more than standard disclosure is called for.

[3] RCJNI p140

Recommendations:

c. Commence section 219 of the Legal Services Regulation Act 2015 as soon as possible.
d. Monitor the implementation of the pre-action protocol in clinical negligence with a view to introducing pre-action protocols, including pre-action disclosure, in other types of proceedings.
e. Consider the introduction of standard pre-action disclosure of documents, while retaining the jurisdiction of the court to order discovery where standard disclosure proves insufficient

4. Encouraging alternative methods of dispute resolution

4.1. As noted in the introduction the Board is a major provider and promoter of alternative dispute resolution in the family justice area. It provided mediation services to approximately 2,800 couples in 2016. The Board's remit to provide mediation is limited (under section 5(1) Civil Legal Aid Act 1995) to providing a family mediation service, which it has done since the transfer of the former Family Support Agency's mediation services to the Board in 2011.

4.2. Notwithstanding the above, the Board is in favour of encouraging potential civil (non-family) litigants to also avail of alternative dispute resolution services that may be available.

4.3. The Mediation Act 2017 places obligations on practicing solicitors to provide clients with information about mediation prior to commencing proceedings. This information should include information on the advantages, benefits, and risks of meditation. It also provides provision for a court (either on the application of a party or on its own motion) to invite the parties to consider mediation, and if they decide to do so, adjourn the proceedings for that purpose. It also provides for the court to consider an unreasonable failure to engage in mediation when considering the costs of an action.

4.4. The Meditation Act 2017 is newly commenced, and it is difficult to gauge what its impact will be at this point. The Board supports the provisions in the Act.

4.5. The Northern Ireland Civil Justice Review[4] recommended a form of compulsory mediation be introduced, as a pilot scheme, in small claims cases. This may be worth considering also. However it might be regarded as an undue limiting of a litigant's right of access to the Courts.

[4] RCJNI p128

4.6. The Board is not making any recommendations at this point save to endorse the provisions of the Mediation Act 2017 and to state its desire to see them fully implemented.

Recommendation

f. The Mediation Act 2017 should be fully implemented.

5. Reviewing the use of electronic methods of communications including e-litigation and possibilities for making court documents (including submissions and pleadings) available or accessible on the internet

5.1. As previously noted, court work involves the production of a large amount of documentation. Any litigation case will involve the production of a significant amount of documentation such as letters, summons, pleadings, affidavits, exhibits, notices of motion, and other correspondence. This documentation must often be copied multiple times – copies for the file, for the other parties, and for the Court, for example.

5.2. We live in an age where case files can be held and dealt with electronically.In 2012, the Legal Aid Board introduced an end-to-end IT case management system. This system, which is on approximately 250 desktops, allows for the electronic management of files, with all correspondence being capable of being scanned and retained on screen.

5.3. Because courts do not work electronically however, it does not prevent the voluminous production of documentation in litigation proceedings. It should be possible for the courts to move towards a position where court documents can be filed and proceedings issued and served electronically. A “paperless court” might be a worthwhile goal to pursue.

5.4. Already there is one example of electronic filing in existence in the Irish courts and that is in the area of personal insolvency. Order 73, Rule 4(1) Circuit Court Rules 2001 provides that, providing certain conditions are met, the County Registrar/Combined Courts Office Manager may authorise the Insolvency Service, personal insolvency practitioners, and parties to proceedings (including their solicitors) to file, to deliver to, or file or lodge with the court office by electronic means any document which may be delivered, filed or lodged and any application which may be made to the Court in any proceedings, or category of proceedings, under the Personal Insolvency Act 2012.

5.5. It is worthwhile examining the arrangements in place in personal insolvency proceedings with a view to examining to what extent they can be extended

and/or replicated in civil litigation and other types of proceedings.

5.6. It is also worthwhile examining what improvements in other IT systems can be provided. For example it would facilitate the roll out of electronic filing and documentation systems if wi-fi could be made available in courthouses. The potential to roll out video conferencing and video link facilities could be examined.

5.7. There are other improvements that could be made. The current Courts Service website could benefit from certain upgrades. In particular, the judgements and determinations section is organised using a set of "twisty" (tree view) controls by court and by year. Court users could benefit from the provision of an upgraded website and search engine. There are other opportunities for the provision of information online e.g. the possibility of using Twitter and other social media platforms to notify the public of important judgements. The Northern Ireland, England and Wales, and Scottish judiciaries have all set up dedicated websites (separate from their respective Courts Services) and Twitter accounts.

Recommendations

g. Pursue a "paperless court" as a goal
h. Examine the arrangements in place for electronic filing in personal insolvency with a view to replicating them in other case types
i. Examine what other improvements court be made to information technology systems in the courts.
j. Upgrade the Courts Service website. Set up a website and social media platform for the judiciary.

6. Conclusion

6.1. The Board welcomes the opportunity to participate in this review of the administration of civil justice. The Board believes that the recommendations it has made would represent worthwhile steps in improving the administration of civil justice in this jurisdiction.

6.2. A summary of the recommendations made are provided as an appendix.

Appendix
Summary of Recommendations

a. Consider introducing a simplified, standard set of civil procedure rules covering the High Court, Circuit Court, and District Court.
b. Consider introducing more lay-friendly terminology, for example, replacing “Plaintiff” with “Claimant”.
c. Commence section 219 of the Legal Services Regulation Act 2015 as soon as possible.
d. Monitor the implementation of the pre-action protocol in clinical negligence with a view to introducing pre-action protocols, including pre-action disclosure, in other types of proceedings.
e. Consider the introduction of standard pre-action disclosure of documents, while retaining the jurisdiction of the court to order discovery where standard disclosure proves insufficient.
f. The Mediation Act 2017 should be fully implemented.
g. Pursue a “paperless court” as a goal.
h. Examine the arrangements in place for electronic filing in personal insolvency with a view to replicating them in other case types.
i. Examine what other improvements court be made to information technology systems in the courts.
j. Upgrade the Courts Service website and set up a website and social media platform for the judiciary.