The Irish Community Development Law Journal

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The Irish Community Development Law Journal is an online journal, published twice a year by Community Law & Mediation (CLM) in Coolock, Dublin. The journal seeks to offer a platform for interaction that encourages greater scholarly and academic collaboration in the areas of social policy, law and community development, promoting the practice of Community Economic Development (CED) law and policy in Ireland and learn about these initiatives in other countries.

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Welcome to Volume 5 issue 1 of the Irish Community Development Law Journal. We recently celebrated the Law Centre’s 40th anniversary with a special commemorative event, where we marked the contribution that Community Law and Mediation has made to the community over the last four decades. President Michael D. Higgins attended the event at Northside Civic Centre, where we discussed the empowerment of the disadvantaged and the importance of social justice in Ireland. President Higgins delivered an impressive speech and acknowledged Community Law and Mediation’s contribution to accessing justice. In light of this, the theme of access to justice is a fitting one for this edition.

As Chief Justice Susan Denham has previously stated, rights are meaningless without access to justice. Similarly, in interpreting the European Convention on Human Rights, the European Court of Human Rights have previously held, in the context of legal aid in particular, that rights contained in the Convention should be practical and effective, not theoretical and illusory. As such, access to justice will remain an important issue until all citizens can access their legal rights without any financial, social, or cultural barriers. This issue focuses on access to justice; each article addresses the issue in a separate and distinct manner.

The issue is opened by Ciarán Finlay who discusses FLAC’s latest report “Accessing Justice in Hard Times” on the system of civil legal aid in Ireland. The author examines the impact of the economic crisis on the scheme of civil legal aid and the consequent effects on individuals seeking access to justice. In particular the author discusses the delays, cuts to funding and staffing levels and the increase in financial contributions to the scheme for certain marginalised groups. Mr. Finlay also explores the issue of the increase in unmet legal needs during the recession, focusing specifically on housing, debt, social welfare and employment, which are in part excluded from the civil legal aid scheme. This article suitably opens the issue and puts the theme of access to justice under the spotlight.

The second article in this issue is co-authored by Ursula Connolly and Dr. Shivaun Quinlivan, who consider access to justice in the employment law context, specifically in the context of workplace bullying. The authors discuss the lack of a dedicated legal remedy for workplace bullying in this jurisdiction and the consequent shoe-horning of bullying claims into other avenues of redress such as constructive dismissal actions, personal injuries actions and actions in discriminatory dismissal. The authors argue that the inappropriateness of the remedies for bullying in the workplace creates a lacuna in Irish law, which acts as a barrier for accessing justice by individuals bullied in the workplace. This article offers a unique perspective on the theme of the issue in the employment law context.

The penultimate article in this issue by Diarmaid O’Sullivan brings into sharp focus the issue of access to justice in the context of the judicial review of local authority decisions. The author discusses how judicial review operates in practice and using the decisions of local government as an example, Mr. O’Sullivan
questions whether judicial review practically controls the actions of local authorities for the average citizen by giving them access to justice. The author also highlights some of the barriers faced by individuals seeking to access justice in the context of the judicial review of local authority decisions, including the barriers of costs, standing and the discretionary nature of remedies in judicial review. This article demonstrates the practical barriers to accessing justice for the average citizen affected by a local authority decision.

The closing article in this issue extends is a book review on *Adapting to Climate Change: Governance Challenges*, edited by Deiric Ó Broin and Peadar Kirby, written by Odran Reid. The author discusses how the book addresses the question of addressing climate change on both a local and global level as well as the complexities of climate change in less developed countries when compared with developed countries. While the article extends beyond the suggested theme of this issue, the book review provides an insightful glance into the topic of climate change.

Finally we have case studies by Clare Naughton, solicitor with Community Law & Mediation. Naughton gives examples of cases taken by Community law & Mediation and the impact of access to justice that led to a change in the legislation.
Articles: Access to Justice
Rough Justice in Hard Times

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Abstract:
Accessing Justice in Hard Times is the Free Legal Advice Centres’ latest report on the system of civil legal aid in Ireland. It examines the impact of the economic crisis on the civil legal aid scheme, the changes made to the scheme in response to the recession and the consequent effects on those seeking access to justice. In particular, the paper discusses the impact of the dramatic growth in waiting times for consultations with Legal Aid Board’s solicitors, cuts to the Board’s funding and staffing levels as well as the increase in financial contributions for civil legal aid services on vulnerable and marginalised groups, particularly those reliant on state payments and victims of domestic violence.

Using FLAC’s Data Collection Programme as a form of comparison, the report also explores the issue of growing unmet legal need during the economic downturn. It focuses specifically on areas such as housing, debt, social welfare and employment which are in large part excluded from the scope of the civil legal aid scheme. In addition, FLAC raises concerns regarding Ireland’s compliance with international human rights law, especially in light of its obligations under the European Convention on Human Rights and the International Covenant on Economic, Social and Cultural Rights. Furthermore, the report outlines the need for maintaining adequate levels of funding of civil legal aid services in times of economic constraint. This article focuses on some of the central points raised in FLAC’s recently published report, together with the main recommendations.

Keywords:
Access to justice, civil legal aid, unmet legal need, Legal Aid Board.
Introduction

Access to justice is a fundamental human right and is recognised as such under a range of regional and international instruments, including the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the International Covenant on Civil and Political Rights. While it has no single precise definition, access to justice includes knowledge of and access to the legal system as well as whatever legal services are necessary to achieve a just outcome. It encompasses access to fair systems of redress and states’ obligations to vindicate and protect human rights. In the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.

In 1979, the European Court of Human Rights delivered a landmark judgment on the right of access to justice which found Ireland in breach of the European Convention on Human Rights. In the seminal case of Airey, the Court held that while in theory the applicant could represent herself in domestic judicial separation proceedings, in practice she was denied the guarantee of access to court as she could not gain the assistance of a lawyer. The Court, in upholding the right to legal aid as an essential element of the right of access to justice, held that “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.

In present day Ireland, the civil and criminal legal aid systems are the main avenues by which the State enables the realisation of the right of access to justice and facilitates effective access to the legal system for those who could not otherwise afford it.

The civil legal aid scheme in Ireland is administered by the Legal Aid Board, through its network of Law Centres, under the provisions of the Civil Legal Aid Act 1995. That Act describes the purpose of the scheme as one to “make provision for the grant by the state of legal aid and advice to persons of insufficient means in civil cases”. Despite this stated goal, problems with the scheme abound.

For almost fifty years, FLAC has been working towards the achievement of a comprehensive system of civil legal aid. To this end, we have produced a number of reports and papers identifying shortcomings in the civil legal aid scheme. Notable among these is the 2005 report, “Access to Justice: a Right or a Privilege?”, which highlighted inadequacies in the system and suggested a blueprint for how a fair, equitable scheme to facilitate access to justice might be achieved. In 2009, “Civil Legal Aid in Ireland: 40 Years On” reflected on the changing status of civil legal aid since FLAC’s establishment in 1969 and advocated for a comprehensive scheme.

These reports highlighted a range of issues including lack of public awareness of the civil legal aid scheme, inadequate staffing levels in and resources allocated to the Legal Aid Board, as well as extended waiting lists for and delays in accessing legal services. Other issues included the restrictive nature of the

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2 ibid, para 24.
3 Civil Legal Aid Act 1995.
4 Free Legal Advice Centres (FLAC), Access to Justice: a Right or a Privilege? (FLAC, 2005).
5 FLAC, Civil Legal Aid in Ireland: Forty Years On (FLAC, 2009).
civil legal aid scheme; financial eligibility criteria that exclude and deter deserving applicants; a lack of diversity in the work undertaken by the Legal Aid Board; and charges for legal aid services that serve as a barrier for people on low incomes.

However, despite these pre-existing problems, FLAC’s most recent report, “Accessing Justice in Hard Times”, shows that as the recession took hold, pressures on the Legal Aid Board increased, reducing already limited capacities and straining a system which was never comprehensive in the first place. This article provides a brief overview of the impact of the economic crisis on the scheme of civil legal aid in Ireland.

Rise in demand for legal aid services during the economic crisis

With poverty levels increasing, more people found themselves eligible for services provided by the Legal Aid Board during the economic downturn. Additionally, people needed greater levels of legal assistance to deal with new and interlinked legal issues. FLAC’s own data confirms that legal problems became more complex during the recession, with people experiencing multiple intertwined legal issues; particularly involving family law and debt issues.

As a result, demand for legal assistance provided by the Legal Aid Board surged. In 2007, there were 10,164 applications for legal services in Law Centres, excluding asylum-related applications. By 2011, this figure had increased by a staggering 84% to 18,657 applications.

Despite a stark rise in demand for its services, there was no corresponding increase in funding for the Legal Aid Board. Between 2008 and 2011, the Board’s overall funding allocation was reduced by over 15%. This presented the Board as a structure with a number of difficulties. Additionally, while frontline services escaped the worst cutbacks, staffing levels were reduced from 390 in 2008 to 346 in 2011. Furthermore, the Circuit Court private practitioner scheme, which allows the Board to outsource work in divorce and separation cases, was suspended for budgetary reasons.

Inevitably, and despite the dedication and commitment of both the staff and the board, these challenges imposed real restrictions on the Legal Aid Board’s capacity to operate effectively and efficiently. These restrictions manifested themselves in long waiting lists and times.

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6 FLAC, Accessing Justice in Hard Times (FLAC, 2016).
7 Data compiled by the Central Statistics Office shows that the consistent poverty rate almost doubled in the period 2008 – 2013, increasing from 4.2% in 2008 to 8.2% in 2013. Central Statistics Office (CSO), Survey on Income and Living Conditions 2013 (CSO, 2014).
9 Legal Aid Board (LAB), Annual Report 2008 (LAB, 2009) 12.
12 Legal Aid Board, Annual Report 2008 (LAB, 2009) 46.
13 Legal Aid Board (n 11) 58.
Between 2007 and 2013, the number of people waiting on a first consultation with a solicitor increased by over 335% from 1163\(^{15}\) to 5067.\(^{16}\) Furthermore, in the period between 2007 and 2012, the maximum waiting time in a Law Centre for a first consultation with a solicitor leaped from 6 months\(^{17}\) to 15 months.\(^{18}\) In 2012, in response to growing delays, the Legal Aid Board introduced a ‘triage’ system where applicants are supposed to be seen by a solicitor within the first month of applying for legal services for a short consultation. While these measures had some tangible impact in terms of allaying pressure on Law Centres, lack of adequate resources made it difficult to effectively implement this initiative.\(^{19}\) Even today, almost four years on since the first piloting of the triage system, people may still have to wait up to nine months for a first appointment with a solicitor.\(^{20}\)

FLAC’s report outlines grave concerns about the impact of chronic delays on access to justice. First, long delays in accessing legal services can lead to avoidance of the scheme. This results in rank denial of access to justice. Secondly, judicial practice in Ireland has varied and not all judges have been prepared to wait the length of time required for an applicant to access legal aid. Such decisions may disadvantage any party who is entitled to receive legal aid but could not access the services that they needed in time. More generally, where court proceedings are delayed due to lack of legal representation, cases cannot be properly resolved and resources are wasted. Thirdly, delays can exacerbate existing problems, especially family disputes and domestic violence cases.

In terms of caseload, demand for the Legal Aid Board’s services in family law cases remained high during the recession. One noteworthy trend was the increase in cases involving children being taken into state care. Between 2007 and 2012, the number of cases in which legal aid was provided for child care cases rose from 707\(^{21}\) to 1178.\(^{22}\) However, appropriate funding increases did not take place to fund this development. As a result, the Board was placed under additional pressure as it was required to devote a considerable and much needed amount of time and resources to deal with the increased volume of such cases, many of which are complicated, sensitive and remain active for a considerable period of time.

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16 Legal Aid Board (n 14) 20.
17 Legal Aid Board (n 15).
19 By the end of 2012, only three of the 11 Law Centres operating the triage system had waiting times of one month for a triage appointment. See Legal Aid Board (n 18).
21 Legal Aid Board (n 12) 14.
22 Legal Aid Board (n 18) 19.
Financial eligibility for legal aid

The report also examines changes to financial eligibility criteria during the recession. In response to greater levels of demand, the State sought to limit the growing numbers of people eligible for the scheme through a variety of measures.

One example of this was that the capital threshold allowance was reduced from €320,000 to €100,000. This action served to limit the availability of legal aid to any individual with assets valued in excess of €100,000 apart from the family home, including those who may be asset rich but cash poor. Categories of persons identified as having been disproportionately disadvantaged by this action include farmers or other self-employed people who often own valuable assets such as land and machinery. This regressive measure constituted a severe legal limitation on those seeking access to justice.

In 2013 the Board also increased its basic charges for advice and legal representation. The minimum cost of legal advice rose from €10 to €30 and for legal representation from €50 to €130. The inevitable effect of raising costs for legal services was both to deter and deny people access to the scheme.

FLAC’s principal concerns relate to the impact of these prohibitive costs on those whose primary source of income is a basic social welfare payment, including those under the age of 26 who receive reduced payments, and those at risk of or subject to domestic violence.

For those aged 26 and over in receipt of a basic social welfare payment, such as Supplementary Welfare Allowance, the required contribution for legal aid of €130 constitutes almost 70% of their weekly income. Therefore, it can be very difficult for those living on the basic rate of social welfare to find the money to pay for legal services, particularly those under the age of 26 who receive reduced rates of social welfare payments.

In addition, organisations working with victims of domestic violence have stated that the increase in legal fees for advice and representation provided by the Legal Aid Board puts legal assistance out of reach for most women availing of their services, in particular those reliant on state payments. Victims of domestic violence are particularly vulnerable during periods of austerity due to higher levels of financial abuse and a greater inability to escape violent relationships. They will also often have to make recurring applications for legal aid which can be very costly, especially given the rise in required financial contributions.

23 SI No 460 of 2006, Civil Legal Aid Regulations 2013.
24 ibid.
25 At the time of writing, the basic rate of Supplementary Welfare Allowance for those aged 26 and over is €186.
26 At the time of writing, the basic rate of Supplementary Welfare Allowance for 18 to 24 year olds is €100 and for 25 year olds is €144 per week.
Furthermore, victims of domestic violence who do not satisfy the Habitual Residence Condition encounter particular financial obstacles in terms of paying for legal services due to difficulties in accessing social welfare payments.\textsuperscript{29}

In recent years, several UN Treaty Bodies, including the UN Committee against Torture\textsuperscript{30} and the UN Human Rights Committee,\textsuperscript{31} have raised concerns regarding the adequacy of legal services provided to victims of domestic violence in Ireland. Most recently, the UN Committee on Economic, Social and Cultural Rights, which monitors Ireland’s compliance with the International Covenant on Economic, Social and Cultural Rights, recommended that support services, including legal aid, for victims of domestic violence be strengthened.\textsuperscript{32} FLAC also intends to raise its concerns regarding the cost of civil legal aid services for victims of domestic violence with the UN Committee on the Elimination of Discrimination Against Women, in advance of Ireland’s examination under the UN Convention on the Elimination of Discrimination Against Women next year.\textsuperscript{33}

On a more positive note, the requirement for parents to pay contributions in child care proceedings was abolished in 2013.\textsuperscript{34} The abolition of fees removed a bureaucratic and financial barrier facing many parents involved in child care proceedings, which are often stressful, upsetting and have long-term impacts on all those involved.

In addition, data covering the period 2013 to 2015 shows that the Legal Aid Board approved the vast majority of applications it received for waiver of legal fees on grounds of hardship. The Legal Aid Board has the power to waive the requirement for contributions where payment would result in “undue hardship”. In 2014, the Board approved 675 applications out of a total of 743, to the value of almost €105,000.\textsuperscript{35} However, issues regarding lack of public awareness of this system of waiver persist.

\textsuperscript{29} The Habitual Residence Condition (HRC) is a qualifying condition for social welfare payments which was introduced on 1 May 2004 in response to EU enlargement. All persons seeking means-tested social welfare payments and Child Benefit after that date have been required to satisfy this condition. The five criteria used by the Department of Social Protection to determine whether a person satisfies the Habitual Residence Condition are: 1) The length and continuity of living in the State or another country; 2) The length and reasons for any absence from the State; 3) The nature and pattern of the person’s employment; 4) The person’s main centre of interest; 5) The future intentions of the person applying for the social welfare scheme. For more information see FLAC, \textit{Guide to the Habitual Residence Condition} http://bit.ly/flacHRC accessed 21 March 2016.

\textsuperscript{30} Concluding Observations, CAT, Ireland, UN Doc. CAT/C/IRL/CO/1 (2011) para 27.

\textsuperscript{31} Concluding Observations, ICCPR, Ireland, UN Doc. CCPR/C/IRL/CO/4 (2014) para 8.


\textsuperscript{33} Ireland is to be reviewed by the Committee on the Elimination of Discrimination Against Women in February or March 2017. See further, List of issues and questions prior to the submission of the combined sixth and seventh periodic reports of Ireland, CEDAW, Ireland, UN Doc. CEDAW/C/IRL/QPR/6-7 (2016).

\textsuperscript{34} SI No 346 of 2013, Civil Legal Aid Regulations 2013.

\textsuperscript{35} Email from the Legal Aid Board to FLAC (05 January 2016).
Growing unmet legal need

Another issue which our report highlights is the considerable growth in unmet legal need during the recession. The remit of the Legal Aid Board is quite narrow and excludes in large part areas related to debt, housing, social welfare and employment. However, need and demand for legal services for issues related to mortgage arrears, housing repossessions, social welfare payments, terms of employment, unfair dismissals and redundancies increased dramatically during the economic crisis.

To take one example, legal need in the area of employment law grew considerably during the downturn. Between 2007 and 2009, the number of referrals to the Employment Appeals Tribunal increased almost threefold from 3173 complaints to 9458. In spite of the complexity of this area of law, which draws on the jurisprudence of the Court of Justice of the European Union and encompasses issues such as contract law, the Legal Aid Board does not provide representation before the Employment Appeals Tribunal, or its successor, the Workplace Relations Commission. The complexity of Irish employment law, coupled with the significant rise in referrals to the Tribunal, means that more people were disadvantaged by the Board’s narrow remit during the economic crisis.

This conclusion is supported by statistics from FLAC’s information and referral line and from FLAC’s legal advice centres. Between 2007 and 2008 alone, the number of calls to FLAC’s telephone line from individuals seeking legal information on employment law issues increased from 850 to 1861. Moreover, between 2007 and 2013, the number of people seeking legal advice for employment law issues from FLAC’s volunteer lawyers increased by 289% from 508 to 1978. These figures prove that legal need for employment law issues rose sharply in the relevant period.

However, demand for FLAC services in the aforementioned areas of debt, housing and social welfare also soared during the downturn. The number of people seeking advice from FLAC volunteers for debt-related matters increased from 153 in 2007 to 1588 in 2013. Callers in need of legal information for housing-related issues increased from 54 in 2007 to 1178 in 2013. In the same period, persons seeking legal advice for issues connected to social welfare rose by 300%.

36 While individuals with debt issues are entitled to apply for legal aid, in many instances such applications are refused by the Legal Aid Board under Sections 28(2)(b), (c) and (e) of the Civil Legal Aid Act 1995 for failure to satisfy the merits test. See, Community Law & Mediation (CLM), Recommendations following Roundtable discussion examining the lack of Adequate Legal Support available to Borrowers facing Repossession of their Family Home (CLM, 2015) 11.

37 Section 28(9)(a)(ii) of the Civil Legal Aid Act 1995 excludes “disputes concerning rights and interests in or over land” from the scheme. As a result, many housing issues do not come within the scope of the scheme.

38 The Civil Legal Aid Act 1995 excludes all quasi-judicial tribunals from the civil legal aid scheme, except those which are “prescribed” by the Minister for Justice & Equality, in line with Section 27(2)(b) of the 1995 Act. As a result, the Legal Aid Board does not provide legal representation before the Social Welfare Appeals Office, the statutory body responsible for dealing with appeals concerning entitlement to social welfare payments.

39 The Workplace Relations Commission, which deals with most employment law disputes, is also not a “prescribed” tribunal for the purposes of the Civil Legal Aid Act 1995.


42 Since 1 October 2015, the Workplace Relations Commission has assumed the roles and functions previously carried out by the Employment Appeals Tribunal. See further, the Workplace Relations Act 2015 and SI No 410 of 2015, Workplace Relations Act 2015 (Commencement) (No.2) Order 2015.

43 For a full breakdown of relevant statistics see FLAC (n 6) 12.
While FLAC accepts that not all cases related to housing, social welfare, employment and debt law will require the intervention of lawyers, there will always be cases where the requirements of justice demand legal representation. As a result of their continued exclusion and greater relevance, more individuals were not in a position to effectively represent themselves in proceedings connected to these areas during the crisis, especially where the issues involved were complex.

FLAC believes that the inability or unwillingness of the Board to expand its remit to cover more areas of civil law, especially to include issues which became more prevalent during the recession, created extra barriers for vulnerable and marginalised groups seeking access to justice.

**International human rights law**

*Accessing Justice in Hard Times* also raises concerns regarding Ireland’s compliance with international human rights law in light of the exclusion of certain areas of the law from the Civil Legal Aid Act 1995. The European Court of Human Rights has ruled that the blanket exclusion of any area of law from a civil legal aid scheme violates Article 6(1) of the European Convention on Human Rights. In *Steel and Morris v the United Kingdom*, commonly called the *McLibel* case, the European Court of Human Rights was clear that:

> “[t]he question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent him or herself effectively.”

Given the conclusion of the European Court of Human Rights, it is quite clear that certain provisions of the 1995 Act are not compatible with the right to a fair hearing guaranteed by the Convention.

Moreover, during Ireland’s recent examination under the International Covenant on Economic, Social and Cultural Rights, the UN Committee on Economic, Social and Cultural Rights expressed concern at the lack of free legal aid services in Ireland, which in its words, “prevents especially disadvantaged and marginalised individuals and groups from claiming their rights and obtaining remedies, particularly in the areas of employment, housing and forced evictions, and social welfare benefits”. Thereafter, the UN Committee recommended that Ireland expand the remit of the civil legal aid scheme. Similar sentiments were expressed by the former UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, during her 2011 visit to Ireland.

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44 App no 68416/01 [2005] 41 EHRR 22, para 61.
46 ibid.
Promoting access to justice during times of economic difficulty

International human rights law is clear that access to justice is a right which exists at all times. However, the obligation to ensure access to justice and to provide an efficient, accessible and sustainable civil legal aid system assumes even greater importance in resource-constrained environments for a number of reasons.

First, civil legal aid schemes are vital tools for disadvantaged and marginalised groups seeking access to justice. However, such groups often suffer disproportionately in recessionary times. Therefore, schemes must remain accessible to those in greatest need.

Secondly, in times of economic difficulty, demand for state-subsidised legal services will inevitably rise. People need information, advice and representation to negotiate new and greater legal problems. At the same time, however, incomes diminish with the effect that more people are unable to afford private legal representation. If increased demand for civil legal aid services is not matched by increased resources, schemes become inefficient and unsustainable.

Thirdly, socio-economic rights, such as the right to housing, social security and work, are more likely to be violated in times of economic difficulty due to tightening budgets. However, states must ensure that human rights are respected, protected and fulfilled at all times, even in times of economic constraint. A comprehensive and well-funded civil legal aid scheme ensures that people on low incomes can access justice and vindicate their basic human rights.

Interestingly, there is also a business case for ensuring that civil legal aid schemes are efficient, accessible and sustainable. Research conducted by Citizens Advice in the UK has found that civil justice problems can be mitigated by early legal advice and aid. For example, failure to provide early legal aid or advice in a mortgage arrears or housing eviction case can ultimately lead to homelessness. Where homelessness occurs, a financial cost is placed on the state through the provision of temporary accommodation, support services, health services as well as lost economic output. Thus, if legal aid services are adequately resourced, such situations may be avoided and states can save money down the line.

48 See for example, Office of the UN High Commissioner for Human Rights (OHCHR), *Report on austerity measures and economic and social rights* (OHCHR, 2013).

Conclusions and recommendations

In summary, while the civil legal aid scheme in Ireland has never been comprehensive, the goal of a more efficient, accessible and sustainable system slipped further and further out of reach during the recession. This had huge adverse repercussions for those seeking access to justice.

FLAC makes a number of recommendations in its report for improving access to justice, directed at both the Government and the Legal Aid Board. These recommendations include but are not limited to:

1. Provide sufficient funds to the Legal Aid Board in order to ensure the provision of an efficient, accessible and sustainable civil legal aid scheme.
2. Increase staffing resources within the Legal Aid Board to ensure the provision of an effective and efficient service.
3. Amend the Civil Legal Aid Act 1995 to place a statutory obligation on the Legal Aid Board to undertake periodic reviews of legal need in Ireland in full consultation with disadvantaged and marginalised communities and the organisations working on their behalf.
4. Ensure the provision of legal aid services in a wide range of areas, including by expanding the remit of the Legal Aid Board in line with the recommendation of the UN Committee on Economic, Social and Cultural Rights.
5. Ensure that borrowers in financial difficulty receive adequate legal advice and are supported in any legal proceedings which may result in repossession or eviction.
6. Review the means test, including disposable income and capital limits, as well as the financial contributions required for legal services provided by the Legal Aid Board so as to ensure that all individuals of modest means who have a genuine need for legal aid and advice can access these services.
7. End the requirement for victims of domestic violence to make financial contributions for legal services.

Recent developments

In late 2015 and early 2016, some positive measures, aimed at improving access to justice, were announced. These included commitments to increase the financial resources afforded to the Legal Aid Board and to make greater use of private practitioners to reduce waiting lists in Law Centres. The Department of Justice and Equality also announced the creation of a new inter-agency legal support scheme for those in mortgage debt. The proposed scheme, to be administered by the Money Advice and Budgeting Service (MABS) with the involvement of the Legal Aid Board, will assist people who are insolvent, and in mortgage arrears, to access independent expert legal advice.

While these measures are welcome, FLAC argues that much more remains to be done to ensure equal access to justice for all. As pressure on the civil legal aid scheme abates, it is our firm view that now is the time to build a system of legal aid that works for and responds to the needs of people on low incomes. Failure to act will mean that when the next crisis hits, vulnerable and disadvantaged people...
will, once again, fall through the cracks. The sad reality is that over 35 years since the judgment in Airey was delivered, access to justice for too many people remains theoretical and illusory, not practical and effective.
Accessing justice in cases of Occupational Bullying in Ireland

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Abstract:
Our understanding of the nature and effect of bullying behaviour has developed dramatically over the past forty or so years. Despite this however Ireland does not have a dedicated legal remedy for workplace bullying. Soft-law mechanisms such as Codes of Practice and policies, such as Dignity at Work policies, are welcome but legally ineffectual mechanisms for protecting employees from bullying behaviour. In the absence of a dedicated legally enforceable provision affected workers are required to rely on a range of actions, some of which were never designed with bullying in mind. These include constructive dismissals actions, personal injuries actions in negligence pursuant to health and safety legislation, discriminatory harassment actions and reliance on the industrial relations mechanism now operated by the Workplace Relations Commission. This paper argues that the inappropriateness of these provisions creates a lacuna in Irish law and acts as a barrier to access to justice for workers subjected to bullying. It further argues that as bullying undermines a person’s right to dignity in the workplace in much the same way as discriminatory harassment, it should be similarly prohibited. It therefore argues that a specific legislative provision should be introduced which mirrors the level of protection offered against discriminatory harassment.¹

Keywords:
Bullying, Workplace Bullying, harassment, Workplace Relations Commission, health and safety, constructive dismissal.

1. Nature and effect of bullying:

Prior to the 1980s very few jurisdictions formally recognised the concept of workplace bullying. Yamada notes that it was not until the 1990s that ‘bullying’ as a term entered legal discourse in the US.\(^2\) This development had itself built on the ground-breaking scholarship of Heinz Leymann dating from the 1980s which describes the behaviour as ‘mobbing’,\(^3\) a term widely used in Sweden and northern Europe. Despite the relatively recent formal recognition of the concept, bullying, as it is generally referred to in Ireland, is widely recognised as giving rise to significant psychological, health and economic costs.\(^4\) The health and psychological effects were first formally researched by Heinz Leymann when he carried out a study of the effect of bullying on nurses in Sweden.\(^5\) Since then research in both Ireland and elsewhere has demonstrated that bullying leads to negative psychological effects including depression, anxiety, feelings of isolation and powerlessness.\(^6\) The prevalence of bullying in Ireland has also been the subject of attention in recent years. A government 2001 Task Force on the Prevention of Workplace Bullying (2001 Task Force) commissioned a report from The Economic and Social Research Institute (ESRI) on its prevalence in Irish workplaces. The research reported that a total of 7% of those surveyed reported being bullied in the six months preceding the survey. A similar survey was commissioned by the Department of Enterprise, Trade and Employment in 2007 which reported that the percentage of those reporting being bullied had increased to 7.9%.\(^8\) More alarming results have emerged from more targeted surveys. A survey of the prevalence of bullying behavior in the Irish nursing sector for instance disclosed that 38.5% of nurses had experienced bullying in the preceding 6 months, with over 3% reporting being bullied on a weekly basis.\(^9\)

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7 The results were based on a sample of 5,252 workers in paid employment.

8 Philip J. O’Connell and others, ‘The Incidence and Correlates of Workplace Bullying in Ireland’ (The Economic and Social Research Institute March 2007). The results were based on a sample of 3,579 interviews with those in work or who had been in work in the previous six months. When adjusted to take into account the working population, the survey reported that 159,000 workers across the working population as a whole had experienced bullying in the preceding six months.

9 Dr Juliet McMahon and others, ‘A Report on the Extent of Bullying and Negative Workplace Behaviours Affecting Irish Nurses’ (March 2013) 20. The report surveyed 2,929 nurses, with over 1,200 reporting experiencing some form of bullying behavior in the preceding 6 months.
2. **What is bullying?:**

There is little international agreement as to what constitutes bullying. Katherine Lippel has observed that the definitions adopted owe much to the political, cultural and societal influences at play in the different jurisdictions. In this way it is referred to mobbing in the northern European jurisdictions reflecting the work of Leymann as described above, as harassment or moral harassment in the civil law European jurisdictions reflecting their Roman law traditions and more commonly as bullying in the common law jurisdictions, including Ireland. In the Irish context while no statutory definition exists there is widespread acceptance of the definition provided by the 2001 Task Force. This describes workplace bullying as

> ... repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual’s right to dignity at work.

This definition has been widely accepted and endorsed. It was adopted by the 2004 Advisory Group on Workplace Bullying, by the Health and Safety Authority 2007 Code of Practice on the Prevention and Resolution of Bullying at Work and by the 2002 Labour Relations Commission (now Workplace Relations Commission) Code of Practice on Procedures for Addressing Workplace Bullying (Labour Relations Commission Code of Practice). The Health and Safety Authority provide some clarity on what form of behaviour or patterns of behaviour could provide examples of bullying, these include: exclusion with negative consequences, verbal abuse or insults, undermining behaviour, excessive monitoring of work, being treated less favourably than colleagues, blame for things beyond the person’s control and withholding work-related information. The 2001 Task Force definition has also found judicial acceptance and has been cited in a number of personal injuries bullying actions as the accepted definition of bullying in Ireland. The definition is inclusive and can apply to any behaviour which undermines a person’s dignity at work. It applies an objective standard, reflecting the views of a ‘reasonable’ person. A slight internal contradiction occurs in the definition. Bullying is acknowledged as any behaviour which undermines an

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14 Health and Safety Authority, ‘Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work’ (National Authority for Occupational Health and Safety) 3.1.

15 ‘LRC Code of Practice Detailing Procedures for Addressing Bullying in the Workplace’ (Declaratory Order) 2002, 5.

16 Other examples provided included: intrusion, pesterling, spying or stalking, menacing behaviour, intimidation, aggression, undermining behaviour, humiliation and repeatedly manipulating a person’s job content and targets; see Health and Safety Authority, ‘Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work’ (National Authority for Occupational Health and Safety) 5.

individual’s right to dignity. A once-off incidence however, although considered ‘an affront to dignity’ does not amount to bullying. This requirement for repetition of the behaviour can present particular challenges to claimants, as can be seen in the *Ruffley* case, discussed further below.

### 3. Personal Injuries Actions

Employees subjected to behaviour at work which falls within the definition of bullying as described above may take an action before the courts. This action is an action for personal injuries arising from a breach by employers of their duty of care to employees.

#### 3.1 Procedural Issues

All occupational personal injuries actions must come before the Personal Injuries Assessment Board (Board) in the first instance. This includes personal injuries actions arising from bullying behaviour. The Board receives applications and other evidence including medical evidence in writing and assesses damages on this basis, there is no oral evidence. The process is relatively inexpensive and speedy, the application cost is €45 and the Board reports that in 2014 it dealt with claims within seven months on average. While the Board has jurisdiction to process all employment related personal injuries actions it has discretion to dismiss an application where it “consists wholly or in part of psychological damage the nature or extent of which it would be difficult to determine by means of assessment to which the assessors are limited to employing by this Act.” Bullying actions fall squarely into this category, to our knowledge the Board has never dealt with a psychological injury bullying claim. Where the Board exercises its discretion in this regard the claimant must pursue their case before the courts as a personal injuries action, with the resulting cost, stress and time commitment involved in this type of litigation. This places victims of bullying in a less advantageous position than those who have been solely physically injured at work, with their access to justice limited by the operation and practice of this provision.

#### 3.2 Personal Injuries Actions

Personal injuries actions arise from a breach of the employer’s duty to provide a safe workplace under the tort of negligence and in breach of an employer’s statutory obligations under health and safety legislation. With respect to the latter, the Safety, Health and Welfare at Work Act 2005 (2005 Act) places obligations on employers to protect against injury at work. Sections 8-13 of the 2005 Act place broad obligations on employers and employees in relation to maintaining a safe workplace including the prevention of any “improper conduct or behavior” which would put health and safety at risk. In addition, section 20 of the 2005 Act requires employers to produce a Safety Statement which identifies workplace risks and steps to be taken to avoid injury arising from identified risks. The Health and Safety Authority (HSA) has advised that employers are under a duty to provide for a procedure to deal with bullying within the company.

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18 *Ruffley v Board of Management of St Anne’s School* [2015] IECA 287 (Court of Appeal).
19 Personal Injuries Assessment Board Act 2003, s 3(a).
21 Civil Liability and Courts Act 2004, s 17(1)(ii)(II).
Safety Statement. Nowhere, however in the 2005 Act is the term bullying or harassment used, and nor is it defined. This reluctance to give it a statutory footing is peculiar and arguably a missed opportunity, in particular when we consider the repeated claims to a commitment to eradicate it. The standard imposed by the 2005 Act is that of ‘reasonably practicable’\textsuperscript{23} arguably a higher standard than that imposed by negligence principles, where the standard is that of a ‘reasonable and prudent employer’.\textsuperscript{24} However, to date this has not had any significant effect on the manner in which bullying cases have been litigated with the few cases where the 2005 Act was referenced focusing primarily on negligence principles. Litigation under the 2005 Act is dealt with as a personal injuries action, involving the requirement to show that the Act has been breached, and that the breach caused an injury. In seeking a remedy through negligence it similarly falls to litigants to establish a breach of the employer’s duty of care, to demonstrate that the breach caused an injury and that the injury is one which the courts will compensate.\textsuperscript{25} There must be an injury, evidence that bullying occurred is insufficient to justify compensation. In terms of the quality of the injury in order to qualify for compensation the psychological injury must be ‘medically recognised’. It means that no claim can be taken until the employee is so psychologically damaged that a psychiatric injury is suffered. Distress, fear, anxiety, isolation – all potential results of bullying behavior – are insufficient to bring a claim. As stated by Justice Fennelly in one of the earliest Irish bullying cases, “The plaintiff cannot succeed in his claim unless he also proves that he suffered damage amounting to personal injury as a result of his employer’s breach of duty. Where the personal injury is not of a direct physical kind, it must amount to an identifiable psychiatric injury.”\textsuperscript{26}

It is clear from this evidential requirement that it is not the bullying behavior itself that is unlawful, as proof of bullying is insufficient to give rise to liability. The particular challenges posted by these evidential burdens are clearly illustrated in the Quigley case.\textsuperscript{27} Mr Quigley was a factory operative who had worked for the defendant company for twenty years. Following the purchase of the company by an American company a new manager was installed who subjected Mr Quigley to persistent and repeated bullying. Mr Quigley’s general practitioner diagnosed with depression and Mr Quigley sued his employer on the basis of negligence principles and a breach of the 2005 Act. The offending behavior, which had been witnessed and evidenced by colleagues, had continued for almost one year and included “persistent watching, constant niggling criticism, failure to respond or communicate and inconsistency”.\textsuperscript{28} Mr Quigley’s action was complicated by the fact that prior to taking the case for bullying he had brought a successful unfair dismissals action against his employer. In the High Court (HC) action, Mr Quigley was successful,\textsuperscript{29} a finding which was appealed to the Supreme Court (SC) by his employer. The principal ground of appeal was that the depression suffered by Mr Quigley was caused not by the bullying, but rather by the effects of the unfair dismissal action.

\textsuperscript{23} Safety, Health and Welfare at Work Act 2005, s 8(1).
\textsuperscript{24} Barclay v An Post (1998) 2 ILRM 385 (High Court).
\textsuperscript{26} Quigley v Complex Tooling and Moulding (2008) IESC (Supreme Court) [17].
\textsuperscript{27} Quigley v Complex Tooling and Moulding (2008) IESC (Supreme Court).
\textsuperscript{28} Quigley v Complex Tooling and Moulding (2008) IESC (Supreme Court) [10].
\textsuperscript{29} Quigley v Complex Tooling and Moulding (2005) IEHC (High Court).
In the SC Justice Fennelly adopted the definition of bullying as set out in the Labour Relations Commission Code of Practice and added that,

“Counsel for the defendant submitted, and I would accept, that bullying must be:-
- repeated;
- inappropriate;
- undermining of the dignity of the employee at work.”

The court accepted and it was not contested by the employers in their appeal that Mr Quigley had been bullied. The SC however, allowed the appeal and found that it had been the unfair dismissals litigation and not the bullying which had caused Mr Quigley’s depression. Mr Quigley was in the unusual situation of being able to clearly demonstrate that he had been subjected to bullying by a manager over a period of approximately one year but the requirement to demonstrate a medically recognised psychiatric illness causatively linked to the employer’s breach arguably denied him access to justice in his case.

It is clear that cases where the standard can be met are rare. One of those successful actions is the HC case of Browne v Minister for Justice, Equality & Law Reform and Ors. Confirming that there was “no separate or distinct tort of bullying and harassment” the court held that the treatment of Mr Browne fell within the definition of bullying as set out in the Quigley case. Mr Browne, a guard, had been subjected to a range of abusive behaviours at the hand of his employers, including having his firearm removed, revocation of his right to drive a car at work, and a number of investigations into the plaintiff’s work which were based on frivolous grounds. His diagnosis of depression and an adjustment disorder by his doctor and a consultant psychiatrist were found to be causatively linked to the bullying behaviour. The bullying behaviour was carried out either by management or with their full knowledge, which Justice Cross referred to as a form of ‘corporate bullying’. In cases of ‘corporate bullying’ Justice Cross stated that the issue of ‘knowledge of employers’ of the bullying behaviour does not arise.
On the question of injury the court held that the applicable principles could be described as follows:

“(a) had the plaintiff suffered an injury to their health as opposed to ordinary occupational stress;
(b) if so, was that injury attributable to the workplace and;
(c) if so, was the harm suffered to the particular employee reasonably foreseeable in all the circumstances.”

This is the standard used in cases of psychological injury arising from workplace stress, which demonstrates a degree of overlap between how these cases are determined. As these conditions had been satisfied by the plaintiff liability was imposed.

In one of the most recent decisions and one of the few decisions from that court, the Court of Appeal recently overturned a finding in favour of a complainant. In the case of Una Ruffley v Board of Management of St Anne’s School the defendants appealed a High Court finding that they had subjected the plaintiff to bullying at work. The plaintiff, a primary school teacher, had successfully argued a breach of the employer’s duty of care in negligence and statutory duties under the 2005 Act. The appeal was based on an argument that the behaviour of the school did not amount to bullying, as the employer “had [not] been motivated “to humiliate and belittle the victim”. It was also argued that there was no evidence to show a causal connection between the behaviour and her injury. This ground was rejected on appeal in light of the weight of medical evidence. She had suffered an anxiety and depressive disorder which was diagnosed by her doctor and by a consultant psychiatrist who attested that it was attributable to her experiences at work. However, a majority of the court accepted the arguments made by her employer that a case of bullying had not been established. The plaintiff’s case arose from a number of incidences of a disciplinary nature which occurred over the course of a year and had as their starting point the locking of a classroom door by the complainant. The locking of the door it appears was a common practice but an incorrect one. The second incidence was a mistake by the complainant in reporting on progress by a pupil. Arising from these incidents a number of events occurred which the plaintiff interpreted as bullying. Justice Ryan accepted that over the course of at least six months, involving at least five separate incidents that “the Principal and the Board overreacted and denied due process in a matter of legitimate concern without verifying the defence that the plaintiff put forward”. However, he rejected that this amounted to bullying in that the incidences were not ‘repeated’, ‘inappropriate’ and undermining of her right to “dignity at work”. Justice Ryan appeared to reject any imposition of a

36 Browne v Minister for Justice, Equality and Law Reform and Commissioner of an Garda Síochána [2012] IEHC 526 (High Court) [28].
37 Maher v Jabil Services Limited (2005) 16 ELR 233 (High Court).
38 Una Ruffley v Board of Management of St Anne’s School [2015] IECA 287 (Court of Civil Appeal).
39 Una Ruffley v Board of Management of St Anne’s School [2014] IEHC 235 [O’Neill J]
40 ibid [20]
41 Una Ruffley v Board of Management of St Anne’s School [2014] IEHC 235 [40] (O’Neill J), [34] (Irvine J),
42 Justices Ryan (P) and Irvine, with Justice Finlay-Geoghegan dissenting.
43 Una Ruffley v Board of Management of St Anne’s School [2015] IECA 287 (Court of Civil Appeal) [64].
44 ibid [67].
disciplinary procedure as inappropriate, even where it is unfairly applied.\textsuperscript{45} He also rejected that it could be considered ‘repeated behaviour’ stating that “a continuing process of discipline in pursuit of legitimate concerns, even if actually mistaken or unfair” could not constitute repeated behaviour for the purposes of bullying.\textsuperscript{46} Finally he rejected that her dignity at work had been undermined, although he conceded that her right to work or her work had been undermined. It is respectfully argued that Justice Ryan took a somewhat narrow view of what could constitute bullying behaviour. He referenced name-calling or practical jokes as something that could amount to bullying but the HSA Code goes much further and includes some of the very things complained of by Ms Ruffley, including ‘excessive monitoring’, ‘blame for actions beyond the workers control’, ‘undermining behaviour’ and ‘being treated less favourably than colleagues’.\textsuperscript{47} The fact that Ms Ruffley had faced a flawed disciplinary process for transgressions which had been carried out without discipline by other colleagues could certainly be considered as satisfying a number of these descriptions. Justice Irvine concurred with Justice Ryan, and similarly found that the behaviour of the Board of Management and Ms Dempsey as principal did not amount to bullying. She drew a distinction between behaviour which is “inappropriate, as opposed to wrong, harsh, insensitive or misguided”\textsuperscript{48} but provided little guidance as to the standard to be met for behaviour to be classed as inappropriate. She did however, state that the standard was an “objective one” which meant that any knowledge the school had as to the effect of the disciplinary process on the plaintiff, was irrelevant to the question of the appropriateness of the school’s behaviour.\textsuperscript{49} Ultimately, she concluded that while the plaintiff had a strong case for a breach of her right to natural justice, she had not been bullied, and allowed the appeal.\textsuperscript{50} The finding in this case, as with the earlier decisions, highlights the significant hurdles to be overcome by litigants arguing bullying actions.

4. Discriminatory Harassment and Constructive Dismissal

Victims of bullying behaviour who wish to avoid the limitations of a personal injuries action can attempt to rely on an action for discriminatory harassment or constructive dismissal. The former requires a claimant to bring themselves within at least one of the discriminatory grounds protected by equality legislation.\textsuperscript{51} The latter forces an employee to leave their place of work and hope that their arguments of being constructively dismissed are accepted. As neither action has been designed to directly address bullying behaviour litigants are in effect shoehorning their case to fit existing legal remedies. This part of the article will address these two statutory remedies as used in the context of bullying cases.

\textsuperscript{45} Una Ruffley v Board of Management of St Anne’s School [2015] IECA 287 (Court of Civil Appeal) [66].  
\textsuperscript{46} Una Ruffley v Board of Management of St Anne’s School [2015] IECA 287 (Court of Civil Appeal) [66].  
\textsuperscript{47} Health and Safety Authority, ‘Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work’ (National Authority for Occupational Health and Safety) 5.  
\textsuperscript{48} Una Ruffley v Board of Management of St Anne’s School [2015] IECA 287 (Court of Civil Appeal) [42].  
\textsuperscript{49} Una Ruffley v Board of Management of St Anne’s School [2015] IECA 287 (Court of Civil Appeal) [89].  
\textsuperscript{50} Una Ruffley v Board of Management of St Anne’s School [2015] IECA 287 (Court of Civil Appeal) [93].  
4.1 Discriminatory Harassment

It is possible that some bullying cases may be captured by the use of the prohibition on discriminatory harassment and sexual harassment under the Employment Equality Acts 1998-2015. The primary benefit of taking a harassment or sexual harassment action is that it permits the applicant to “bypass those often insurmountable practical difficulties” of taking a personal injuries case and it permits the victim of such conduct to pursue a statutory remedy, if there is a discriminatory element to the inappropriate behaviour.

Section 14A of the Employment Equality Acts 1998-2015 prohibits sexual harassment and discriminatory harassment. Discriminatory harassment is harassment based on one of the protected grounds within the Acts. Section 2 of the Employment Equality Acts 1998-2015 sets out the nine protected grounds which are: gender, civil status, family status, sexual orientation, religious belief, age, disability, race and membership of the traveller community. Discriminatory harassment is defined as “any form of unwanted conduct related to any of the discriminatory grounds.” Unwanted conduct may include “acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material,” that has the purpose or the effect of violating “a person’s dignity creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.” Behaviour that can amount to harassment has been held to include isolation verbal abuse and insults, and less favourable treatment. The overlap with the Health and Safety Authorities definition of bullying is evident. Sexual harassment in contrast prohibits unwanted “verbal, non-verbal or physical conduct of a sexual nature.” Both discriminatory harassment and sexual harassment can occur at the place of employment or otherwise in the course of employment. The Acts prohibit harassment by an employer, colleague, client customer or other business contact of the employer, and it is the employer who will be liable for such harassment. There is a statutory defence available to employers and that is that he or she took such steps as are reasonably practicable to prevent the harassment in question, or the person being treated differently as a result of harassment. It appears from case law that in order for an employer to avail of the statutory defence, they must have a harassment/sexual harassment policy in place.

53 Marguerite Bolger and others, Employment Equality Law (Round Hall Ltd 2012) 546.
58 Chasi v J & I Security [DEC-E2011–16].
It is possible that cases of bullying could be litigated using the Employment Equality Acts 1998-2015 as is evident from the case of *Chasi v J & I Security*. In this action the complainant a black Zimbabwean man successfully claimed he was subject to discriminatory race harassment in the course of his employment. The evidence of harassment included being assigned unfavourable night shifts, unfavourable pay rates as compared to his Irish colleagues and a failure to pay the complainant holiday pay, or overtime. When the complainant raised any of his concerns with his employer the employer used ‘foul and abusive’ language and threatened him with dismissal. In addition after raising the matter with his employer he was assigned only two thirds of his normal shifts the following week. It is evident that much of this behaviour amounts to bullying behaviour according to the definition used by the Health and Safety Authority. He was treated less favourably than colleagues in that he could show that some of his Irish colleagues were paid holiday pay and he was not, he was subjected to verbal abuse, he was threatened and that behaviour was repeated, inappropriate and it undermined his dignity at work. This applicant was permitted a remedy because in addition to the above behaviour there was the added racial element to the unacceptable behaviour. In evidence it was stated that his employer texted a colleague to the effect: ‘Remember you are working with a black guy, you will have to watch him.’ Additionally there were racial slurs used when he was subjected to the ‘foul and abusive’ language, thus ensuring that this was a case of racial harassment. The applicant was awarded €25,000 compensation for the distress suffered by him as a result of this discriminatory harassment. What arguably differentiates this case from a more general bullying case was the additional race discrimination element to this set of facts. It is undoubted that race discrimination is both offensive and inappropriate, but arguably so was all the other behaviour. The recognition in this instance of the statutory wrong for which there is a statutory remedy allowed this applicant a legal remedy. Where a complainant is subjected to this form of behaviour and the added element of race discrimination, or discrimination on the other protected grounds is not present, then an applicant wishing to take a bullying action must attempt to pursue the much more onerous personal injuries claim as discussed above, or the high risk strategy of taking a constructive dismissal case, described below.

### Constructive Dismissal

Constructive dismissal actions are actions where either the behaviour of the employer constitutes constructive dismissal of the employee or it is otherwise reasonable for the employee to terminate the employment without notice. Using constructive dismissal actions for bullying actions is a high-risk strategy which, if it fails could result in the employee being without employment and with legal costs. The Unfair Dismissals Acts 1977-2005 prohibit constructive dismissal and it is also possible to take a constructive dismissal under the Employment Equality Acts 1998-2015. Constructive dismissal is defined in the Unfair Dismissals Acts as:

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64 *Chasi v J & I Security* [DEC-E2011–16].
65 *Chasi v J & I Security* [DEC-E2011–16] [3.1–3.4].
66 Health and Safety Authority, ‘Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work’ (Health and Safety Authority 2007).
67 *Chasi v J & I Security* [DEC-E2011–16] [3.4].
“(b) the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer...”

The Labour Court has noted that the definition used in the Employment Equality Acts “is practically the same as that contained at section 1 of the Unfair Dismissals Acts 1977-2001 and the authorities on its application in cases under that Act are apposite in the instant case.” Constructive dismissal cases fall into two broad categories, the first are those that come under the contract test, the others come under the reasonableness test.

The contract test is where the employee, 'because of the conduct of the employer' is 'entitled to terminate' their employment contract. In this instance the employee argues that he or she was entitled to terminate the contract as the employer has breached a fundamental condition that goes to the heart of that contract. Unilateral changes to the employee’s contract, failure to pay agreed wages, reduction in an employee’s pay, or agreed benefits, demotion, changes in location of work and bullying have all given rise to successful invocations of the contract test. In order to raise this test the employer must commit a repudiatory breach of the employment contract. This is a demanding test, which is often difficult to raise successfully.

In McKenna v Pizza Express the complainant worked for the company in a number of capacities, she had started work as a part-time waitress and over time moved into a management role. She began to experience difficulties on her return from maternity leave. She noted that there was an increase in her workload, and more pressure to meet targets. While on parental leave she was moved to another branch which she considered a demotion. An incidence arose where a couple in the restaurant complained that there was a hair in a pizza. Ms McKenna deducted the price of the pizza from the bill and told them if they were not satisfied to just pay for the drinks, which they did, she amended the bill accordingly. Shortly after there was a financial audit and the employee felt she was under suspicion in relation to this complimentary bill and that her integrity was being called into question.

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68 Section 1 Unfair Dismissals Acts 1977-2001 (Ireland).  
69 An Employer v A Worker [DET No EED053] Labour Court; Section 2 Employment Equality Acts 1998-2015 defines ‘dismissal’ as: ‘includes the termination of a contract of employment by the employee (whether prior notice of termination was or was not given to the employer) in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled to terminate the contract without giving such notice, or it was or would have been reasonable for the employee to do so, and “dismissed” shall be construed accordingly.”  
70 This test was established by Lord Denning Mr in Western Excavating (ECC) Ltd v Sharp [1978] (United Kingdom) GB, 1978) 332.  
71 Byrne v Furniturelink International Limited [UD70/2007].  
73 Gibbons v W F Rational Built-in Kitchens Ltd [UD406/87].  
74 Nolan v Hermans Limited [UD43/87].  
75 McKenna v Pizza Express Restaurants [UD1062/06].  
76 [UD1062/06].
The employer suspended her and escorted her off the premises, and then scheduled a disciplinary hearing. She became unwell and could not attend the scheduled date and felt her employer unreasonably refused to reschedule the hearing during a difficult pregnancy. The court accepted that she had been constructively dismissed and described her employer’s conduct as inappropriate and disproportionate and that she was humiliated by their behaviour. Ms McKenna was awarded over €60,000 for the constructive dismissal. Again, much of the content of the action could equally be described as bullying of Ms McKenna, however, by litigating as a constructive dismissal action she was able to obtain a remedy without the burdens of a personal injuries action.

The second test for constructive dismissal is the reasonableness test which may be used as an alternative or in conjunction with the contract test. The Labour Court defined the reasonableness test as follows:

“This test asks whether the employer conducts his or her affairs in relation to the employee so unreasonably that the employee cannot fairly be expected to put up with it any longer. Thus, an employer’s conduct may not amount to a breach going to the root of the contract but could, nonetheless, be regarded as so unreasonable as to justify the employee in leaving.”

In this scenario the employee alleges that the employer’s actions or conduct are so serious or so unreasonable as to effectively force the employee to leave. In effect the unreasonable or inappropriate behaviour of the employer makes it impossible for the employee to remain in employment. In Kukstaite v Shedan Ltd the Equality Officer noted that the employee had raised a concern about discriminatory treatment, one she was entitled to raise but one which had resulted in a fundamental change to her employment. She was moved to a different work location, into a different work environment and into a different job. The Equality Officer held that these actions ensured that it was reasonable for the complainant to resign.

Arguably the most successful and high profile action for constructive dismissal arising from bullying behaviour is that of Allen v Independent Newspapers. In this case Liz Allen, the former crime writer with the Sunday Independent brought a case before the Employment Appeals Tribunal arguing that the bullying she had been subjected to amounted to grounds for constructive dismissal. She contended during the case that both the editor and the assistant editor had bullied her. During the case she claimed that she was ignored in meetings and that one colleague refused to communicate with her. Moreover she was hired as a crime correspondent and in August 1999 she was asked to write the ‘Keane Edge’ which she contended would amount to a change in the nature of her employment. Her refusal to write the ‘Keane Edge’ resulted in her being summoned to a meeting and she was required to be in attendance in the office from 10am daily, thus further impacting her role as crime correspondent. She also felt that her role as crime reporter had been undermined as a new reporter had been hired to also deal with criminal matters. She had repeatedly tried to raise the issues with her superiors with little success. She contended that the conduct of Independent Newspapers undermined her confidence and health.

77 An Employer v A Worker [DET No EED053] Labour Court.
78 Kukstaite v Shedan Limited [DEC-E2013–193].
79 Allen v Independent Newspapers [UD641/00].
It was held that it was reasonable in all the circumstances of the case for Ms Allen to terminate her employment. In this case Ms Allen was awarded 78 weeks pay as compensation.\textsuperscript{80}

Despite the successes in actions of this kind the risk taken by the employee in relying on them is high, and even more so when we consider the burden of proof in constructive dismissal cases. Employees must not only prove the facts of the case but also justify her/his decision to resign. It seems from the case law that employees should at first instance use the appropriate internal grievance procedures,\textsuperscript{81} and it is only when there is no appropriate result from this, should the employee consider resignation. While it is important that this remedy is available to an applicant it is clear it is a high risk strategy and one that should only be considered when all else fails.

5. Soft Law Mechanisms

In addition to the potential to take legal action as described above, employees can seek to rely on Codes of Practice either in resolving bullying actions without taking legal action, or in evidence should legal action be taken. As a mechanism for accessing justice, Codes of Practice are very useful in providing a standard for employers to adhere to and can be used in evidence should a case be taken. Their principal weaknesses however, are their voluntary nature and the fact that they do not confer any legally enforceable rights. As discussed above, Ireland has two Codes of Practice that deal specifically with workplace bullying, one published by the Health and Safety Authority in 2007 (HSA Code) and one by the Labour Relations Commission in 2002 (LRC Code). Their provisions follow a pattern of escalating formality and broadly offering the same three stages for resolving bullying disputes: an informal process, a formal process and where necessary, an investigation. The HSA Code is by far the more comprehensive offering a detailed explanation of the procedure at each stage. A weakness however, in the case of the bullying Codes is their lack of congruence which creates an unnecessary layer of incoherence in attempting to navigate bullying claims. For instance in both Codes the starting point is the nomination of a ‘contact person’ but their roles in both Codes are not the same. In the HSA Code this person has a listening and advisory role but is explicitly not permitted to act as an advocate for either party.\textsuperscript{82} The LRC Code has a similar starting point in the nomination of a ‘contact person’. However, in the LRC Code the ‘contact person’ is responsible for the first-step Informal Process in attempting to informally resolve the issue between the parties. It is unclear why two Codes of Practice are necessary and duplication and confused language in this area does little to strengthen the position or access to justice for either the complainant or the alleged bully. Where legal action is taken and Codes are used to support the action of the litigant or indeed the defendant, the discussion of personal injuries action above demonstrates that courts rely almost exclusively on the LRC Code in their interpretation of the nature of bullying without recourse to the greater detail afforded by the HSA Code. This operates to the detriment of claimants as was seen in the \textit{Ruffley} case, where a narrow interpretation of bullying was applied.

\textsuperscript{80} See also Farrell Wesley, ‘The Law of Workplace Stress, Bullying and Harassment: Part 1’ (2002) 7 The Bar Review.

\textsuperscript{81} \textit{Keogh v Green Isle Foods} [UD516/07].

\textsuperscript{82} Health and Safety Authority, ‘Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work’ (National Authority for Occupational Health and Safety), 5.3.
Conclusion

The myriad of avenues for taking a bullying action and their restrictions in defending the rights of employees has left Irish law in a very unsatisfactory position with respect to bullying claims. Personal injuries actions place high burdens in terms of demonstrating a medically recognised psychiatric illness, causatively linked to the bullying behaviour. Discriminatory harassment provisions require a link with a discriminatory ground that may not always be possible to establish. Constructive dismissal actions require workers to walk out of their jobs and gamble that they fit within the provisions of that action. Other soft-law measures are legally unenforceable. That there is no legally binding provision is perhaps not surprising. The 2001 Task Force Report did not support the introduction of a legislative provision.\(^83\)

It is clear also that the employers’ unions are hostile to any development in this direction. The 2005 Task Force Report noted that the Irish Business and Employers’ Confederation opposed the much more minor recommendation of that body to have bullying included as a risk within employers’ workplace Safety Statements.\(^84\) It is likely that there would be trenchant opposition from this direction to have any more legally binding provision introduced. However, despite this the 2005 Task Force Report in acknowledging the unsatisfactory position of Irish law advised in favour of the introduction of greater guidelines for employers. The resulting Code of Practice gives detailed guidance in relation to the treatment of bullying complaints.\(^85\) However this Code as with all Codes of Practice is not legally binding and it is questionable to what extent it guides the courts in the determination of personal injury bullying claims.\(^86\)

The 2005 Task Force Report also detailed a mechanism to deal with bullying actions, with the Labour Relations Commission (now the Workplace Relations Commission) as the central body to deal with claims.\(^87\) The proposed process emphasised mediation with recourse to the services of a Rights Commissioner only where mediation clearly failed. The proposal envisaged an attempt at internal mediation as a first stage, with recourse to the internal dispute resolution mechanisms in the event that mediation failed. In the event that this was unsuccessful the matter should be taken externally, to the Labour Relations Commission, now the Workplace Relations Commission. In the event that mediation failed at that level the case would be referred to a Rights Commission for determination and from there if necessary to an appeal process. The process has been criticised for being excessively lengthy, involving too many stages and lacking in clarity as to the final outcome of the process.\(^88\) If adopted in its proposed form it would certainly have the distinction of being a process without a legislative underpinning.

A more coherent approach, it is argued, would be to take as a starting point the acceptance that bullying is an attack on a workers’ right to dignity in the workplace and to legislate on that basis. The underlying principle would be that bullying behaviour as an undermining of an employee’s dignity at work is unlawful and that employees subjected to it should be entitled to a remedy. It is proposed that the model used for discriminatory harassment could be used as a template for how an action for bullying could be framed. The current definition in the LRC Code given its broad acceptance could be used as a definition

\(^85\) Health and Safety Authority  Code of Practice on the Prevention and Resolution of Bullying at Work 2007.
\(^86\) See Una Ruffley v Board of Management of St Annes School [2015] IECA (Court of Appeal) discussed above.
for bullying, with the language of the HSA Code used to augment the definition for purposes of clarity and to guide the adjudicating body. As with legislation that has been introduced in other common law jurisdictions, the provision could make it clear that the exercise of reasonable management functions does not constitute bullying. As with discriminatory harassment provisions and with constructive dismissal actions employees should not be required to show a medically recognised psychiatric injury in order to bring a claim. This requirement as is evidenced in the personal injuries action discussed above, places too high a burden on employees and provides scant regard for dignity at work if that dignity is protected only in the event of a resulting medically recognised psychiatric illness. Reflecting the harassment provisions, bullying behaviour should be prohibited where it occurs at work or in the course of the employee’s employment. A feature of harassment legislation in terms of a remedy is the ability to award compensation and to recommend action on the part of employers. Given the similarity of the nature of harassment and the nature of bullying this would also be a worthwhile inclusion in bullying legislation, where the adjudicating body, could where appropriate, require training, awareness raising or the development of appropriate tools within the workplace to address a bullying culture or bullying behaviour. Limitation periods, dating from the last incidence of bullying, could be similar, currently standing at six months from the date of the last incidence with provision to extend for another six months with ‘reasonable cause’. It is proposed that the Workplace Relations Commission and not the courts act as the adjudicating body for claims. It is hoped that this would allow for a less adversarial, less costly and speedier resolution of disputes. The development of a distinct legislative provision is a long overdue development in addressing workplace bullying. It falls to the legislature to take action in introducing such a measure, both to address the failings of the current system and to provide victims of workplace bullying with an effective mechanism to access justice.

See for example the Australian Fair Work Act 2009 (Cth) sections 789FA – 789FI.
The Judicial Review of Local Authority Decisions – Limitations for Citizens and Possible Alternatives

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Abstract

Local authorities exercise a wide range of powers that can have a significant effect on the fundamental and constitutional rights of individuals. The traditional means by which a citizen can challenge a local authority decision is through the courts via judicial review. However, local government in Ireland has changed in recent year with the advent of New Public Management and increasingly adopts a corporate approach. These developments in how local authorities operate have not been matched by developments in administrative law. The traditional, hierarchical conception of law, with the courts at the centre, cannot easily accommodate these new ways of working, which poses the question - ‘does judicial review practically control the actions of local authorities for the average citizen by giving them recourse to justice?’ This paper explores that question. It examines how judicial review operates in practice, highlighting some of the barriers faced by individuals in getting access to justice and explores the question of what impact judicial review actually has on local authorities. It concludes by looking at some of the alternatives that might be considered for judicial review as a mechanism by which members of the public can challenge decision in local authorities.

Keywords

Judicial Review, Local Authorities, New Project Management, Barriers to Justice.
Introduction

The actions of local authorities have a significant impact on the daily lives of citizens and their civil rights in a wide range of areas; granting or refusal of planning permission, allocating grants, drawing up development plans, allocating social housing, in addition to carrying out a raft of regulatory functions.\(^1\)

The traditional means by which a citizen can challenge a local authority decision is through the courts via judicial review, but given the changes that have occurred in local government in recent years the question has to be asked– ‘does judicial review practically control the actions of local government for the average citizen by giving them recourse to justice?’

This paper will explore that question. It will begin by looking at the nature of local government in Ireland and the impact of New Public Management. It will then examine how judicial review operates in practice, highlighting some of the challenges faced and explore the question of what impact judicial review actually has on local authorities. The paper will conclude by looking at some of the alternatives that might be considered for judicial review as a mechanism by which members of the public can challenge decision in local authorities.

Local Government in Ireland

Local government in Ireland performs four main roles: 1) a democratic role; 2) a provider of services role; 3) an agency role for central government and 4) a regulatory role.\(^2\) In recent years however, there has been a gradual hollowing out of a number of these functions, in particular in the area of service provision; for example water supply and sewage is now managed by Irish Water and road building by the National Roads Authority. Increasingly, local government undertakes an agency function for central government. Despite the fact that a significant amount of government expenditure is spent at a local level, there is a very low level of fiscal autonomy for local authorities.\(^3\) Local government remains subject to a high degree of central control by national government as has been the case historically.\(^4\)

The manner in which local authorities are managed and go about their work has changed in recent years, particularly with the advent of New Public Management\(^5\) (NPM). Under this corporate approach, the public are viewed as customers with limited consumer rights, as opposed to citizens with a broader range of social rights.\(^6\) NPM places a focus on private sector type management processes and has seen the introduction of increased competition, corporatised units, performance indicators and measurement.

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Central to the approach is a focus on cutting costs and doing less with more.\(^7\) Recent government policy in the area of local government reform such as *Putting People First- Action Programme for Effective Local Government*\(^8\) contains much of the language of NPM. Under the Local Government Reform Act 2014\(^9\) there is an expanded role for local authorities in economic development and promotion, and in stimulating and enabling innovation. City and County managers have been replaced by Chief Executives.

Cousins has suggested that under NPM there is consultation with, as opposed to any meaningful transfer of power to, public users of services.\(^10\) Furthermore, in terms of the mechanisms for consultation that have been put in place, it is debatable if bodies such as City Development Boards and Strategic Policy Committees have facilitated real input from local communities into local decision making. It remains to be seen if the establishment of Local Community Development Committees and the drawing up of Local Economic and Community Plans under the Local Government Reform Act 2014 will improve the situation.

Under NPM, the focus has shifted from accountability to efficiency and effectiveness under a corporate approach with a focus on enabling partnership working and a significant contracting out of activities. Human rights and constitutional rights frequently just get lip-service and policies and strategic plans are ‘bullet-proofed’ to ensure they can withstand legal challenge.\(^11\) Local authorities increasingly do their work with and through others and have become ‘enabling authorities’.

Local authorities now operate in a variety of different spheres; public, market and community, all of which have competing legitimacy and accountability criteria. With the increasing fragmentation of governance, traditional forms of accountability, be they democratic or legal, are no longer sufficient, particularly when it comes to individual rights.\(^12\)

These developments in how local authorities carry out their work have not been matched by developments in administrative law.\(^13\) It is debatable if the traditional, hierarchical conception of law, with the courts at the centre, can easily accommodate new approaches to working that have been adopted by local authorities. It is suggested that the process of judicial review is inadequate to provide meaningful recourse to justice in this new environment.

The problem can be summarised as follows: there exists a tension between the legal rationality of the judicial control of the administrative actions of local authorities and their impact on human rights on the

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9. Local Government Reform Act 2014 Section 49.
one hand and the bureaucratic and manageralist rationality of local authority decision making on the other.\textsuperscript{15} There exists a ‘cognitive dissonance’ between the two.\textsuperscript{16}

So what has been the response of the courts to these developments? Traditionally the courts in this jurisdiction have shown significant deference to the demands of bureaucratic efficiency and rationality.\textsuperscript{17} While the need to give due consideration to issues of expertise, competence or legitimacy must be acknowledged, the courts do have a duty to uphold constitutional rights.\textsuperscript{18} However, the full impact of the Supreme Court’s decision in \textit{Meadows v Minister for Justice, Equality and Law Reform},\textsuperscript{19} which introduced a general requirement for a proportionality analysis to be undertaken in administrative actions where there are individual rights implications,\textsuperscript{20} is yet to be seen.

But, before exploring the operation of judicial review specifically in a local government context it is appropriate to first look at judicial review more generally.

\textbf{Judicial Review}

\textit{‘Judicial review is concerned with the lawfulness of decision making in the public field.’}\textsuperscript{21}

Public bodies, including local authorities, have the power to make decisions that can have a significant effect on the rights and lives of individuals.\textsuperscript{22} The scope of governmental power in Ireland, either direct or indirect, has in recent years increased dramatically and it now has much more impact on society and individuals that it had previously.\textsuperscript{23}

To ensure the principle of legality, ‘every executive or administrative act which affects legal rights, interests or legitimate expectation must be legally justified’.\textsuperscript{24} Furthermore, where an administrative body makes a decision that is legally binding on an individual, the individual must have access to the courts to challenge its validity.\textsuperscript{25}

There are a variety of grounds under which a decision of a public body may be found to be unlawful. The principles underlying judicial review were succinctly outlined by Clarke J in \textit{Rawson v Minister for Defence}\textsuperscript{26} [2012] IESC 26 per Clarke J.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} ibid 27.
\item \textsuperscript{16} See Joanne Scott and David M. Trubeck, ‘Mind the Gap: Law and New Approaches to Governance in the European Union European’ (2002) 8 Law Journal 18, for a discussion of the challenges posed for the law by new approaches to governance at a European level.
\item \textsuperscript{18} Aileen Kavanagh, \textit{Constitutional Review under the UK Human Rights Act} (Cambridge University Press 2009) 186.
\item \textsuperscript{19} \textit{Meadows v Minister for Justice, Equality and Law Reform} [2010] 2 IR 701.
\item \textsuperscript{21} \textit{Rawson v Minister for Defence} [2012] IESC 26 per Clarke J.
\item \textsuperscript{22} Gerard Coffey, \textit{Administrative Law} ( Roundhall Thomas Reuters 2009) 15.
\item \textsuperscript{23} Gerard Hogan & David Gwynn-Morgan, \textit{Administrative Law in Ireland} ( 3rd Edition Roundhall 1998) 770.
\item \textsuperscript{24} \textit{Browne v Attorney General} [2002] IEHC 47 per Kearns J.
\item \textsuperscript{25} \textit{Article 26 Referral of the Illegal Immigrants (Trafficking) Bill 1999} [2000] 2 IR 360 (SC) 385.
\end{itemize}
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Defence.\textsuperscript{26} Firstly a public body must have the power or jurisdiction to make the decision; secondly the decision must be made in accordance with fair procedures and according to the rules in place for making the decision concerned; thirdly relevant factors must be taken into account and irrelevant factors excluded from consideration and; fourthly the decision maker must arrive at a rational decision.

Local authorities are public bodies invested with powers which they must use for the benefit of the public.\textsuperscript{27} As bodies exercising public functions they are subject to judicial review.

Judicial review is the primary means through which government and public bodies are legally held to account. It is the law acting as a break on the actions of the state.\textsuperscript{28} Delaney has suggested that judicial review is ultimately concerned with two questions: ‘How much discretion do public bodies have in decision making?’ and ‘How willing are the courts to intervene to overturn administrative decisions?’\textsuperscript{29}

Curial Deference

In terms of how willing the courts are to overturn administrative decisions, it has been argued by academics that there has been a growth in curial deference by the courts in Ireland in recent years.\textsuperscript{30} This was evident in \textit{O’Keefe v An Bord Pleanála},\textsuperscript{31} where the view of the court was that it should not interfere with the expertise and specialised skills of the planning authorities.\textsuperscript{32} It was also quite evident in \textit{ACT Shipping (PTE) Ltd v Minister for the Marine} where Barr J stated that where an authority is acting \textit{intra vires}, the courts should be loath to interfere ‘particularly where the decision maker is acting within its own area of professional expertise’.\textsuperscript{33} The courts have tended to show significant deference to ‘bureaucratic efficiency and rationality compared to the principles of administrative law’,\textsuperscript{34} but it is critical, if citizens’ rights are to be upheld, that the ‘court must not shrink from its fundamental duty to do right for all manner of people.’\textsuperscript{35} It is the responsibility of the courts to ensure that administrative bodies act \textit{intra vires} and that their decisions respect the constitutional rights of citizens\textsuperscript{36} notwithstanding the need to acknowledge possible limits on their expertise, competency or legitimacy.\textsuperscript{37}

\textsuperscript{26} Rawson v Minister for Defence [2012] IESC 26.
\textsuperscript{27} Patrick S. Butler, \textit{Keane on Local Government} (First Law 2003) 46.
\textsuperscript{30} Ibid 23.
\textsuperscript{31} [1993] 1 IR 39.
\textsuperscript{32} Curial deference was also evident in \textit{Orange Communication Ltd v Director of Telecommunication} (No 2) [2000] IESC 79; [2000] 4 IR 159 and \textit{Henry Denny & Co. (Ire) v Minister for Social Welfare} [1998] 1 IR 34.
\textsuperscript{33} \textit{ACT Shipping (PTE) Ltd v Minister for the Marine} [1995] 3 IR 406.
\textsuperscript{35} \textit{R v Ministry of Defence, ex p. Smith} [1996] QB 517, 556 per Bingham MR.
The Problem of Discretion

The issue of discretion in administrative decision-making brings curial deference in judicial review into sharp focus. Writers such as Dicey have considered discretion as the antithesis of law viewing it as the arbitrary use of power. However, discretionary power is exercised by local authorities on a regular basis in a variety of area such as the allocation of social housing. Indeed the courts have found that there must be some scope for discretion in decision making. In *McDonald v Dublin Corporation* the Supreme Court held that local authorities, in developing policies for the allocation for housing, could not make them so rigid as to exclude allocation on a discretionary basis.

Biehler neatly summarises the challenge facing the courts thus: ‘Essentially, the courts must seek to ensure that they strike the correct balance between upholding rights to a sufficient degree and avoiding taking an overly intrusive approach towards the exercise of administrative discretion’.

While the need for some flexibility and discretion in decision-making must be acknowledged, the question of how such discretion can be overseen and how arbitrary decisions, even if they are *intra vires*, can be minimised. It is questionable if judicial review is an adequate and accessible mechanism for citizens to challenge decisions that are manifestly unfair.

Reasons, Reasonableness and Proportionality – Judicial Review and Local Authorities

There have been a number of decisions in judicial review cases in recent years that, at least theoretically, can be viewed as positive developments in terms of making local authorities accountable for their decision making. Both *Rawson v Minister for Defence* and *Mallak v Minister for Justice, Equality and Law Reform* have made it a clear requirement for bodies subject to judicial review to give reasons for their decisions. These decisions are likely to have a significant impact on local authorities in that they will be required to provide citizens with reasons for decisions that affect them. In the decision of the High Court in *Christian v Dublin City Council*, it was found that there was an obligation on elected members to give reasons for their decisions when they were made against the Chief Executive’s advice. The case concerned the zoning of land under the Dublin City Development Plan 2011-2017. Interestingly, from a local authority perspective, the decision saw judicial review proceedings being applied to the democratic function and arguably will result in a further swing of power towards the executive.

Councillors, in theory at least, have an important democratic role to play in local government in scrutinising the actions of the executive and holding them to account. However, with increased contracting out and
with the implications of *Christian* raising levels of power now rests with the executive, in particular the Chief Executive. The corporate approach, it has been argued, has little regard for the democratic basis of local government.

The development of the requirement to act reasonably began with the case of *Associated Provincial Picture House Ltd v Wednesbury Corporation* and was adopted into Irish law in *State (Keegan) v Stardust Compensation Tribunal*. The circumstances in which a court can find a decision unreasonably was subsequently restricted further in *O’Keefe v An Bord Pleanála*.

The tests in *Keegan* and *O’Keefe* may have served to prevent judicial intrusion into the administrative decision-making process, but arguably they have done little to ensure the protection of fundamental rights. However the case of *Meadows v Minister for Justice, Equality and Law Reform* saw a significant development and introduced the proportionality principle into the requirement to act reasonably. In *Meadows* the Supreme Court recognised proportionality as a basis for challenging administrative decisions which have an impact on fundamental rights.

In that decision Fennelly J discussed the reach of the state and the impact that administrative bodies can have on individual citizens, observing:

> ‘The modern state confers an enormous range of decision-making powers on a variety of bodies. Such bodies carry out and supervise vast areas of the work of government and of economic and social life. Their decisions routinely affect the lives of almost everyone. The powers they exercise in many cases affect the fundamental and constitutional rights of individuals’.

As a result of the decision there is now a general requirement for proportionality analyses in all administrative actions that have individual rights implications. However, the burden of proof for

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47 Patrick Birkenshaw, *Grievances, Remedies and the State* (Sweet and Maxwell 1994) 89.
48 *Associated Provincial Picture House Ltd v Wednesbury Corp* [1948] 1 K.B. 223.
49 *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 142.
56 [2010] IESC 3, per Fennelly J at 38.
establishing unreasonableness in a given decision lies with the party alleging it, according to Fennelly CJ in *P. & F. Sharpe Ltd v Dublin City and County Manager*. This, it is suggested, can be seen as a significant obstacle to a citizen challenging the decision of a local authority on reasonableness grounds.

### European Convention on Human Rights

The introduction of the European Convention on Human Rights Act in 2003 (ECHR) has meant that the courts have had to apply greater scrutiny to administrative action to ensure the fundamental rights provided for by the Convention are protected. In *Pullen v Dublin City Council (No 2)*, it was found that when a public body applies discretion in its decision making it is required to do so in a manner that has least impact on an individual’s rights under the Convention. Interestingly an appeal to the Supreme Court by Dublin City Council was subsequently withdrawn. Both in *Pullen* and in *O’Donnell v South Dublin County Council* substantial damages were awarded for breach of rights under the Convention. The impact of the ECHR was further seen in *Donegan v Dublin City Council* and *Dublin City Council v Gallagher*.

### Irish Human Rights and Equality Commission Act 2014

The enactment of the Irish Human Rights and Equality Commission Act 2014 introduced a public sector equality and human rights duty. The Act has potentially wide reaching effects and has the potential to impact significantly on how local authorities carry out their various functions.

However, the key shortcoming in the legislation is that there is no direct complaint mechanism available to a member of the public who feels that their rights have been breached. Rather, it is up to the Irish Human Rights and Equality Commission to take a public body to task for failing to uphold its obligations under the Act. It would however appear to be open to an individual to seek redress by way of judicial review.

### Contracting out of Local Authority Services and the Scope of Judicial Review

Recent years have witnessed an increased instance of contracting out of services and functions by local authorities. As a result, the line between state and non-state is becoming increasingly blurred. Certain bodies although technically private, now exercise significant regulatory power. These developments raise very real challenges for a member of the public seeking redress in the event of an abuse of power by a private body exercising a public function. In such cases, where there is no adequate private law
remedy, there is an argument that the decisions of such bodies should be subject to judicial review.\textsuperscript{65} Hogan and Gwynn-Morgan suggest that some clarity might be brought to the area if the ideas contained in the judgement in Foster v British Gas\textsuperscript{66} were to be applied in the Irish courts.\textsuperscript{67} In that case the Court of Justice suggested that as a rule, judicial review might lie against ‘...organisations or bodies which were subject to the authority of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals.’\textsuperscript{68}

**The Impact of Judicial Review on Local Authorities**

The traditional view amongst scholars is that judicial review in general does not bring about significant positive change in public bodies.\textsuperscript{69} Where judicial review does result in change, it can be negative with public bodies acting defensively and adopting ‘tick box’\textsuperscript{70} or ‘bullet-proofing’\textsuperscript{71} approaches to implementing judgements. Halliday argues that there are three main barriers to judicial review exerting influence on administration: the decision makers, the decision-making environment and the law itself.\textsuperscript{72} Barriers, he suggests, will be higher where decision-makers are ignorant of the law and will consequently be less likely to comply with the law. The decision-making environment can also exert significant influence and the demands to comply with the law may regularly be trumped by other normative demands\textsuperscript{73} – demands such as achieving performance indicators and strategic objectives frequently found in local governments operating under the ‘New Public Management’. Finally, compliance with the law will be lower where the decisions of the courts are unclear, uncertain or confusing.

Furthermore, as judicial review takes a dispute out of the administrative arena and into the courts it is challenging to develop any shared understanding; dialogue or persuasion is not facilitated as pointed out by Sunkin:\textsuperscript{74}

\textit{‘The relationship between judicial review and government is typified by an absence of dialogue and by consequential dissonance between judicial requirements and the realities of administration.’}\textsuperscript{75}

\begin{itemize}
  \item De Blacam Judicial Review (2nd edn, Tottle, 2009) 79.
  \item Gerard Hogan and David Gwynn-Morgan, Administrative Law in Ireland (3rd edn, Roundhall 1998) 772.
  \item Ibid 773.
  \item Ibid 337.
  \item Simon Halliday, Judicial Review and Compliance with Administrative Law (Hart Publishing 2004) 63.
  \item Ibid 31.
  \item Ibid 65.
  \item Ibid 61.
\end{itemize}
It is perhaps not surprising therefore that much previous research has found that judicial review does not exert significant influence on local government given that the courts are not really designed to bring about general changes in the performance of public bodies, but are rather primarily concerned with individual disputes. Furthermore, the remedies available under judicial review are, in general, non-coercive declarations with compensation or damages rarely awarded.

So the question must be asked: can judicial review have a positive effect on the quality of local government services? Research by Sunkin et al in England and Wales looked at the performance of local authorities and the level of judicial review. They found that poorly performing local authorities experience greater levels of challenge and secondly that increased levels of challenge can act as a driver for improvement in performance. Their research however does not establish precisely how and why judicial review drives change in local authorities.

Halliday suggests that the importance of judicial review can only be assessed in terms of the instrumental effect it has on public bodies, that is the change it brings about in the way in which they deliver services to the public. This assessment can only be made by undertaking empirical research of the response of public bodies to judicial scrutiny, certainly something that could usefully be undertaken in an Irish context.

### Barriers to the public – Cost, standing and remedies

The primary method available to remedy maladministration is judicial review, but as Hogan and Gwynn Morgan point out ‘the High Court – and it is usually only the High Court which has jurisdiction – is a relatively expensive and inaccessible place.’ Their view was recently echoed by Barret J in the High Court who described the Irish Court system as ‘fearfully expensive’, ‘alien’ and ‘truly accessible to increasingly few.’ Furthermore, the complexity of judicial review can mean that outcomes can be quite unpredictable.

For an individual citizen seeking to challenge the decision of a local authority, in some cases to enforce their fundamental rights, perhaps the single biggest hurdle is the issue of costs. The prospect of being faced with litigation costs of thousands of euros is surely a factor in the low level of maladministration cases that come before the courts. The fact that civil legal aid is not available for the judicial review

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77 ibid 338.
78 ibid 337.
79 Their research was based on the numbers of judicial reviews of 409 local authorities and their performance under the Comprehensive Performance Assessment, which is carried out by the Audit Commission.
80 ibid 341.
83 Irish Times Editorial, ‘Judge says courts ‘fearfully expensive’ and ‘accessible to few’ The Irish Times (Dublin, 25 November 2015).
84 Patrick Birkenshaw, Grievances, Remedies and the State (Sweet and Maxwell 1994) 93.
of administrative decisions undoubtedly has the effect of limiting access to justice for those without sufficient means.

The issuing of a protective cost order in *Max Schrems v Data Protection Commissioner* by Hogan J, whereby the costs of the applicant were capped at €10,000, may offer some hope for judicial review in public interest cases, but cost looks set to continue to be a barrier in individual cases.

**Locus Standi and Public Interest Litigation**

A further barrier is that of *locus standi*. A claim for judicial review will not be granted unless the individual concerned can demonstrate that they have sufficient interest in the matter to prevent the courts becoming ‘a happy hunting ground of the busybody and the crank’.  

Given that the actions of a local authority can affect the public at large, but an individual may not have the resources to take a case, in certain situations it may fall to a non-governmental organisation to challenge systemic failures by taking test cases. The rules on *locus standi* can be relaxed somewhat if it can be demonstrated that there is a genuine and valid public interest for doing so as was the case in *Lancefort Limited v An Bord Pleanála* and *Irish Penal Reform Trust Limited v the Governor of Mountjoy Prison.*

However, as Gerry Whyte has suggested, although Irish law is developing an ability to accommodate public interest litigation, the majority of litigation is still focused on the vindication of individual rights.

**Judicial Review Remedies**

It is important to recognise that under judicial review there is no absolute right to a remedy, even if it is established that a public body has acted unlawfully. The available remedies, certiorari, prohibition and mandamus, are at the discretion of the courts. So even if an applicant establishes the grounds for judicial review, the court must also be satisfied that ‘it would be just and proper in all the circumstances to satisfy the relief sought’.

**Beyond judicial review? - Ombudsmen, Complaints, Administrative Appeals Tribunals**

So, given the shortcomings of judicial review as a remedy for citizens in relation to local authority decisions, what are the possible alternatives? Some commentators have argued that the redress mechanism that are made available in relation to the decisions of local authorities should be informed by the fact
that civil legal aid is not available to challenge such decisions.\(^92\) There are a variety of instruments of accountability, including Ombudsmen and tribunals, which sit alongside the courts and have expanded the scope of administrative law in recent years.\(^93\)

### Office of the Ombudsman

In addition to the main Office of the Ombudsman\(^94\), there also exists a range of sectoral Ombudsmen in Ireland.\(^95\) It is interesting to note that in the UK there exists a Local Government Ombudsman, which deals specifically with complaints against local councils. The establishment of such an office in Ireland is something that warrants consideration.

It has been suggested the approach of the Ombudsman, which is more flexible and inquisitorial, allows them to get closer to the administrative details of a citizen’s case, having unlimited access to files and information.\(^96\) Furthermore, the approach to delivering a remedy is more likely to deliver a practical result satisfactory to all parties, unlikely to be delivered by action through the courts.\(^97\) In 2014, 25% of all complaints made to the Ombudsman related to local authorities.\(^98\)

### Ombudsman Remedies

In the majority of cases, the payment of money is the remedy provided by the Ombudsman, although the amounts are generally quite small, but the key advantage of the office is its flexibility: ‘Where the complaint centres on an issue of fairness rather than of legality, the office may provide a remedy not available at law.’\(^99\)

Essentially, the Ombudsman is designed to provide a remedy where there has been maladministration by a public body, even where it does not constitute a breach of the law.\(^100\)

### Ombudsman and policy change

Where the Ombudsman upholds a complaint, it can direct the public body in question to undertake a review of similar cases and can therefore have a systemic impact, an impact that is by no means guaranteed following judicial review.\(^101\) At a more general level, the intervention of the Ombudsman can

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92  Varda Bondy and Andrew Le Seur, *Designing redress: a study about grievances against public bodies* (Public Law Project 2012) 5.
94  As established under the Ombudsman Act 1980.
95  Amongst others there is an Ombudsman for Children, for the Defence Forces, the Garda Síochána Ombudsman Commission (GSOC) and in the private law field there is the Pensions Ombudsman and the Financial Services Ombudsman.
97  ibid 435.
100 ibid 434.
101 ibid 436.
bring about legislative change. The intervention of the office in relation to the unlawful deductions from the pensions of residents of public funded nursing homes played no small part in the referral of Re Article 26 and the Health (Amendment) (No 2) Bill 2004.\textsuperscript{102}

### Shortcomings and Limitations

The findings of any investigation by the Ombudsman are however not legally binding, which is a shortcoming of the office. That said, it is the norm for public bodies, including local authorities to comply with any the recommendations of the office. Although the office does publish a selection of its cases annually, it does not publish them all which could be seen as a deficiency in terms of justice being seen to be done in public and could undermine public confidence in the office.

### Complaints and Appeals Procedures

Most, if not all local authorities operate internal complaints, review and appeals procedures which are available to any member of the public unhappy with a decision that affects them.\textsuperscript{103} The availability of such remedies is not, however, always obvious. Such systems must be accessible and visible to the public, effective, user friendly and responsive if they are to be meaningful. How much faith members of the public have in internal appeal procedures or how often local authority decisions are reversed on appeal is unknown and would benefit from further investigation.

### Alternative Mechanisms

One possible alternative to judicial review would be the establishment of an administrative appeals tribunal along the lines of the Australian Administrative Appeals Tribunal.\textsuperscript{104} The Administrative Appeals Tribunal (AAT) conducts independent merits review of administrative decisions made under Commonwealth laws. Because the AAT looks at the facts, law and policy relating a given decision and arrives its own decision, the remedies available to it and the frame of analysis is much less restricted than those under judicial review.\textsuperscript{105}

In the UK, Independent Complaints Adjudication services have been established in a wide variety of public bodies\textsuperscript{106} including some local authorities.\textsuperscript{107} Under such arrangements, an agency working at arm’s length from the public body independently reviews complaints. Such a system may help add legitimacy to a public body’s complaints process.\textsuperscript{108}

\textsuperscript{102} Re Article 26 and the Health (Amendment) (No 2) Bill 2004 [2005] IR 105.
\textsuperscript{104} Established under the Administrative Appeals Tribunal Act 1975.
\textsuperscript{105} Fiona Donson and Darren O’Donovan, Law and Public Administration in Ireland (Clarus Press 2015) 28. A number of appeal bodies such as the Social Welfare Appeals Office already exist in Ireland.
\textsuperscript{106} Independent Complaint Adjudication services exist for services such as Office for Standards in Education, HM Revenue & Customs the Valuation Office Agency, The Insolvency Service, Land Registry, The National Archives to name but a few.
\textsuperscript{107} See for example Cambridge City Council.
\textsuperscript{108} Varda Bondy and Andrew Le Seur, Designing redress: a study about grievances against public bodies (Public Law Project 2012) 7.
Alternative Dispute Resolution approaches including mediation, arbitration and conciliation schemes may also offer a means by which to resolve disputes with recourse to the courts.

**Conclusion**

An absence of adequate redress mechanisms can seriously undermine the legitimacy of an administrative body. Grievance redress is important not only for citizens, but also for local authorities and is an essential feature of accountability.\(^{109}\) Indeed, redress mechanisms can be of significant value to public bodies themselves and can facilitate learning in relation to decision-making and can help define the legal powers of a public body.\(^{110}\)

This paper has outlined some of the shortcomings of judicial review as a redress mechanism in relation to local authority decisions and has explored some possible practical alternatives.

However, it is important not to lose sight of the fact that getting decision-making right in local authorities in the first instance is as, if not more, important than having appropriate redress mechanisms available.\(^{111}\)

> ‘Just as health is not found primarily in hospitals or knowledge in schools, so justice is not only to be found in official justice-giving institutions. Ultimately, access to justice is not just a matter of bringing cases to a judge, but of improving relations and actions between people.’\(^{112}\)

Notwithstanding the need to develop alternatives to judicial review, perhaps the ultimate challenge is to develop administrative decision-making systems in local authorities that are informed by principles of constitutional justice, fairness and a respect for human rights.

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Case Study: The Impact of Access to Justice
The Impact of Access to Justice

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Working in advocacy and policy can often be a long road. Whilst some cases can have immediate impact such as *McCann v. Monaghan District & Ors [2009] IEHC 276* which led to an almost immediate decision to strengthen the level of fair procedures and safeguards to debtors. Other cases can take years and years to complete and also years for the impact of the decision to be felt. For many years lawyers had questioned whether Section 62 of the Housing Act 1966, as amended, breached human rights as protected by Article 8 of the European Convention on Human Rights, and enacted by the European Convention on Human Rights Act 2003.

Section 62 was the mechanism local authorities used to recover possession of local authority homes. This legal mechanism was used in all situations, rent arrears; anti-social behaviour or where the local authority had refused an application of a household member to succeed to the tenancy of a deceased tenant. It was unfair as it did not afford the tenant or household member an independent and proportionate decision making procedure. Once the local authority decided to issue a notice to quit, and all of the documents had been issued and served correctly, there was nothing a judge could do but make an order for possession. Community Law and Mediation were involved in quite a number of cases relating to this process, including *Lattimore v. Dublin City Council [2014] IEHC 233*.

In 2012, the Supreme Court in the case of *Donegan v. Dublin City Council & Anor; Dublin City Council v. Gallagher [2012] IESC 18* declared that the procedure was incompatible with a person’s rights protected by the European Convention on Human Rights. Section 18 of the Housing (Miscellaneous Provisions) Act 2014 amended the process completely and whilst Community Law & Mediation expressed concern regarding the *replacement legislation* it is an improvement on Section 62.

One of the cases Community Law and Mediation have been involved in is a case involving a man who was trying to succeed to the tenancy of his late father at their family home. Shortly after the death of this man’s father, he made an application to succeed to the tenancy. This application was refused as the man was not listed on the rent account. This man continued to remain in his home for a further 8 years. As this man was not a ‘tenant’ the local authority refused to carry out very necessary and basic works to his home. Whilst the conditions in this man’s home were very poor, the alternative for him was homelessness. Despite numerous requests from himself and Community Law and Mediation to engage with him to offer him a tenancy and also to secure his home, the local authority refused to engage, however, allowed him to remain in the property.
In 2015, following the commencement of the Housing (Miscellaneous Provisions) Act 2014 and 8 years after the death of the man’s father, the local authority indicated that they were considering recovering possession of this man’s home and they intended to use the powers under the legislation relating to a succession of tenancy scenario. The local authority afforded him the right to make written submissions through Community Law & Mediation in advance of issuing District Court proceedings. The local authority considered the submissions and invited the man to a meeting. Following the meeting the man was offered a tenancy agreement and has since signed it. The local authority have also committed to carrying out the works in his home. The local authority decided not to engage any further in the District Court procedure to seek to recover this man’s home.

Community Law & Mediation played a number of important roles which contributed to this man securing a tenancy in his home, policy submissions; community education; casework; information and advice were all used to address this serious breach of human rights. The impact of the other cases led to a change in the legislation which extends fairer procedures to those living in local authority homes. In this case, the change in the legislation would have required the local authority to persuade the District Court, amongst other issues, that:

a. The local authority has grounds for the recovery of possession,

b. Recovery of possession by the local authority is a proportionate response to the occupation of the dwelling by the person concerned; and

c. It is reasonable having regard to all of the circumstances of the case for the Judge to make the order.

Instead, the local authority reviewed this man’s circumstances, with supporting documentation from Community Law and Mediation and offered him a tenancy. As already mentioned, you can walk a long road before you see real impact but this a fantastic example of impact and access to justice on a number of levels.
Book Review:
Adopting to Climate Change – Governance Challenges a map to decision making
Book Review: Adopting to Climate Change – Governance Challenges a map to decision making

Odran Reid

There is a widespread acceptance that climate change is the most significant challenge facing the world. 98% of scientists accept that failure to tackle global warming threatens the continued survival of life on planet. So why is there such difficulty in addressing policies to address climate change?

A new book launched in 2015, just before the December Climate Summit in Paris, edited by Dr. Deric Ó Broin and Professor Peadar Kirby entitled *Adapting to Climate Change: Governance Challenges* attempts to address this question. The book focuses on the questions of governance, how states, intergovernmental institutions, local authorities and corporate structures such as universities can address climate change on a scale that is global as well as local.

This book stresses the need for engagement with all facets of civic society through the development of dialogue and education. The political decisions that need to be taken are difficult. One only needs to witness the difficulties of achieving water charges in Ireland in the last seven years and the ongoing love affair with the car and cheap oil in the USA. To effect change the political process and democratic deliberation will be necessary if agreement is to be achieved with the electorate within democratic states. The alternative is conflict and failure.

In setting the context, Ó Broin and Kirby indicate that climate change poses major risks to society and the global economy. They point to 15,000 heat related deaths in France in 2013 and rising sea levels which exacerbated flooding in the US following Hurricane Sandy in 2012. Increased urbanisation in the world puts greater pressure on the use of energy and with some exceptions, this has happened with little regard to sustainable development practices. The Book claims that with the exception of geography, social science disciplines have not brought climate change into the core of their work or thinking. The longer the problem of climate change remains outside core thinking in all aspects of work and thinking, the more likely it is that “wicked problems” will emerge around policy implementation relating to climate and global warming.

Diarmuid Torney’s chapter gives an easy to read context of the politics of climate summits and the journey taken to get to the Paris Summit in 2015. He describes a road that is filled with incremental success, difficult choices averted and abject failure. The complexities of interests and competing demands
are addressed. Issues in countries that are poor and less developed are very different to those that emerge in those that are wealthy. The need for catch up development and to address the fast developing countries such as China and India need to be understood and addressed with some understanding, but with a view to learning from past mistakes in the developed countries. The recent progress being made by countries such as China and India in addressing climate change policies are acknowledged but it is noted that unless the concept of tackling climate change is embedded in its political culture, states will have trouble implementing change. The US, even with a President who has invested considerable political capital on climate change, has found it difficult to overcome attitudinal resistance and political blocking to policies address global warming. While the EU has been progressive and has increased its targets on reducing CO\textsubscript{2} emissions, it is not uniformly implemented within various states. There is a stark contrast between those states who are progressive on the issue of climate change like Sweden and Denmark, and laggards at the back of the class such as Ireland and Greece.

Conor Murphy uses an example from Ireland to show how localism can pull back actions to address the already evident impact of climate change. He looks at the resistance to Dublin City Council’s plans to build flood defences on the Clontarf promenade which were vigorously objected to by local residents. Change at a local level can be as difficult and as emotive as any policy issue addressed at a global summit. Introducing policies to address climate change will need both the involvement of the electorate and, if possible, their tacit approval.

Paul Price adds to this argument where he states that societal and attitudinal change are required from individuals and communities if we are to move away from “our addiction to cheap, future risking, fossil fuel energy and greenhouse gas food production”. This is easier said than done. While many in the policy community may get this imperative, but a dairy or beef farmer whose whole livelihood and way of life is dependent upon the agricultural industry will find moving to a less carbon intensive activity seriously problematic.

Kirby questions the capacity, capability and willingness of local governance structures to address the issues of climate change. He indicates that they will require substantial change and a commitment to engaging differently with people at a local level. Kirby stresses that there needs to be a commitment to democratisation of our society. Local government is under resourced, undervalued and lacking in power and direction.

In reviewing the Irish political capacity to address the changes necessary, Ó Broin, perhaps rather depressingly, concludes that it is not yet fit for purpose. He indicates that Ireland’s political culture and institutions remains “rurally–linked, social constructive, anti-intellectual, passive and very locally driven”. If only to prove this point, newly elected rural based Deputy Danny Healy-Rea, in contributing to the debate in the Dáil on climate change, gave the opinion that “only God controls the weather”. This alone is a fine advertisement why thinking people should read this book. Pre-empting this public representatives comments, Ó Broin quote’s from Pope Francis’s 2015 encyclical on the climate where he said:
“It is remarkable how weak international political responses have been. The failure of global summits on the environment make it plain that our politics are subject to technology and finance. There are too many special interests, and economic interests easily end up trumping the common good and manipulating information so that their own plans will not be affected”.

Perhaps Pope Francis and Deputy Healy-Rae should talk. But in the mean time Adapting to Climate Change: Governance Challenges, is a book anyone needing to know about the fundamental changes in thinking and institutional structures that have to be addressed in Ireland to effectively tackle climate change is a must read.

*Adapting to Climate Change: Governance Challenges* is edited by Deiric Ó Broin and Peadar Kirby, and is published by Glasnevin Publishing.

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