Legal Studies (2025), 1–20
doi:10.1017/lst.2024.29

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The Society of Legal Scholars

RESEARCH ARTICLE

The legacy of *Airey v Ireland*: family law distortion of civil legal aid

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(Accepted 20 August 2024)

Abstract
The Irish Civil Legal Aid Act 1995 allows a broad approach to civil legal aid, but cultural legacies distort civil legal aid towards legal remedies on marital breakdown. The genesis of the symbiotic relationship between civil legal aid and family law is explored through in-depth examination of archival materials related to *Airey v Ireland*, while modern day qualitative interviews with Legal Aid Board workers investigate how entrenched this distortion towards marital breakdown remains and how it manifests. This Irish experience demonstrates the need to consider how legal aid is dependent on and informed by other substantive areas of law, and the potential for certain legal areas to dominate, distorting national legal aid provision and discourse.

Keywords: legal aid; family law; *Airey v Ireland*; marital breakdown

Introduction

The constitutional importance of the marital family and social attitudes towards marital breakdown have shaped Irish legal aid services in a way that disproportionately prioritises private family law disputes. Article 41 of the Irish Constitution commits the state to protecting the institution of marriage as the basis of family life. Reflecting 1930s Catholic attitudes,[1] the marital family is placed on a pedestal, as the 'necessary basis of social order' imbued with 'inalienable and imprescriptible rights, antecedent and superior to all positive law'. The constitutional protection of marriage reflects a deep relationship between the Catholic Church, state and nation that developed during the nineteenth century.[2] Historically, Irish culture embraced the indissolubility of marriage, deeming Catholicism to be a key party of personal and national identity.[3] Article 41.3.2̊ of the Irish Constitution expressly banned the introduction of divorce until amended by constitutional referendum in 1995. Until the 1980s, inaccessible legal remedies based on British Ecclesiastical law were the only available option to regulate marital breakdown in Ireland.

†We are very grateful to the two anonymous referees and to Dr Laura Lammasniemi for their helpful comments and insights on earlier drafts of this paper. The qualitative interviews discussed here were funded through a Graduate Teaching Fellow Scholarship at the University of Liverpool and conducted in collaboration with the Legal Aid Board. The first author wishes to acknowledge and thank the Legal Aid Board for their support in this collaboration.

[1]JH Whyte *Church and State in Modern Ireland 1923–1979* (Dublin: Gill and MacMillan, 2nd edn, 1980) p 51; K Mullarkey 'Ireland, the pope and vocationalism: the impact of the encyclical *Quadragesimo* Anno' in J Augusteijn (ed) *Ireland in the 1930s: New Perspectives* (Dublin: Four Courts Press, 1999) p 106.

[2]V Malešević 'Religious regulation in Ireland' (2019) Oxford Research Encyclopaedia of Politics 1 at 2.

[3]For a more detailed discussion on the Irish state's relationship with marriage see D McGowan 'Governed by marriage law: an Irish genealogy' (2016) 25 Social & Legal Studies 311 at 315.

The Irish civil legal aid system developed as a policy reaction to the European Court of Human Rights (ECtHR) ruling in *Airey v Ireland*,[4] where the inaccessibility of legal remedies for marital breakdown was found to be in violation of Article 6(1). Civil legal aid was not connected to a more comprehensive idea of setting up a social state, as was the case in other jurisdictions.[5] Jenny Burley describes the Irish state as 'a reluctant provider of legal aid', arguing that this hesitancy was in part due to broader issues around economic growth in the post-colonial period and a lack of government action on any issues relating to social welfare in that period.[6] Today, the workload of the Irish legal aid service is dominated by divorce and judicial separation applications. This is in stark contrast to the priorities of legal aid in England and Wales, where LASPO[7] has greatly reduced the scope of legal aid for private family law proceedings.[8] In England and Wales for 2022–2023, the highest workload for civil legal aid case type completed was immigration and asylum (for legal help) and Special Children Act proceedings (for civil representation).[9]

Abel has argued that legal aid and family law have always been and always will be intertwined. For Abel, legal aid's focus on family matters may be seen as an attempt by the capitalist state to respond to the crisis of the breakdown of the family unit. Through this lens, divorce law is an element of welfare which sustains the fractured family so they may continue to perform their reproductive function.[10] This paper explores the relationship between civil legal aid and marital breakdown in Ireland. While legal aid is by its nature always dependent and informed by other substantive areas of law, it is vital to consider why and to what extent certain legal areas dominate in shaping national legal aid provision and discourse. This is a timely intervention, as the future of civil legal aid in Ireland is under review. A Working Group on Access to Justice in Ireland, set up by the Chief Justice in 2021, has highlighted the need for a comprehensive review and reform of the civil legal aid system including the eligibility criteria and the areas of law covered.[11] In 2022, the Minister for Justice, Helen McEntee, established a Civil Legal Aid Review Group to review the operation of the Civil Legal Aid Scheme which went to public consultation by online survey in April 2023.[12]

In-depth examination of archival materials related to *Airey v Ireland* demonstrates how initial civil legal aid provision was forged within the policies and structures of legal reforms providing for marital breakdown in the 1970s–1990s. The Irish Government's reaction to the *Airey v Ireland* litigation elided the general provision of legal aid with the immediate need to modernise family law and they became culturally entwined. Modern day qualitative interviews with Legal Aid Board workers explore how contemporary understanding of legal aid remains dominated by marital breakdown, in part because of need for court intervention to change marital status. It is argued that this continued domination is a distortion of civil legal aid provision. Although family law issues are hugely important and politically emotive, the failure to properly consider legal need in Ireland means that needs are unmet in many other areas of law. Reforming the civil legal aid system without acknowledging the imbedded influence of marital breakdown on the system, is likely to result in limited change.

[4]*Airey v Ireland* (Merits) (Judgment) ECtHR App No 6289/73 (9 October 1979).

[5]J Flood and A Whyte 'What's wrong with legal aid? Lessons from outside the UK' (2006) 25 Civil Justice Quarterly 80 at 81.

[6]J Burley 'Legal aid and family law in Ireland' (2000) 25 Alternative Law Journal 169 at 170.

[7]Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[8]See for example J Mant and J Wallbank 'The post-LASPO landscape: challenges for family law' (2017) 29 Journal of Social Welfare and Family Law 149–151; M Maclean and J Eekelaar *After the Act: Access to Family Justice after LASPO* (Oxford: Hart Publishing, 2019); R Blakey 'Assessing the availability of legal support through the "Help with family mediation" legal aid scheme' (2024) 46 Journal of Social Welfare and Family Law 82.

[9]Ministry of Justice 'Legal aid civil detailed statistics', https://www.gov.uk/government/statistics/a-guide-to-legal-aid-statistics-in-england-and-wales.

[10]RL Abel 'Law without politics: legal aid under advanced capitalism' (1985) 32 UCLA Law Review 474 at 565.

[11]The Chief Justice's Working Group on Access to Justice, Access to Justice Conference: 'Civil legal aid review: an opportunity to develop a model system in Ireland' (Office of the Chief Justice, 2023) pp 5–6.

[12]'Public consultation on the review of the Civil Legal Aid Scheme' (Government of Ireland, 8 December 2022), https://www.gov.ie/en/consultation/79e1d-public-consultation-on-the-review-of-the-civil-legal-aid-scheme/.

https://doi.org/10.1017/lst.2024.29 Published online by Cambridge University Press

1. Methods: assessing the long-term impact of *Airey* on civil legal aid provision

The current relationship between civil legal aid and family law is a long-term legal impact of *Airey v Ireland* as a piece of strategic litigation,[13] designed to improve women's experiences of marital breakdown. As Fischer-Lescano argues,[14] strategic litigation can have a stabilising effect on prevailing political and juridical systems. *Airey* bolstered existing legal policy that marital breakdown should always require access to court adjudication, and thus civil legal aid provision is essential. *Airey* had a multidimensional impact,[15] leading to material change for Mrs Airey, direct legislative change in the areas of family law and civil legal aid and, most importantly, a lasting shift in attitudes towards the appropriate purpose of legal aid. To inform our assessment of whether Irish civil legal aid provision is distorted, this paper uses archival research and qualitative interviews as a dual-methods study to unravel the long-term impact of *Airey* on the structures of legal aid and family law and explore current conceptualisations of legal aid amongst Legal Aid Board workers.

Archival research was undertaken to shed light on the Irish state's litigation approach in *Airey* and its reaction to the European rulings. All the archival material explored in this paper comes from the Irish National Archives and was accessed by the second author in June 2023. Files relating to the *Airey v Ireland* litigation from the Irish Department of Foreign Affairs, the Attorney General's Office, the Department of Finance and the Department of Justice were examined. These sources contained correspondence from Mrs Airey's legal team, a transcript from the ECtHR hearing and Government correspondence relating to litigation strategy. As this information is in the public domain, and no other ethical issues arose, ethical approval was not sought for this stage of the research. Some of the files were abstracted under the National Archive Act 1986[16] and will be withheld for 75 years. However, the archival material that was available gives a clear picture of the Government's response to the *Airey* litigation and the contemporaneous understanding of the meaning of the ruling in relation to civil legal aid provision. Analysis of the archival documents was mindful that they were produced for the purposes of defending against Mrs Airey's claims and thus required connection to the bigger picture of legal change in Ireland.[17] Our examination of the political and legal situation preceding Mrs Airey's legal proceedings gives context to the litigation strategy adopted by both sides in the case.[18] A feminist legal history approach[19] was taken to the analysis, and this challenges the myth of steady progress in Irish family law and highlights the agency of Mrs Airey and her all women legal team.

The qualitative interview data explored in this paper is part of the first author's PhD in sociology, which aims to better understand the legal aid system and is funded by the University of Liverpool. This research was conducted using a constructivist grounded theory approach.[20] Interviews were not directed towards investigating the influence of historical and cultural factors on legal aid but this emerged as an important theme during the interviews. In total, 27 semi-structured interviews were carried out with people working in and around the legal aid system in Ireland, including 15 solicitors, 6 clerical officers, 3 legal clerks and 3 barristers. The sample comprised 18 women and 9 men from both urban (15) and rural (12) regions in Ireland. Most of the interviews were conducted over Zoom but 7 interviews took place in law centres. Data collection for this paper occurred between August 2022 and

[13]K Van Der Pas 'Conceptualising strategic litigation' (2021) 11(6) Oñati Socio-Legal Series 116 at 130.

[14]A Fischer-Lescano 'From strategic litigation to juridical action' in M Saage-Maaß et al (eds) *Transnational Legal Activism in Global Value Chains* (New York: Springer, 2021).

[15]'Strategic litigation impacts: insight from global experience' (Open Society Justice Initiative, 2018) p 19, https://www.justiceinitiative.org/publications/strategic-litigation-impacts-insights-global-experience#:~:text=Arguing%20against%20a%20simplistic%20view,more%20plentiful%20than%20previously%20understood

[16]Section 8(4).

[17]L Stanley 'Archival methodology inside the black box' in N Moore et al *The Archive Project : Archival Research in the Social Sciences* (Routledge, 2017) pp 54–59.

[18]S Buckel et al 'Legal struggles: a social theory perspective on strategic litigation and legal mobilisation' (2024) 33(1) Social & Legal Studies 36.

[19]E Rackley and R Auchmuty 'The case for feminist legal history' (2020) 40(4) Oxford Journal of Legal Studies 828.

[20]G Foley et al 'Interviewing as a vehicle for theoretical sampling in grounded theory' (2021) 20 International Journal of Qualitative Methods 2.

https://doi.org/10.1017/lst.2024.29 Published online by Cambridge University Press

September 2023. Ethics approval was obtained from the Committee of Research Ethics at the University of Liverpool. In reporting results, all participants have been deidentified and any references in quotes to identifiable characteristics and locations have been removed.

This qualitative interview data evidences current attitudes and understandings amongst civil legal aid providers. Themes were identified through simultaneous data collection and data analysis, theoretical sampling and further data collection to enhance insights. All interviews have been transcribed in full and were initially coded in an open and inductive manner, followed by more focused coding.[21] Detailed memos were kept during the data collection and analysis period. The influence of historical and cultural factors on legal aid and the dominance of family law emerged as important themes and evidence the distorting effect of legal regulation of marital breakdown on civil legal aid provision in Ireland.

2. The legal aid context prior to *Airey*

Long after civil legal aid schemes were established in the UK, the US, Australia and across Europe in the aftermath of the Second World War,[22] no government-funded legal advice or legal representation services existed in Ireland.[23] From the late 1960s, law students set up a free legal advice and representation service, known as the Free Legal Advice Centres (FLAC), on a pro bono basis for civil matters. The primary objective of FLAC was to push the state into establishing a public civil legal aid scheme by demonstrating the extent of unmet legal need in Ireland. Much of the advice provided by FLAC related to family law issues.[24] Following a series of campaigns by FLAC[25] the Government set up the Pringle Committee to examine the need for civil legal aid and advice.

The Pringle Committee Report, published in 1977,[26] suggested the adoption of a comprehensive scheme of civil legal aid and advice and, in the interim, a more limited scheme, and included draft Heads of Bill. The Irish Government did not act on any of these suggestions until it found itself in front of the ECtHR for the *Airey* case in 1979. The interim scheme suggested by the Pringle Committee Report focused on family law, landlord and tenant and consumer protection as areas of high priority.[27] The committee viewed family law issues as self-evidently peculiarly sensitive and presenting particular social problems[28] because most of the submissions to the Committee highlighted the need for a legal aid scheme for family law cases. However, the committee also noted that the mere provision of legal aid without proper reform of family law would not result in any real benefit: an effective legal aid system and an improved framework of family law was required.[29]

Irish family law in the 1960s and 1970s was archaic and utterly inadequate to protect woman and children during marital breakdown; it did not provide a safe way of leaving a violent spouse or adequate financial support. Judicial separation procedures, introduced in England and Wales under the 1857 Matrimonial Causes Act had not been extended to Ireland, and Irish law continued to use the limited remedies of ecclesiastical law to deal with marital separation well into the 1980s.[30] No modern law existed to end the obligations of marriage or regulate the consequences of marital

[21]J Mills et al 'The development of constructivist grounded theory' (2006) 20 International Journal of Qualitative Methods 25 at 29–30.

[22]Burley, above n 6, at 170.

[23]Though some pro bono work was undertaken by private solicitors and barristers on a discretionary basis: see G Whyte *Social Inclusion and the Legal System: Public Interest law in Ireland* (Institute of Public Administration, 2000).

[24]Ibid, p 303.

[25]Ibid, p 302.

[26]Committee on Civil Legal Aid and Advice, Report for Minister for Justice, Prl 6862 (Dublin: Stationery Office, 1977).

[27]Ibid, p 15.

[28]Ibid, at [2.7.2].

[29]Ibid, at [1.5.2].

[30]The Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870 (c 110), ss 7 and 13 transferred the ecclesiastical jurisdiction to the newly created Court of Matrimonial Causes. The jurisdiction was transferred to the Irish High Court under the Judicature Act 1877. Judicial separation was introduced by the Judicial Separation and Family Law Reform Act 1989.

https://doi.org/10.1017/lst.2024.29 Published online by Cambridge University Press

breakdown.[31] Divorce was constitutionally prohibited by Article 41.3.2̊. Although the marital family was prioritised within Irish constitutional values as 'the natural and fundamental unit group of Society'[32] and Article 41.3.1̊ required the Irish state to 'guard with special care the institution of Marriage, on which the family is founded and to protect it against attack', Irish law did not protect women and children within marriage in any meaningful way. European human rights litigation brought by Mrs Josie Airey highlighted the significant issues experienced by Irish women on marital breakdown.

3. Denying women's lived experiences and emphasising the progress of family law reform: litigation strategy in *Airey*

The provision and improvement of civil legal aid in Ireland has consistently been connected to women's experiences in highlighting the inadequacy of law in action and the building momentum of feminist activism.[33] Mrs Airey's legal team was made up of Mary Robinson SC, the first woman president of Ireland, and Susan Denham JC, the first woman appointed to the Irish Supreme Court. Throughout the litigation, Mrs Airey's team centred women's lived experiences of the inadequacy of the Irish family law system and backed up Mrs Airey's story with broader empirical evidence that the problems encountered were systemic.[34] In contrast, as discussed below, the Government denied Mrs Airey's experience of the legal system, focused on abstract legal arguments and relied on evidence of the 'new and improved' family law remedies introduced since Mrs Airey's petition.

Josie Airey was married to Timothy Airey, a lorry driver employed by the state transport company Córas Iompair Éireann. The couple had four children. Mrs Airey claimed that Mr Airey was a violent alcoholic who had assaulted and beaten her violently on several occasions.[35] The marriage broke down in 1971 when Mr Airey was convicted in the Cork District Court of assault after attacking Mrs Airey with a bread knife.[36] He moved out and lived apart from Josie, who remained in the family home. Mrs Airey claimed that she was unable to get a legal separation and that the Irish state had failed to protect her from a violent alcoholic husband.

Very few substantive legal options were open to Mrs Airey to end the obligations of marriage. Spouses could agree a deed of separation which ended their obligation to live together and created a legally binding financial settlement, but although a draft separation agreement was drawn up in 1972, Mr Airey refused to sign it. Innocent spouses who could prove that the other spouse had committed the marital offence of adultery or cruelty[37] could apply to the High Court for a decree of divorce *a mensa et thoro*. This gendered ecclesiastical law remedy ended the legal duty of cohabitation but did not allow the spouses to remarry. Unlike judicial separation, divorce *a mensa et thoro* did not give the court a general jurisdiction to sort out the spouses' finances to allow them to live apart. Alimony was only available to an innocent wife[38] and, where granted, was limited to periodic and

[31]M Harding and D McGowan *Family Law in Context* (Dublin: Clarus Press, 2023).

[32]Art 41.1.1.

[33]D Foley 'The Irish family, marital breakdown and the Josie Airey case c.1974–1981' (2024) 29 The History of the Family 15, at 17.

[34]In *Airey v Ireland* App No 6289/73 (Commission Decision as to Admissibility, 7 July 1977) they cited the 19th interim report of the Committee on Court Practice and Procedure on Desertion and Maintenance and the stufy by Kathleen O'Higgins 'Marital desertion in Dublin – an explanatory study' to demonstrate the widespread inadequacy of law surrounding spousal maintenance prior to the introduction of the 1976 Act.

[35]2010/19/1766, Transcript of *Airey v Ireland* (Merits) (Judgment) ECtHR App No 6289/73 (9 October 1979) hearing, Cour/Mis (79)19 pp 26 and 27.

[36]Mr Airey was ordered to pay 24p and £3.15 in costs.

[37]While a third ground of the husband's 'unnatural practices' was part of the legal doctrine of divorce *a mensa et thoro*, there is no evidence that this was ever relied upon in the Irish courts. See K Hayes 'The matrimonial jurisdiction of the High Court' (1973) 8 Irish Jurist NS 55.

[38]A husband could not be compelled to keep his adulterous or cruel wife and there was simply no possibility of alimony for husbands: AW Samuels 'The law of divorce in Ireland' (1887) 9 Journal of the Statistical and Social Inquiry Society of Ireland 188; WH Kisbey *The Law and Practice of the Court for Matrimonial Causes and Matters* (Dublin: W McGee, 1871) pp 58–59.

https://doi.org/10.1017/lst.2024.29 Published online by Cambridge University Press

unsecured maintenance payments that were capped at an arbitrary amount rather than being based on financial need.[39] Mrs Airey had tried to apply for divorce a *mensa a thoro* on the basis of cruelty[40] but could not convince a solicitor to act for her.[41] The necessity, cost and accessibility of divorce *a mensa et thoro* in the Irish High Court were the main points of dispute throughout the *Airey* litigation.

Some ad hoc legal remedies existed to force Mr Airey to pay maintenance. Maintenance orders could be made for children under the Guardianship of Infants Act 1964 and spousal maintenance could be ordered for deserted wives under the Married Women (Maintenance in Case of Desertion) Act 1886 where a husband *wilfully* refused to maintain his wife and children.[42] Mr Airey was ordered to pay a weekly sum in maintenance from June 1972, but this was not paid regularly. The courts rejected two applications by Mrs Airey to enforce maintenance and she had to cope without any maintenance payments for periods of up to four weeks.[43]

Throughout the litigation, the Irish Government claimed that the family law system in Ireland was perfectly adequate and accessible, denying Mrs Airey's lived experience. The Government questioned Mrs Airey's need for a decree of divorce *a mensa a thoro*, arguing that it would not add any additional legal finality to Mrs Airey's situation.[44] They claimed that maintenance orders and orders to protect against domestic abuse could be obtained from the lower courts, that such procedures were simple, did not require legal assistance and cost very little. The Government also claimed that maintenance enforcement procedures were adequate and that social security benefits were also available to Mrs Airey in case of her husband's default.[45]

The Irish Government then disputed the inaccessibility and claimed cost of proceedings in the High Court,[46] suggesting that most solicitors would be willing to act for Mrs Airey in the hope of obtaining costs from the other side.[47] In the alternative, they suggested that the existence of a constitutional right that allowed Mrs Airey to represent herself adequately protected her right to access.[48] McCarthy SC made unsubstantiated claims that the High Court was accessible to Mrs Airey as a litigant in person, that such litigants commonly petitioned the High Court for divorce a *mensa et thoro* and that a High Court judge would assist such litigants with their applications.[49] Airey's team cited figures on the low numbers of divorces *a mensa et thoro* granted by the High Court in Ireland between 1970–1976[50] to support their claim that the High Court was one of the most inaccessible courts in Ireland.[51] In order to make sense of these conflicting claims the ECtHR requested empirical information from the Government on the numbers of petitions to the High Court of Ireland between 1972–1978, whether either side were represented by a lawyer and the outcome.[52] This data conclusively showed that no litigants in person had successfully petitioned for divorce *a mensa et thoro* during this time period.

[39]This was not fixed but a third of the husband's income was commonly allotted: Kisbey, above n 38, pp 56–57.

[40]Mr Airey had been convicted of assault by the Cork District Court in 1972.

[41]The average cost of such proceedings was £500–£700 in an uncontested action and £800–£1,200 in a contested action. Although such costs would eventually be levied against the husband, the wife was faced with the task of convincing legal counsel to take the case on credit up until this time.

[42]The Married Women (Maintenance in Case of Desertion) Act 1886.

[43]Ibid.

[44]*Airey v Ireland* App No 6289/73 (Commission Decision as to Admissibility, 7 July 1977).

[45]Ibid.

[46]*Airey v Ireland* App No 6289/73 (Commission Report, 9 March 1978) at [44].

[47]Ibid, at [46].

[48]Ibid, at [45].

[49]2010/19/1766, Transcript of *Airey v Ireland* (Merits) (Judgment) ECtHR App No 6289/73 (9 October 1979) hearing, Cour/Mis (79)19, p 56.

[50]Ibid, p 35. These statistics were taken from A Shatter *Family Law in the Republic of Ireland* (Dublin: Wolfhound Press, 1997) p 21.

[51]Ibid, pp 22–26.

[52]2010/19/1766, Note by J Liddy 26 February 1979.

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The *Airey* dispute[53] was an important driver in the modernisation of Irish family law. The Committee on Court Practice and Procedure had called for radical change to legal mechanisms for obtaining maintenance following marital breakdown in 1973.[54] In the July 1977 hearing, the Government were keen to emphasise to the Commission the progress that had been made in modernising Irish family law and submitted up to date statistics about the numbers of applications under the new Family Law (Maintenance) Act 1976.[55] By the final hearing, in 1979, the Irish Government tried to rely on these newly introduced remedies as evidence that access to the High Court was now unnecessary on marital breakdown, but again such measures did not address Mrs Airey's experience.

The Family Law (Maintenance of Spouses and Children) Act 1976 allowed barring orders to be made to exclude a husband from the marital home for three months[56] and for maintenance orders to be granted for a spouse and any dependent children on the basis that the other spouse had 'failed to provide such maintenance as is proper in the circumstances'.[57] Applications were made to the District Court,[58] which kept legal costs down for applicants. The 1976 Act was a huge improvement in accessibility of legal remedies for women on the breakdown of marriage, but as Mary Robinson spelled out, was inadequate to address Mrs Airey's situation.[59] Mrs Airey had applied for maintenance under the 1976 Act and been awarded £27 per week on 14 February 1977. However, since then, Mr Airey had voluntarily retired from his work, had no income and could not be pursued for periodic payments under the 1976 Act,[60] which contained no mechanism for a lump sum order. Barring orders under the Act expired after three months and had to be renewed by repeated returns to court and so did not provide permanency.[61] Airey's team introduced a report by Coolock Community Law Centre to support the claim of wider problems caused by the inadequate operation of the Family Law Act 1976.[62] Peter Ward's later examination of maintenance applications from 1977–1985[63] found a high rate of payor default.[64] He concluded that the vast majority of wives granted maintenance orders could not be assured of an adequate or secure income and would become reliant on state support.[65] The inherent inadequacies of the revised 1976 Act to provide for effective child maintenance continue to be highlighted today.[66] *Airey* was effective in the short term[67] in improving family law legislation but did not achieve any real epistemic change that centred women's experiences of law within legal reform.

The Irish state again emphasised its 'new and improved' family law measures to the ECtHR at the just satisfaction hearing. The Government was keen that the recital on measures taken in consequence of the judgment would reflect that civil legal aid had been initiated *before* the judgment on the merits.[68] The Government also emphasised that measures to simplify court proceedings to allow the Circuit Court to grant divorces a *mensa et thoro* were underway even though the official Government position was that these measures were additional and unnecessary to satisfy the

[53]The *Airey* litigation includes four published adjudications: *Airey v Ireland* App No 6289/73 (Commission Decision as to Admissibility, 7 July 1977); *Airey v Ireland* App No 6289/73 (Commission Report, 9 March 1978); *Airey v Ireland* (Merits) (Judgment) ECtHR App No 6289/73 (9 October 1979); *Airey v Ireland* (Just Satisfaction) (Judgment) ECtHR App No 6289/73 (6 February 1981).

[54]The Committee on Court Practice and Procedure, Desertion and Maintenance (Dublin 1973) Prl 366 at [43].

[55]2010/19/1766.

[56]Family Law (Maintenance of Spouse and Children) Act 1976, s 22.

[57]Family Law (Maintenance of Spouse and Children) Act 1976, s 5.

[58]The High Court and later (under the Courts Act 1981) the Circuit Court also had concurrent jurisdiction.

[59]2010/19/1766, Transcript of *Airey v Ireland* (Merits) (Judgment) ECtHR App No 6289/73 (9 October 1979) hearing, Cour/Mis (79)19, pp 29–52.

[60]Ibid, p 38.

[61]Ibid, p 39.

[62]Ibid, p 40.

[63]P Ward *Divorce in Ireland: Who Should Bear the Cost?* (Cork University Press, 1993) p 45.

[64]Ibid, p 46.

[65]Ibid, p 47.

[66]*Report of the Child Maintenance Review Group* (November 2022).

[67]G Spivak 'Righting wrongs' (2004) 103(2) South Atlantic Quarterly 540.

[68]2010/19/1771, Memorandum from Jane Liddy to Government dated 20 November 1980.

https://doi.org/10.1017/lst.2024.29 Published online by Cambridge University Press

judgment.[69] The subsequently introduced Courts Act 1981 allowed divorce a *mensa et thoro* to be granted by the Circuit Court, a more accessible and cheaper court.[70]

When the new Scheme of Civil Legal Aid and Advice opened on 15 August 1980, Mrs Airey's application was rejected by the Law Centre in Cork because after taking a job at a local sweet factory, she was ineligible under the means test.[71] This indicated that the Government response was a reaction to international scrutiny rather than designed to provide for women like Mrs Airey. Mrs Airey brought a final set of 'just satisfaction' proceedings under Article 50 of the European Convention on Human Rights, declining a settlement offer of £3,140 in July 1980.[72] The Government Legal Division, concerned that the news that Mrs Airey was ineligible under the new legal aid scheme would have an adverse effect on the court's deliberations,[73] suggested that the Government simply pay for Mrs Airey's legal fees.[74] The need to save face under European scrutiny was the most important consideration, not the general workability of the new Civil Legal Aid scheme.

The Government's later submission to the Committee of Ministers[75] did not accept that Mrs Airey was finally excluded from the Civil Legal Aid Scheme. They portrayed Mrs Airey as being in the 'happy position of being able to choose between proceeding under the Scheme or, in the alternative, under the terms of the agreement regarding future legal costs'. They also included an announcement by Minister for Justice, Mr Gerard Collins, that the eligibility limit for the scheme would be increased from 1 February 1981.

Foley argues that the outcome of *Airey* was indicative of an increasing social recognition of marital violence[76] but we argue that the legal response and legal recognition of women's realities following martial breakdown came reluctantly. Comments expressed by the Government's Senior Counsel and the Irish judge at the ECtHR, O'Donoghue, are highly revealing of Irish legal attitudes to women at the time and the widespread denial of their experiences. In the hearing in 1979, McCarthy SC for the Government focused on preserving the good name of Mrs Airey's husband,[77] and revived the argument that Mrs Airey did not need a divorce *a mensa et thoro* to safely resolve the consequences of her marriage. In his dissenting judgment, the Irish judge, P O'Donoghue, questioned whether one court finding of assault was enough to characterise Mr Airey as a violent and drunken husband and considered it peculiar that a Deed of Separation was not possible in the absence of documented further threats on Mrs Airey.

Mrs Airey finally got her decree of divorce a *mensa et thoro* from the High Court, on the basis of cruelty, in May 1983,[78] a full ten years after her attempts to obtain legal remedy for her family situation. Her solicitor, Walsh O'Connor & Company, acted for her without payment and later approached the Government for costs.[79] The total cost with VAT came to £3,000, with Mary Robinson charging £1,287.30 and Susan Denham £941.85.[80]

4. The nature of the Article 6 violation in the *Airey v Ireland* litigation

Mrs Airey lodged her application with the European Commission on Human Rights in 1973 and it was ruled admissible following a hearing in July 1977.[81] In this admissibility ruling, the

[69]2010/19/1771, Draft statement to Committee of Ministers 15 August 1980.
[70]The Courts Act 1981, s 5. This commenced 12 May 1982.
[71]2016/22/1030, Letter from Walsh O'Connor to HC Kruger 30 October 1980.
[72]2016/22/1030.
[73]2016/22/1030, Letter M Eissen 10 November 1980.
[74]2010/19/1771, Draft memorandum for Government November 1980.
[75]2010/19/1771, CM/Del/Concl (81) p 334.
[76]Foley, above n 33.
[77]2010/19/1766, Transcript of *Airey v Ireland* (Merits) (Judgment) ECtHR App No 6289/73 (9 October 1979) hearing, Cour/Mis (79)19, pp 52–53.
[78]2016/22/1030 Decree made by Mr Justice Doyle on 17 May 1983 and issued by the High Court registrar on 23 May 1983.
[79]2016/22/1030, Letter Walsh O'Connor to Jane Liddy, 26 July 1983.
[80]2016/22/1030, Letter Mary Robinson SC to Maura Buckley, Walsh O'Connor &Co, 10 June 1983.
[81]*Airey v Ireland* App No 6289/73 (Commission Decision as to Admissibility, 7 July 1977).

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Commission rejected the Government's argument that Mrs Airey's claim was inadmissible because orders from the lower courts could provide an adequate remedy for Mrs Airey. The Commission concluded that such ad hoc remedies did not relate to the marital status of the parties. They found that the alleged prohibitive costs of accessing the High Court raised questions of law and fact and so the petition was declared admissible.[82] The admissibility ruling was widely reported by Irish media including an interview with Mrs Airey's counsel, Senator Mary Robinson on *This Morning* and coverage in the *Irish Times*.[83] This coverage was embarrassing to the Irish Government, which took steps to refute claims by the *Irish Times*[84] that Irish law was in breach of Article 6 and that a friendly settlement would not be reached. By request of the Irish Government, the Commission issued a further statement that no decision had yet been reached as to whether Ireland was in breach of Article 6 and that the Commission was ascertaining the facts with a view to friendly settlement.[85]

A friendly settlement was not reached. When the Commission published their report on the application in March 1978[86] Mrs Airey's complaint was framed as the contention that Ireland must provide some accessible effective legal remedy for marital breakdown. The Commission limited the issue to whether the fact that Mrs Airey was unable to secure an order in the High Court for judicial separation due to the high costs of proceedings was in violation of Article 6(1) of the Convention. They found that the costs in proceedings for judicial separation could range from £800–£1,200 in contested proceedings and that Mrs Airey was not in a financial position to meet these costs.[87] They also found that it would unreasonable to expect a person 'untrained in the law and procedures associated with judicial separation in Ireland, and so closely affected by the issues involved to act as her own lawyer during the proceedings'.[88]

On this basis the Commission held that Mrs Airey had been denied effective access to a competent court.[89] The only remotely adequate legal remedy for marital breakdown was inaccessible because of the high cost in accessing the High Court. The failure of the state to ensure effective access to court was held to be a breach of Article 6(1). The Commission emphasised that this did not amount to a finding of a requirement of free civil legal aid. Access to the High Court could be made compliant by introducing means-based legal aid, simplified and cheaper proceedings or by the appointment of an official to help in the presentation of such cases to the High Court.[90]

The ECtHR published its ruling in October 1979, finding Mrs Airey unable to present her case in person to the High Court 'properly and satisfactorily' because the High Court had complex proceedings, fault-based Irish law involved complicated legal points and because marital disputes often entail an emotional element that is 'scarcely compatible with the degree of objectivity required by advocacy in court'.[91] The mere possibility of appearing in person did not provide Mrs Airey with an effective right of access to court and by 5 votes to 2, Ireland was found in breach of Article 6(1).[92] The ECtHR was clear that Article 6(1) did not create an obligation for the state to provide free legal aid for every dispute relating to civil rights but could compel the state to provide legal assistance where the legal procedure or the case is complex.[93]

[82]Ibid, p 50.
[83]2010/19/1770.
[84]'Government not to give legal aid in family law cases' (*The Irish Times*, 10 November 1977) p 1.
[85]2010/19/1770, Communique issued by the Secretary to the European Commission of Human Rights 15 November 1977.
[86]*Airey v Ireland* App No 6289/73 (Commission Report, 9 March 1978).
[87]Ibid, at [76].
[88]Ibid, at [74].
[89]Ibid, at [79].
[90]Ibid, at [80].
[91]*Airey v Ireland* (Merits) (Judgment) ECtHR App No 6289/73 (9 October 1979) at [24].
[92]Ibid, at [28].
[93]Ibid, at [26].

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5. The immediate significance of *Airey* for civil legal aid reform

The *Airey* judgment had immediate consequences for civil legal aid.[94] The ECtHR ruled that civil legal aid is exceptionally required to ensure access to court and thus safeguard the right to a fair trial under Article 6, but both the Commission and the Court were clear that the introduction of a civil legal aid scheme was not necessarily required; there were other methods of resolving the specific violation in *Airey*. An effective right of access to court to deal with marital breakdown could be achieved by a civil legal aid scheme *or* by simplification of legal procedure. Yet, throughout the litigation, the Government understood the issue of access to court as requiring two interconnected responses, the simplification of family law and family procedures and the introduction of civil legal aid for family law issues. This meant that the already associated issues of civil legal aid and family law reform became firmly interwoven, distorting the rationale for a general civil legal aid scheme.

Embarrassment on the international stage was a driver for the Government, who were eager to present Irish family law as in a state of rapid modernisation rather than ossified in the nineteenth century. They did consider whether the simplification of family law procedure would be enough, in itself, to remedy the violation in *Airey* but in the end, they did not think that the court would accept it.[95] This is important in understanding the Government's motivations for establishing the civil legal aid scheme. The Government informed the European Court that they would introduce legal aid in family law matters and have necessary measures in place before the end of 1979. [96] The Minister for Justice, Gerard Collins, TD, established a trial 'Scheme of Civil Legal Aid and Advice' on an interim administrative basis. In August 1980, the first state-controlled law centres opened under the Legal Aid Board.[97] Due to economic difficulties in the 1980s, it was not long until the government made cutbacks. The lack of funding led to significant delays and the service was suspended in its entirety at times in order to work through backlogs.[98] The scheme was not placed on statutory footing until 1995 when the Civil Legal Aid Act was introduced as part of a series of government reforms in the area of family law.[99] Despite this shift to legislation, the scheme was not changed in any substantial way, although funding was increased.[100] The 1995 Act remains the legislative basis for the legal aid scheme today, the details of which are discussed further below.

Through *Airey,* legal aid and simplification of family law become culturally entwined. At a time when a totally unsuitable family law system needed rapid modernisation, *Airey* framed the national discourse around legal aid as an issue within family law, as being about access to court and this led to narrow, reactionary reform. The reflections and comments of the interviewed Legal Aid Board workers support the analysis that the impact of *Airey v Ireland* remains a significant root cause of the family law distortion within Irish civil legal aid. Participant 26 noted how the idea that law centres exist as family law specialists is a culturally embedded concept:

> I think, first and foremost, lots of people perceive the Legal Aid Board as providing services only for women, and only in family law and that isn't actually the case. There's an entire misdescription out there in relation to the Legal Aid Board … there is this perception that we just do family law, and they don't know what else we do. And because a lot of the publications from the Board focus on that, that's where we get pigeonholed, rather than people being aware that we assist in relation to housing matters, and that we assist in relation to a wide range of other things. (Participant 26, solicitor)

[94]S O'Leary 'The legacy of *Airey v Ireland* and the potential of European law in relation to legal aid' (2019) 42 Dublin University Law Journal 93 at 98.

[95]2010/19/1770, comment by A Ward.

[96]*Airey v Ireland* (Merits) (Judgment) ECtHR App No 6289/73 (9 October 1979) at [11].

[97]Whyte, above n 23, p 288.

[98]M Cousins 'Legal aid reform in France and the Republic of Ireland in the 1990s' in F Regan et al (eds) *The Transformation of Legal Aid* (Oxford: Clarendon Press, 2000) p 163.

[99]Burley, above n 6, at 170.

[100]Whyte, above n 23, p 293.

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The solicitor's comments describe how people believe that the Legal Aid Board only focuses on family law, but also how this is further perpetuated by the Legal Aid Board itself. It is suggested that rather than recognise this as a problem and issue publications which reflect the broader remit of the Legal Aid Board, the focus is kept on family law and this further influences cultural and social beliefs about the Board. Similarly, Participant 6 made a direct correlation between the current emphasis on family law and the *Airey* case:

> I mean the Legal Aid act deals with family and certain civil matters, right? And so for us, if you boil it all down, the Board deals primarily, but not exclusively, with family law … I suppose it's just historically how the legal aid board came into being and the *Airey* case is a well-known one in terms of this lady had no access to legal support at the time. (Participant 6, solicitor)

These accounts demonstrate how the cultural legacy of the Legal Aid Board's origins remains in people's minds today. These participants recognise that while the scope of what they can provide legal aid for is broad under legislation, a primary emphasis on family law is embedded. As Participant 26 alludes to, these beliefs and associations with family law and legal aid continue to be enacted culturally in the present day.

6. The impact of judicial separation and divorce law on the operation of legal aid

The structure, complexity and public policy basis of Irish divorce and judicial separation law meaningfully impacts the operation of legal aid. Irish divorce and judicial separation legislation were designed to 'save marriages' by requiring the encouragement of reconciliation and imposing a lengthy process for divorce. The introduction of judicial divorce was bitterly contested and two divisive referendums were held on the issue. In 1986,[101] divorce was rejected by 63.48% of voters, but the 1995 divorce referendum[102] passed with a narrow majority of 50.28% of the vote.

The unsuccessful 1986 referendum resulted in the introduction of a modern law of judicial separation. The Family Law Reform and Judicial Separation Act 1989[103] now allows the Circuit Court and the High Court to grant judicial separation on fault grounds of adultery, desertion and behaviour and on the no-fault basis of living apart for a prescribed period of time or where 'no normal marital relationship' exists between the spouses.[104] The Family Law Act 2019 reduced the no-fault wait period for judicial separation from three years of living apart to one year.[105] On judicial separation, the Circuit Court and High Court are given huge discretionary powers to make financial orders. The court is required to make 'adequate and reasonable' provision[106] and to consider a statutory checklist of relevant factors. However, there are no specific legal principles outlining the extent of the obligation to maintain or the goal to be achieved when making financial orders.[107] These radical discretionary powers did not draw much attention or cause controversy at the time and Louise Crowley suggests that it is because the Act did not incorporate a right to remarry.[108]

By the time divorce was introduced in Ireland, most of its western counterparts had experienced at least 20–30 years of divorce.[109] Ireland did not simply copy and paste legislation from other jurisdictions: 'instead it crafted a uniquely restrictive divorce regime that would uphold the sanctity of

[101]The Tenth Amendment of the Constitution Bill 1986.

[102]The Fifteenth Amendment of the Constitution Act 1995.

[103]Section 2(1).

[104]For discussion of how the grounds work see D McGowan 'The end of marriage – judicial separation and divorce' in Harding and McGowan (eds), above n 31, pp 60–78.

[105]Family Law Act 2019 (hereafter FLA 2019), s 2.

[106]Section 20(1).

[107]Ward, above n 63, p 25.

[108]L Crowley 'Dividing the spoils on divorce: rule-based regulation versus discretionary-based decision' (2012) International Family Law 388 at 401.

[109]E Moore *Divorce, Families and Emotion Work: 'Only Death Will Make Us Part'* (London: Macmillan, 2016) p 5.

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marriage'.[110] Deirdre McGowan argues that the Irish state portrayed those people who failed at marriage as social problems – a view that continues to have social and cultural implications.[111]

Article 41.3.2̊ of the Constitution now provides that a 'court designated by law' may grant a dissolution of marriage where: (a) there is no reasonable prospect of a reconciliation between the spouses; (b) such provision as the court considers proper is made for spouses and children and any further condition prescribed by law are complied with. Until 2019, Article 41.3.2̊ also required spouses to live apart for four years before a divorce could be granted. Following a constitutional referendum, this was removed, further conditions for divorce were left to legislation and the Family Law Act 2019 reduced the wait period for divorce to living apart to two years.[112] Section 5(1) of the Family Law (Divorce) Act 1996 now allows a court to grant a divorce where the spouses have lived apart for periods amounting to at least two years during the previous three years, there is no reasonable prospect of reconciliation between the spouses and such 'provision as the court considers proper' has been made.[113]

The introduction of divorce resulted in legal aid in Ireland growing by 70% from 1999 to 2004.[114] Because there is no possibility of a purely administrative or privately agreed divorce in Irish law, all cases must be channelled through court proceedings. The interviews with the Legal Aid Board, discussed in the next section, suggest two key reasons why they do not say no to divorce cases; court intervention is required to change marital status and the need for legal aid because of the inherent uncertainty of what 'proper provision' might mean in particular circumstances.

Irish law is unusual in that the requirement *to go to court* to secure a divorce is written into the text of the Constitution itself. Court approval of the pre-conditions for divorce, including the existence of 'proper provision' is constitutionally required. This means that administrative divorce[115] is simply not possible. Nor is it possible for couples to come to a binding private agreement as to the financial consequences of divorce; the court must decide whether any financial arrangements satisfy the highly discretionary and unpredictable standard of proper provision.[116] This is the case even if divorce follows an otherwise binding private separation agreement or a court order for financial provision on judicial separation.[117] Mediation, collaborative law and negotiation is encouraged,[118] but couples still have to go to court after these processes to have their finances approved and their marital status dissolved. Clean break, although encouraged as a legitimate goal by the courts,[119] is not possible in a technical sense.[120] Even after divorce has been granted there is no financial certainty as the issue of proper provision may be re-litigated within the lifetime of the parties.[121]

The Family Law (Divorce) Act 1996 promotes the idea of divorce as a last resort. Solicitors are obliged to discuss the possibility of reconciliation with clients and provide details of marriage counsellors. They must also discuss options that fall short of divorce, such as the possibility of separation by agreement or judicial separation as an alternative to divorce.[122] The divorce court is also required to

[110]Ibid, p 34.

[111]McGowan, above n 3, at 327.

[112]FLA 2019, s 3.

[113]The FLA 2019, s 2 also reduced the living apart ground for judicial separation from three years to one year.

[114]Flood and Whyte, above n 5, at 87.

[115]Such as the quasi-administrative approach to joint applications under the Divorce, Dissolution and Separation Act 2020 in England and Wales.

[116]For discussion, see K O'Sullivan 'The legacy continues: ancillary relief on divorce in Ireland' (2019) Journal of Family Studies 337.

[117]Prior separation agreements are given 'significant weight' but must represent proper provision in the circumstances at the time of divorce: *YG v NG* [2011] IESC 40.

[118]Judicial Separation and Reform Act 1989, ss 5–6; Family Law (Divorce) Act 1996, ss 6 and 7.

[119]*G v G* [2011] IESC 40.

[120]L Crowley 'Sheltering the homemaker in Irish family law – Ireland's failure to evolve with the shifting social and family norms' in M. Brinig (ed) *The International Survey of Family Law* (Cambridge: Intersentia, 2018).

[121]Family Law (Divorce) Act 1996, s 22(2).

[122]Sections 6 and 7.

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consider whether reconciliation is possible and adjourn proceedings to allow this to happen.[123] The structures of law and the presumed engagement of solicitors to act as protectors of marriage, ensure that divorce is a last resort.

The divorce process was deliberately designed to be lengthy and onerous on the policy assumption that this would protect dependent family members.[124] More recent reforms to divorce law in Ireland have been motivated by the need to relieve pressures on the system and separating parties.[125] This represents a shift in social and cultural attitudes from the 1990s, but policy makers are unwilling to properly revisit the core beliefs and policies of divorce law. For example, McGowan notes that there was no real consideration whether a living apart period before divorce actually protected dependent spouses or was still needed; it was just accepted by policy makers that the four-year period needed to be shortened because the length caused hardship.[126] This demonstrates a lack of clear intentionality within Irish legal reform.

Although legal processes to resolve marital breakdown in Ireland are more straightforward than Mrs Airey's experiences in 1973, acting as a litigant in person in such proceedings is still very difficult. Divorces can be granted by the Circuit Court and the High Court.[127] Financial remedies are highly discretionary because the meaning of 'proper provision' is highly subjective. The inherent uncertainty of proper provision means that a lay person will be unlikely to have enough legal knowledge to properly advocate for themselves.

The dominance of family law within civil legal aid provision is a lasting manifestation of this Irish policy belief that state intervention can save marriages. The underlying 1990s policy basis that divorce can only be granted as a last resort is still given effect by divorce law designed to save marriages by slowing the process down to promote reconciliation and requiring extensive court scrutiny. Ireland still has one of the lowest divorce rates in the EU,[128] although the rate of marital breakdown is much higher.[129] This discrepancy is in part due to the deliberately onerous nature of Irish divorce law compared to other European family law systems.

Within the Irish policy psyche, divorce remains a legal category apart. Constitutional protection of marriage allows the state to promote and favour marriage but the legacy of the divisive divorce referendums means that spouses must be legally protected from detrimental consequences of divorce.[130] Social attitudes towards marriage and divorce have shifted in Irish culture since the initial introduction of divorce and the establishment of the civil legal aid system. There has been a significant decline in the influence of the Catholic Church on family values, an economic boom and bust, and an increase in women entering the workforce.[131] While marriage is still the most popular family form,[132] marriage has transgressed somewhat beyond traditional patriarchal norms in the Irish psyche.[133] Over 62% of the population voted in favour of legalising same-sex marriage in the 2015 referendum.[134] Irish social attitudes have shifted enough to question whether the dominance of family law in civil legal aid

[123]Section 8.

[124]*Report of the Joint Committee on Marital Breakdown* (Stationery Office, 1985) at [3.2].

[125]L Keenan 'The divorce referendum 2019' (2020) 35 Irish Political Studies 80 at 82.

[126]McGowan, above n 104, pp 74–76.

[127]Where assets may exceed €3 million, divorce proceedings must be taken in the High Court.

[128]'Marriage and divorce statistics' (Eurostat, 2022), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_fewer_divorces.

[129]'Measuring Ireland's progress 2019' (Central Statistics Office, 2019) Table 1.8, https://www.cso.ie/en/releasesandpublications/ep/p-mip/measuringirelandsprogress2019/society/.

[130]L Crowley 'Irish divorce law in a social policy vacuum – from the unspoken to the unknown' (2011) 33 Journal of Social Welfare and Family Law 230.

[131]Moore, above n 109, p 34.

[132]The 2022 census statistics show that nearly 70% of families in Ireland involve a married couple (882,999/ 1,279,951 families): 'Households, families and childcare 2022' (Central Statistics Office, 2023) at Profile 3, https://www.cso.ie/en/releasesandpublications/ep/p-cpp3/censusofpopulation2022profile3-householdsfamiliesandchildcare/families/.

[133]Moore, above n 109, p 34.

[134]Y Murphy 'The marriage equality referendum 2015' (2016) 31 Irish Political Studies 315.

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provision, a consequence of the constitutional requirement to 'protect marriage from attack', now serves the needs of modern Ireland or whether it distorts the reality of legal need.

7. Civil legal aid provision today

As O'Leary notes, 40 years on from the *Airey* decision, a range of questions remain relating to appropriate provision of civil legal aid.[135] The Government Review focuses on ensuring fair and equal access to justice. The Review of the Civil Legal Aid Scheme has gone to public consultation, but no report has yet been issued.[136]

The need for comprehensive reform is widely acknowledged.[137] Civil legal aid provision in Ireland is overstretched and does not meet the needs of many citizens. The areas of social welfare, housing and discrimination have been recognised as having gaps under the current legal aid scheme.[138] Financial pressures make it difficult for the Legal Aid Board to recruit and retain staff or engage private solicitors.[139] There are long delays and the financial contribution and financial eligibility criteria mean that civil legal aid is not accessible to all.[140]

This section will outline the structure of the civil legal aid system in Ireland and analyse the legislation governing the provision of legal aid to explain why marital breakdown disputes continue to dominate in civil legal aid provision and support our claim that this ongoing dominance is a distortion of civil legal aid provision.

(a) The Legal Aid Board

The Legal Aid Board is an independent statutory body responsible for the provision of civil legal aid and advice services in the Republic of Ireland. It also provides family mediation, vulnerable witness related services and a number of ad hoc legal aid schemes. The stated mission of the Legal Aid Board is 'to deliver timely, effective, inclusive and just resolution of family and civil disputes to those most in need of [our] assistance'.[141] The Legal Aid Board operates under a service model whereby the focus is on the discrete claims and problems of an individual applicant. This approach contrasts with strategic models of legal aid provision used by several small non-governmental organisations such as the Free Legal Advice Clinics and Ballymun Community Law Centre,[142] which focus on identifying community social problems and developing a long-term approach which may involve research, reform and education.

The Legal Aid Board has around 526 staff in total, with 37 law centres and 16 meditation offices across the country.[143] The law centres are staffed with solicitors, paralegals and administrative staff. The Legal Aid Board also retains private solicitors organised into different subject-based private solicitor panels.[144] Depending on the complexity of the case, and at the discretion of the acting solicitor, barristers services may also be acquired. As of 2022, all law centres had waiting lists to access legal services with wait times of 5–34 weeks.[145]

[135]O'Leary, above n 94, at 94.

[136]'Issues paper to guide submissions on the Review of the Civil Legal Aid Scheme' (Department of Justice, 2023), https://assets.gov.ie/238964/299d5b89-ae0d-4dd8-b621-9e673d0f037e.pdf.

[137]O'Leary, n 94 above, at 99.

[138]'Annual report 2022' (Free Legal Advice Centres, 2023) p 7, https://www.flac.ie/publications/flac-annual-report-2022/.

[139]The Chief Justice's Working Group on Access to Justice, above n 11, pp 38–39.

[140]Ibid, pp 39–40.

[141]'Statement of strategy 2021–2023' (Legal Aid Board, 2021) p 4, https://www.legalaidboard.ie/en/policy-and-guidance/our-strategies-2021-2023/.

[142]Whyte, above n 23, pp 284–285.

[143]'Annual report 2023' (Legal Aid Board, 2023), https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/final_legal-aid-board-annual-report-2022_20231103.pdf.

[144]Private panels cover international protection, inquests, divorce and separation, family law and district court, childcare, and the abhaile scheme.

[145]Legal Aid Board, above n 143, p 28.

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(b) Legislative landscape

The Civil Legal Aid Act 1995[146] allows for the provision of both legal aid and legal advice. Legal aid refers to representation by a solicitor or barrister engaged by the Board in any civil proceedings and includes any ancillary assistance connected to the proceedings, for the purposes of arriving at a settlement, given by the solicitor or barristers.[147] Legal advice relates to 'any oral or written advice given by a solicitor of the Board or by a solicitor or barrister engaged by the Board for that purpose'.[148]

In response to *Airey*, the civil legal aid scheme was designed around access to court. All quasi-judicial tribunal work is excluded from the scope of legal aid, except those which are prescribed by the Minister. To date the only tribunal prescribed is the International Protection Appeals Tribunal because this is a requirement of the Treaty of Amsterdam.[149] Other quasi-judicial tribunals relating to common legal problems remain excluded, such as the Social Welfare Appeals Office and the Workplace Relations Commission.[150] There are also some areas which are explicitly excluded: defamation, disputes concerning rights and interest in or over land (which results in most housing issues not coming within the scope of the scheme),[151] as well as licensing, election petitions, conveyancing, any cases that should ordinarily be taken to the small claims court, and any class actions for the purpose of establishing a precedent or determining a point of law.[152] These exclusions are currently under review and are important context in understanding why Irish civil legal aid provision is dominated by marital breakdown.

To qualify for civil legal aid in Ireland, there are three key tests which an applicant must satisfy: an overarching principle test;[153] a merits test;[154] and a means test. Applicants with marital breakdown disputes seeking legal aid automatically satisfy the principle and merits by virtue of the subject matter of their legal problem. This is reflected in the application form provided to applicants both in person or online which explicitly asks applicants to distinguish whether they need legal services for a 'family law' legal issue or 'non-family law' legal issue. While the online form provides some examples of non-family law legal issues, the in-person form does not. These bureaucratic forms are the place where law starts for people turning to legal aid.[155]

The principle test is set out in section 24 of the 1995 Act and provides that a person shall not be granted legal aid or advice unless, in the opinion of the Board, a 'reasonably prudent person' who had the means to seek legal services at their own cost would be likely to do so and that a solicitor or barrister acting reasonably would advise this person to obtain their services at their own expense.[156] Marital breakdown disputes automatically satisfy these criteria because of the necessity to go to court to obtain an order, the complexity of the law surrounding financial provision and the culturally acknowledged emotive nature of such disputes.

Section 28(2) lays out the merits test for granting legal aid. The Board may grant a legal aid certificate where: (a) the applicant has satisfied financial eligibility criteria under section 29; (b) the applicant has reasonable grounds for instituting, defending or being a party to the proceedings, (c) the applicant is reasonably likely to be successful, (d) the proceedings stated in the application are the

[146]See also Civil Legal Aid Regulations 1996–2021 (hereafter CLAR 1996–2021), consolidated version available at https://www.legalaidboard.ie/en/policy-and-guidance/legislation/.

[147]Civil Legal Aid Act 1995 (hereafter CLA 1995), s 27.

[148]Ibid, s 25.

[149]SI Nos 74 and 162 of 1999 amendments, made pursuant to s 27(2) of the Act.

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

[151]*Accessing Justice in Hard Times* (FLAC, 2016) p 7, https://www.flac.ie/publications/report-accessing-justice-in-hard-times/.

[152]CLA 1995, s 28(9).

[153]Ibid, s 24.

[154]Ibid, s 28(2).

[155]A Ryan 'The form of forms: everyday enablers of access to justice' (2023) 32 Social & Legal Studies 690 at 690.

[156]CLA 1995, s 24.

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most satisfactory means by which the result sought by the applicant may be achieved; and, finally, (e) having regard to all the circumstances of the case (including the cost to the Board measured against the likely benefit to the applicant), it is reasonable to grant it. Disputes about marital breakdown automatically satisfy this test because the required decree of judicial separation or divorce will be granted as long as the statutory eligibility criteria are met, usually the living apart requirement:

> If you come into me and you have a family law problem right well there's merit in it – if you want a divorce, you want a divorce. If you qualify for legal aid financially then there's nothing I can do essentially to – I hate to use the phrase – to get rid of you right? It is what it is, but like when you come in to me with the civil cases … you see lots of probates coming in they don't have money to run the proceedings, private solicitors probably turn them back in those situations, we can get rid of them if we can get an opinion to say there is no merit. (Participant 2, solicitor)

Here the participant makes clear the restrictive impact of divorce law on general legal aid provision. Solicitors are not in a position to question whether or not there is merit with these types of legal issues. If a client wants to end their married status, they need a divorce and they have to go to court. If they satisfy the living apart requirement, they will be successful and so the claim has merit. The participant also notes how the system enables legal aid workers to deprioritise other legal claims, such as probates, and acknowledges the lack of services for people experiencing these legal problems. The requirement for people to issue court proceedings in order to get divorced regardless of the nature of the parties' relationships means that financial eligibility is the only reason why such cases would be refused legal aid:

> You need a court order for a divorce so there is no way around this whether or not these people could do it themselves, whether it could be done by consent very easily, you know you still have to take people through the process, because it's a legal process, and that's it. So, the only grounds[referring to the test criteria] there that they would have to comply with would be the financial eligibility. (Participant 13, solicitor)

The tests distort legal aid provision towards divorce because uncertainty in divorce lies in the detail of financial remedies, not in the question of whether the client's problem requires court intervention. In other areas of law, such as probate, there is legal uncertainty around the necessity of court intervention and therefore the merit of the claim and the likelihood of success is more unclear. Ironically, the uncertainty of financial remedies is a common reason given for the need for legal aid for marital breakdown but the more inherent uncertainty in other claims is a reason to exclude them under statute. This demonstrates how designing civil legal aid specifically around marital breakdown has led to distortion. Despite being a direct response to the case, arguably the current system misses the key ethos of the *Airey* case:

> I think that maybe the broader points of *Airey* is [that] having overly narrow or really vacuums – lacunas – where there just is no legal aid is hugely problematic, and there needs to be at some level an existing civil legal aid system, you know, for the justice of the justice system … I think that there does need to be more done, maybe within the spirit of *Airey*, or maybe even more litigation on that. (Participant 9, barrister)

As the above comments allude to and other key stakeholders have noted,[157] significant gaps remain in the provision of legal aid services. If the Legal Aid Board wishes to deliver on its mission statement to deliver services 'to those most in need of assistance',[158] the distortion towards divorce disputes must be addressed. Participant 9 suggests that this may come in the form of more litigation. If the current civil legal aid review does not result in significant changes, the next *Airey* case could be waiting in the wings.

[157]Free Legal Advice Centres, above n 138, p 7.
[158]'Statement of strategy 2021–2023', above n 141, p 4.

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The criteria for obtaining legal advice are broader than those for obtaining legal aid. Applicants must satisfy the means test only[159] and there are fewer subject matter restrictions on areas of law. The extent to which legal advice is provided is no longer broken down in the annual Legal Aid Board reports but the FLAC report issued in 2022 suggests that there is insufficient focus on early intervention and advice, particularly in relation to family law and employment law.[160] Access to advice is a fundamental element of access to justice and crucial to citizen-state relationships, inclusion and trust.[161] The Legal Aid Board has a duty to promote the wide range of areas where legal advice is available and this can be seen as part of the '*broader points*' of *Airey* which Participant 9 alludes to.

8. Why family law dominance suggests legal aid distortion

Family law dominance in civil legal aid is documented as an ongoing issue.[162] The issues paper published by the Review of the Civil Legal Aid Scheme[163] acknowledged that the majority of cases currently supported are family law based. This reality is also documented in the annual reports from the Legal Aid Board. In the most recent report from 2023, the Legal Aid Board reports that out of a total of 16,477 cases, 6,543 of cases dealt with were divorce cases followed by international protection (2,420), childcare (1,924), separation (1,382) and 'other family law' (587) with the remainder being other legal issues.[164]

Legal aid workers have essentially become specialists in family law issues because of the extensive amount of work which they do in the area. This further embeds a culture where the Legal Aid Board is viewed as a network of family law centres. This results in cases involving other legal issues potentially slipping through the cracks:

> I do wonder sometimes that if we were all experts on succession like we are on family law, and if we were experts on tort like we are on family law, would we just find a way [to grant legal aid]? And would we feel more comfortable with it? And would we fight harder with legal services, because we know more about it … I think that there's a couple of cases that might get through or might get fought harder for if we actually had people who were experts in those areas. (Participant 10, legal clerk)

Participants also suggested that, due to the high caseloads and demands on their services, they were further motivated to deprioritise other types of legal issues:

> Your divorces they all follow a trajectory, and they are, you don't really have to give it – you don't do a whole lot of legal research. But then something comes in out of left field like an eviction, and you don't have a clue of that. You don't have the time to sit down and do legal research, and that's part of the reason that people are like – Oh, just try and get it done or get it, just get it through as quickly as possible. (Participant 3, solicitor)

This demonstrates how the system further enables a culture which prioritises family law issues. This participant feels that due to the pressures on the system, they do not have the capacity or time to examine the merits of other legal issues, but divorces are par for the course. Legal aid workers do not have

[159]CLA 1995, s 26.

[160]Free Legal Advice Centres, above n 138, p 7.

[161]J Sigafoos and J Organ 'What about the poor people's rights?' The dismantling of social citizenship through access to justice and welfare reform policy' (2021) 48 Journal of Law and Society 361 at 384.

[162]J Burley and F Regan 'Divorce in Ireland: the fear, the floodgates and the reality' (2002) 16 International Journal of Law, Policy and the Family 202 at 214.

[163]Department of Justice, above n 136.

[164]Legal Aid Board, above n 143, p 26.

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the scope to assess the level of legal need a client may have. Instead, divorces are prioritised regardless of the client's particular situation. This culture appears to influence those who apply the law, such as solicitors, and potentially those at other levels of the service, such as administrative staff:

> [There is a] lack of awareness around the fact that legal aid is available for more issues … I wonder are there soft barriers when people go in the door, like are people being told, oh we don't deal with that. (Participant 3, solicitor)

These comments describe how those who greet clients at the doors of legal aid services are also implicated in the production and embodiment of this culture. The prioritisation of divorce is enacted in different ways and at different levels. This suggests that people in need of advice and support in areas such as social welfare, housing and discrimination,[165] may be being turned away at the doors of legal aid services.

We argue that this continued emphasis on marital breakdown highlighted in reflections from interviewees is a distortion of civil legal aid provision. Both Abel[166] and Alcock[167] note that legal aid programs have historically not been established with clients' needs in mind. Alcock suggests that legal aid emerged due to the unwillingness of lawyers in private practice to deal with divorce cases, as they favoured more prestigious cases.[168] Abel argues that legal aid was established in the US, Australia and Britain out of a want to increase morale in the armed forces. Under this view, legal aid systems in these jurisdictions were established to deal with the large increase in marital breakdown for sailors and soldiers and to ease fears that this marital disruption would impact their effectiveness in the war.[169] For Abel, the centrality of divorce to legal aid explained the presence of legal aid in Protestant countries and its absence in Catholic countries.[170] Cousins questions this analysis but contends, through comparing Italy, Belgium, France, the Netherlands and the UK, that while a likely correlation exists with the implementation of divorce and legal aid in Protestant countries, that this is less so in Catholic countries, or that legal aid simply developed much more slowly in these countries. [171]

Family law matters do seem to dominate in many countries, but it is sometimes difficult to discern to what degree divorce features within this.[172] While divorce may have been a feature of the establishment of legal aid systems, many have explicitly moved beyond this. In England and Wales, divorce is excluded unless you are a victim or at risk of domestic violence. In Scotland and Finland,[173] legal aid systems exclude divorces which are not contentious. In Sweden, divorce cases must be more complicated and require more legal counsel than a typical divorce case to qualify for legal aid.[174] Norway requires couples to undergo mediation before commencing court proceedings and provides an administrative alternative to court proceedings if the parties choose this option, but legal aid is available for financial settlements and issues relating to children.[175] The complexity of the procedures in Ireland may actually be creating legal need. Ireland's complex and restrictive rules for divorce, along with

[165]Free Legal Advice Centres, above n 138, p 7.
[166]Abel, above n 10, at 529.
[167]PC Alcock 'Legal aid: whose problem?' (1976) 3 British Journal of Law and Society 151 at 155.
[168]Ibid.
[169]Abel, above n 10, at 520.
[170]Abel, above n 10, at 580.
[171]M Cousins 'The politics of legal aid – a solution in search of a problem?' (1994) 13 Civil Justice Quarterly 111 at 114
[172]M Barendrech at al 'Legal aid in Europe: nine different ways to guarantee access to justice' (2014) at 65–66, https://www.hiil.org/research/legal-aid-in-europe-nine-different-ways-to-guarantee-access-to-justice/.
[173]Ibid, p 30.
[174]I Schoultz 'Legal aid in Sweden' in O Halvorsen Rønning and O Hammerslev (eds) *Outsourcing Legal Aid in the Nordic Welfare States* (Palgrave MacMillian, 2018) p 55.
[175]A Barlow 'The machinery of legal aid: a critical comparison, from a public law perspective, of the United Kingdom, the Republic of Ireland and the Nordic countries' (Åbo Akademi University Press, 2019) p 184, https://www.doria.fi/bitstream/handle/10024/168020/barlow_anna.pdf?sequence=1&isAllowed=y.

https://doi.org/10.1017/lst.2024.29 Published online by Cambridge University Press

the necessity to go to court, increases the need for assistance to navigate this process. In countries where divorces can be processed administratively, applicants may just need brief legal advice.[176]

The absence of legal needs surveys conducted in Ireland makes it difficult to say whether this emphasis on divorce is reflective of real legal need. Such surveys aim to understand the experience of justiciable problems from the perspective of people who face them, as opposed to the legal professions and institutions that may help to resolve them. A legal need survey was conducted in Northern Ireland in 2006, but no such survey has ever been conducted in the Republic of Ireland.[177] In the last 25 years alone, 55 legal need surveys have been conducted around the world and many of these have been funded by legal aid agencies or various governments.[178] Given the absence of such research in the Irish context, it is argued that this further reflects the Irish Government's tendency to be slow to respond to these issues.

Research from England and Wales suggests that people tend to recognise their rights and articulate them more frequently with family law issues than with other civil justice issues.[179] A legal needs survey published in 2020, on behalf of the Law Society and Legal Services Board in England and Wales, indicated that the most common type of legal problem experienced was employment, finance, welfare and benefits (32%) followed by property, construction and planning (28%), consumer problems (26%), wills, trusts and probate (22%), conveyancing/residential (15%), family (11%) and rights of individuals (4%).[180] While not all those who experience legal problems will wish to resolve these problems through legal means, this gives us some sense of alternative hierarchies of legal problems which may exist in the Irish context.

Citizen's Information is an Irish statutory body which supports the provision of information, advice and advocacy on a broad range of public and social services in Ireland. The Citizen's Information 2021 annual report states that the top categories asked about are social welfare (43%), housing (9%), employment (9%), health (6%), with birth, family and relationships making up just 3%.[181] Similarly, FLAC's 2022 annual report notes that out of a total of 13,556 calls to its Telephone Information & Referral line, only 4,136 of these calls related to family law. While this was the highest amount of calls for any area of law, there were also a substantial number of calls for other legal issues, such as employment (2,063), civil (1,014), wills (979), housing/landlord and tenant (824), consumer (648) and property (394).[182] These figures represent people who are looking for information on particular issues and this may not necessarily be reflective of the number of legal problems. In the absence of other data sets, this is the only indication we have for what legal need may look like in the Irish context.

The Review of the Civil Legal Aid Scheme's issues paper asks the public what areas should be covered by civil legal aid and how types of cases should be prioritised *considering the current operation of the scheme*,[183] which, of course, is family law dominated. Such questions seem designed around easy reform of existing legislation rather than directed towards a new, more comprehensive, understanding of legal need in Ireland.

[176]JT Johnsen 'Nordic legal aid and access to justice' in Halvorsen Rønning and Hammerslev (eds), above n 174, p 242.

[177]*Legal Needs Surveys and Access to Justice* (OECD Publishing, 2019) pp 26–27, https://www.oecd.org/gov/legal-needs-surveys-and-access-to-justice-g2g9a36c-en.htm.

[178]Ibid, p 25.

[179]C Denvir et al 'When legal rights are not a reality: do individuals know their rights and how can we tell?' (2013) 35 Journal of Social Welfare and Family Law 139 at 156.

[180]*Legal Needs of Individuals in England and Wales Technical Report 2019/20* (The Law Society and Legal Services Board, 2020) p 11, https://legalservicesboard.org.uk/wp-content/uploads/2020/01/Legal-Needs-of-Individuals-Technical-Report-Final-January-2020.pdf.

[181]*Annual Report 2021* (Citizen's Information, 2022), https://www.citizensinformationboard.ie/downloads/cib/annual_report_2021.en.pdf.

[182]Free Legal Advice Centres, above n 138, p 16.

[183]Department of Justice, above n 136, Questions 1 and 2.

https://doi.org/10.1017/lst.2024.29 Published online by Cambridge University Press

Conclusion

Very serious and significant gaps remain when it comes to the provision of legal aid in Ireland.[184] The Civil Legal Aid Act 1995, on paper, allows for a broader approach to civil legal aid but this is not within the current working understanding of legal aid provision. Family law distortion of legal aid reflects cultural and historical obsessions in Ireland and demonstrates the complex relationship between law and society.

While the *Airey* case allowed for a shift in the position of women in Irish society and access to legal remedies for marital breakdown at the time of its ruling, the continued legacy of this case restricts access to civil legal aid and limits the likelihood of comprehensive reform. Government reaction to *Airey v Ireland* meant that the idea of civil legal aid in Ireland has always been framed in terms of family law. This continued symbiosis has been exacerbated by the structure of Irish divorce law which requires court intervention before a divorce can be granted and gives the judiciary control over 'proper provision', a highly discretionary model of financial relief making private agreement difficult.

Reforming the civil legal aid system without acknowledging the influence of marital breakdown on the system is likely to result in limited change. This is an opportunity to break away from Ireland's embedded tradition of narrow reactionary legal reform toward an approach of intentionality and ambition – to design a civil legal aid system that serves the needs of Irish people. A proper conversation about what civil legal aid is for and how it should be allocated is long overdue in Ireland. We should consider whether civil legal aid's 'preoccupation with family law matters' still serves. Access to justice should not be pre-judged on a subject matter basis. Family law disputes are difficult and complex and affect the long-term happiness of adults and children, but they should not be automatically prioritised by the structures of law without meaningful discussions of the goals of civil legal aid.

[184]Free Legal Advice Centres, above n 138, p 16.

Cite this article: MacLachlan L, Harding M (2025). The legacy of *Airey v Ireland*: family law distortion of civil legal aid. *Legal Studies* 1–20. https://doi.org/10.1017/lst.2024.29