Can the law create social welfare reform?
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Introduction.[1]

In a review of complaints made to him about social welfare law and entitlements in 1994, the then Ombudsman said that because of the

> *"complexity and inaccessibility of some of the legislation, it is not surprising that complainants are frequently not in a position to articulate a reasoned legal argument in support of their case."* [2]

Since then, there has been over a decade of legislation, schemes, policy announcements, budget changes, court cases and the like in the area of social welfare law, none of which has made it any simpler to understand, or any easier to articulate a grievance, or indeed an entitlement.

There are periodic attempts to bring clarity. In 2005, the Social Welfare (Consolidation) Act 2005 drew together all of the legislation which then existed and it repealed older laws. However, even since then, because every budget brings changes, there has been more social welfare legislation. The previous consolidation had taken place in 1993.

But even if that had not happened, the 2005 Act is not a clear pathway to understanding social welfare law as it is implemented in Ireland today. Many of the sections contain phrases like "the Minister may by regulation …." This means that the legislation is itself only a framework, and much of the detail, and therefore of the implementation, happens by regulation or by administrative order or system.

Sometimes the law will contain a lot of detail about the scheme. Even there, the detail tends to be a compilation of previous schemes and regulations. As time goes by, new guidelines and regulations will be enacted, which in due course will all be consolidated the next time an attempt is made to consolidate all the existing law.

In essence, social welfare law is works within an administrative law system. According to Hogan & Gwynne Morgan in their leading text book on the topic[3]*, administrative law focuses on the executive and the other two major organs of state – the legislature and the judiciary – are important only so far as they impact on the executive. The government and the civil service constitute the executive.*

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[1] Thanks to Prof. Gerry Whyte, Trinity College Dublin for his background material in preparing this paper. Errors and omissions are my own.

[2] Office of the Ombudsman Annual Report 1994.

[3] Administrative Law In Ireland. 3rd. Ed. Hogan & Gwynne Morgan. Round hall press. 1998

However, as the same authors also point out, while administrative law looks more to questions of detail and matters of function, nonetheless, it is very often in cases involving the administrative actions of the executive that fundamental rights have to be invoked.

Making the rules.

As stated above, although the main features relating to any particular social welfare scheme may be based on the Social Welfare (Consolidation) Act 2005 or another piece of primary legislation, most of the actual schemes depend on further elaboration. That normally takes place under the supervision of the Minister for Social and Family Affairs within that Department. Details relating to definitions, setting out who is to be included or excluded etc. may be set out in regulations or in departmental guidelines to staff.

As Mel Cousins explains in his book on Social Welfare Law:[4]

> *"…the Department issues a very large number of guidelines to its staff, most of which are available on the departmental website. These largely explain the Acts and Regulations in non-legalistic terms. However, in a number of cases, issues which have not been addressed in legislation are provided for in guidelines."*

I want to refer to two examples which illustrate how social welfare law can develop.

The habitual residence condition.
The first example I will choose is a relatively new legal requirement which has been imposed on certain social welfare assistance payments and on child benefit since May 2004. This is the so called "habitual residence" condition. The condition was introduced when the 10 more states acceded to the European Union. It was designed to limit the availability of certain social welfare payments. Currently it applies to a number of assistance payments including unemployment assistance, various non-contributory payments, one parent family payment and most supplementary welfare allowance payments. Unusually and controversially child benefit has also been subjected to the condition.

I choose this example as one where the legislation is brief and somewhat vague. However, by the time the law has filtered down to a deciding officer, there are layers of guidelines and interpretations in being which turn what seems to be as simple rule into a complicated piece of law invoking a sophisticated interpretation carried out by the administration of the case law of European Union courts.

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[4] Social Welfare Law. 2nd. Ed. Mel Cousins. Thomson Round Hall 2002

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The habitual residence stipulation in the legislation is alike for a number of payments. For example, in dealing with unemployment assistance as an example. It says, in the Social Welfare Consolidation Act 2005 at section 141(9):

> "**141 (9)** A person shall not be entitled to unemployment assistance under this section unless he or she is habitually resident in the State at the date of the making of the application for unemployment assistance."

S.246 of the same Act sets out a clarification of what constitutes habitual residence:

> *"***246**.—(1) ……. it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless the person has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years ending on that date."

Beyond that, the legislation is silent. If however you refer to the Dept. of Social and Family Affairs leaflet SW 108, you will find a leaflet of more than 1,000 words dealing with the topic. It describes what will constitute "habitual residence" for the purpose of a number of payments, and it says:

"Five factors are considered when deciding whether you are habitually resident:

- **your main centre of interest** - facts such as whether you have a home, close family, a job, friends or you are a member of a club or a professional body or have financial accounts such as bank accounts, etc. will be taken into account when deciding whether the Common Travel Area is your main centre of interest,
- the length and continuity of your presence in the Common Travel Area,
- the length and reason for any absence from the Common Travel Area,
- the nature and pattern of your employment, if any, in the Common Travel Area, and
- your future intention to live in the Republic of Ireland as it appears from your particular situation.

The list is not exhaustive, no single factor is likely to be the most important and some factors may have more influence than others, depending on your particular circumstances."

That leaflet is produced for the benefit of the general public, for those who want to access assistance payments, and is also available to those deciding on whether someone qualifies for payment. Even that leaflet, which was last updated on the Department of Social and Family Affairs website in October 2004 does not give the up to date picture.

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For that, one has to turn to a different section of the Department's website where, under the heading of "Freedom of Information", a much more detailed exposition of what the Department means by the term "habitual residence" is set out. That runs to some 5,000 words, and very importantly, it stipulates that the condition has only limited applicability to members of the European Economic Area, which constitutes the European Union countries together with Norway, Switzerland, Iceland and Liechtenstein.

Here is an example of the primary legislation just setting out a minimal, broad framework, with the merest indication of what may constitute habitual residence condition, interpreted by the Dept. of Social and Family Affairs in the light of European Union case law and in the light of government policy. Indeed, depending on which section of the website you read, the interpretation even differs internally.

The interpretation of "habitual residence" is based on a particular interpretation of Irish and European Union law, internally, by the Minister and Department of Social and Family Affairs. No legislation directed the Minister and Department to use this interpretation rather than another but under general principles of administrative law, once the interpretation is lawful, and within the overall framework of the law – be that the Social Welfare Consolidation Act, EU law, or the Irish constitution, the Department is at liberty to choose this interpretation.

<u>Homemakers Scheme</u>

Another scheme which developed in the same way was the Homemaker scheme. This scheme is described in NWCI's report - "A Woman's Model for Social Welfare Reform"[5] This scheme, introduced to make it easier for those who provide full time care for children or for an incapacitated person to qualify for a contributory old age pension. The scheme came into effect on 6 April 1994. The NWCI report concludes that it is reasonable and practical to apply the scheme retrospectively to 1973. This has not been done.

The date of coming into effect of the homemakers scheme is interesting. It happened a year after the 1993 consolidation of legislation. The next consolidation would not happen until 2005. So when the scheme was introduced in 1994, it was loosely based on section 84 of the Social Welfare (Consolidation) Act 1993 which provided that regulations might provide for modifications of the meaning of contributions or might permit payment of a contributory old age payments to people other than those with paid contributions. What followed then, between 1994 and 2005 was a series of regulations and guidelines all of which elaborated in more detail what the relevant Minister and Department interpreted as the conditions on which the scheme would be payable. At the time of writing, although there is new legislation in place, the guidelines on the

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[5] "A Woman's Model for Social Welfare Reform." Mary Murphy 2003. National Women's Council of Ireland.

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Department website still run to some 5 pages in the smaller document, and 8 pages of explanation and interpretation in the longer one.

From broad generic principles that allowed the executive to develop criteria about when contributions could be disregarded, the homemakers scheme came up with a series of eight regulations made over 10 years and guidelines which specified when a person could seek recognition as a homemaker, whose lack of contributions would be disregarded. The result was a very specific scheme. According to the guidelines, person could qualify where the person is:

- *aged 16 or over:*
- *permanently resident in the State;*
- *under age 66;*
- *living with the person s/he is looking after or in a position to provide full time care and attention to a person who is not living with him/her*
- *caring for the person on a full time basis;*
- *previously employed self employed;*
- *not engaged I full time employment – with some small allowance for part time work;*
- *not living in a hospital, convalescent home or similar p[lace.*

Each of these conditions was spelled out in some detail. The guidelines also provided that the scheme only applied forward from April 1994. Mary Murphy in that NWCI report concluded that it would be both reasonable and practical to apply the scheme retrospectively to 1973 and allow people who satisfied the conditions over that 20 year period to claim on the same terms as one could after April 1994.

Those guidelines and regulations were the law until 2005. Those guidelines are now out of date. This scheme no longer has its primary impetus in generic legislation which is adapted by guidelines and departmental policy to provide a set of rules. The particulars of this scheme are now consolidated and appear not as guidelines but as primary legislation. In the Social Welfare Consolidation Act 2005, section 108 provides:

> **"108**.—(1) Subject to this Act, a person shall be entitled to old age (contributory) pension where he or she has attained pensionable age and satisfies the contribution conditions in *section 109*.
> (2) In this Chapter—
> "homemaker" means a person who—
> (*a*) is resident in the State and is under pensionable age,
> (*b*) is not engaged in remunerative employment, other than employment specified in *paragraph 5* of *Part 2* of *Schedule1*,

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(*c*) either—
(i) resides with and cares for a child under 12 years of age on a full-time basis, or
(ii) resides with and provides full-time care and attention to a person who is so incapacitated as to require fulltime care and attention within the meaning of *section 179(4)*, or
(iii) subject to the conditions and in the circumstances that may be prescribed, does not reside with but provides full-time care and attention to a person who is so incapacitated as to require full-time care and attention within the meaning of *section 179(4)*,
and
(*d*) other than in the case of the class or classes of person that may be prescribed, makes application to be regarded as a homemaker in the prescribed manner and within the prescribed time;

……..

(3) In the case of a claimant who was a homemaker for the duration of any complete contribution year, beginning on or after 6 April 1994, in which the claimant does not have any credited contributions or voluntary contributions, that contribution year shall be disregarded for the purposes of determining the yearly average of that claimant subject to the total number of contribution years so disregarded not exceeding 20."

In effect, the main provisions of this scheme have now been "raised" to the status of primary legislation. In one sense, this is a good thing. It is easier to source the main legislation, and perhaps easier to ensure that it is applied uniformly. However, on the other hand, a certain flexibility may be lost.

For the purpose of this seminar particularly, it may be worth noting that where the practice is based on a particular interpretation of the law, reform may sometimes be as possible from a more thorough or precise interpretation or through a better set of guidelines emanating from the bureaucracy as easily as by seeking reform of what is often rather broad and overarching legislation debated in the Oireachtas. In the case of the homemakers scheme, it may now be harder to lobby for retrospective application to 1973. Any change in the legislation now would mean an actual amendment of the law. Arguably, this is even more difficult than seeking reform only of an administrative scheme!

Nowadays too, those seeking reform may wish to remind all those who control the legislation – legislators, government ministers and the civil service, Health Service Executive and local authorities, that following on the enactment of the European Convention on Human Rights Act 2003, every organ of the State, including all of those mentioned here, is under a general obligation to perform its

functions in a manner compatible with the State's obligations under that Convention, subject to any law which may exist to the contrary.[6]

Checks and balance.

The delegation of the power to make detailed schemes within the broad general framework has to be subject to checks and balances in order to control that power. In the administrative scheme which constitutes social welfare law, there is almost no recourse to the courts. For the most part, decisions which are challenged must be debated within the scheme itself.

Some decisions may be made by executive officers. A person seeking to challenge those decisions does not have a right of appeal to the Social Welfare Appeals Office.

Deciding officers have very extensive powers. They are key decision makers. Difficulties can arise – particularly with new schemes, or those which are not applicable to very many people – where deciding officers make varying interpretation of the laws and the guidelines.

When a person is dissatisfied with a Deciding Officer's decision, it can be reviewed by another deciding officer and if that does not solve the problem, the case may be referred for another hearing to the Social Welfare Appeals Office
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Decisions of the Social Welfare Appeals Officers may be reviewed internally but normally that decision is the final one. While the Social Welfare Appeals Office is part of the same overall administrative scheme for the implementation of social welfare law, the Office stresses above everything else its independence of the Minister and the decision makers within the Department of Social and Family Affairs. In its annual report of 2004[7]*, it recognised the administrative law framework that informs its decisions. It said:*

> *"*Appeals Officers are conscious of the fact that administrative law is an integral part of their functioning environment as is statute social welfare law. Keeping abreast of developments is, therefore, equally as important for the proper exercise of their duty as is the more obvious knowledge of changes in the social welfare code."

In that report too of 2004, the Social Welfare Appeals office referred to appeals which arose from varying interpretations of the same term. In a reference to the Habitual Residence Condition, the report says:

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[6] s.3(1) European Convention on Human Rights Act 2003.

[7] Social Welfare Appeals Office Annual Report 2004

> "As with all new statutory provisions there was considerable discussion about the interpretation and application of the new HRC to cases coming on appeal. Appeals Officers were concerned about the adequacy of safeguards to ensure consistency of the decision making process by the Department – for example whether it would be possible for a person to satisfy the HRC for Supplementary Welfare Allowance purposes but not for Unemployment Assistance."

In relation to child benefit, the report concluded:

> "There are particular concerns in relation to the application of the HRC to the Child Benefit Scheme – including a view that Child Benefit should have been excluded from the remit of the HRC altogether. Under EU legislation Child Benefit is a "Family Benefit" which confers rights to "migrant workers" who are nationals of the European Economic Area (EEA) and resident in the State. What this means in effect is that the HRC cannot be applied in the manner envisaged for Child Benefit purposes to EU "migrant workers". Appeals Officers consider that there may be other grounds for excluding Child Benefit from the scope of the HRC. For example, there is a concern that the HRC provision may be in breach of the United Nations Convention on the Rights of the Child – to which Ireland is a signatory. The concerns of Appeals Officers have been conveyed to the Department of Social and Family Affairs and, it is understood, will be considered as part of a review of the operation of the scheme"

In the event, the concerns of the Appeals Office were taken on board in relation to child benefit for EU/ EEA workers though regrettably, the condition still applies in relation to children of parents from outside those countries.

In cases outlined by the Social Welfare Appeals Office, they were able to refer on a number of occasions to the useful role that the office played in levelling the playing pitch, to give Deciding Officers guidance on what criteria to apply in relation to a number of schemes. Given this valuable function of the office, it is unfortunate that the decisions of the Social Welfare Appeals Office are not published. The failure to publish all their cases means that the general public, and even more, those who are considering an appeal, cannot know what standards or interpretations are being applied by the Appeals Office. It also means that Deciding Officers receive no assistance in interpretation from this expert and independent body. In its assessment of the social welfare appeals system, Northside Community Law Centre has called for such publication in order to build up a bank of knowledge.[8]

It is also unfortunate that appeals to the Social Welfare Appeals Office are excluded by law from the civil legal aid scheme. Appellants may supply their own

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[8] The Social Welfare Appeals System: Accessible and Fair? Ciairín de Brun. A report commissioned by Northside Community Law Centre 2005.

legal representation and may, at the discretion of the Appeals Officer, be awarded a contribution towards that. While it is true that many appellants could manage the appeals system perfectly well without legal advice or assistance, it is also undoubtedly true that the exclusion will give rise to hardship and unfairness in complex and complicated cases (such as is involved in the interpretation of EU law) and will deny some appellants their right of access to justice, which is a fundamental human right.[9]

Decisions may later be altered by new evidence or circumstances.

A separate and less extensive system exists to review the operation of Health Executive officials who make decisions in relation to supplementary welfare allowance.

The courts are not part of the general system of checks and balance of the system of administration of social welfare. Under general law principles, there is always a right to apply to the High Court for judicial review – a judge's review – of a decision. However, judicial review will only examine a point of law or a complaint that a decision failed to observe fair procedures or to apply natural or constitutional justice or failed to give effect to rights guaranteed by the European Convention on Human Rights. Given that such applications are made to the High Court, they tend to be prohibitively costly and complex, and will only arise in a very small number of cases. Even if a judicial review is successful, its effect may be only to set aside the decision made by the Social Welfare Appeals Office or the other decision maker, and the complainant may have to start all over again. In some instances, the great power of a judicial review will be that similar cases will benefit from the conclusions or improvement to the administrative system which may result from one judicial review.

There is also a recourse from unfair decisions to the Office of the Ombudsman. At the outset, I quoted from the 1994 report of the Ombudsman's Office and each year, its annual report has reported on social welfare cases. The ombudsman can investigate any complaint of unfair treatment by a government department or by the Health Service Executive. She has extensive powers to demand information and can require any official to give information. She also has powers to carry out special investigations and present reports to the Houses of the Oireachtas. For the most part, the executive respects and implements recommendations of the Ombudsman. As against this, her recommendations are not binding.

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[9] Access to Justice: A Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland. A report of FLAC, July 2005.

In addition, the publicity surrounding her report can be an impetus for change within a reform campaign

Conclusion.

This paper aims to identify the structures by which the social welfare system actually operates. In what is a fairly opaque, administrative and bureaucratic world, it is relevant to identify where and how a practice or scheme originated.

While many of the ideas originate with a piece of legislation, many of the decisions depend on the interpretation given by one or more people to the legislation. An examination of the structure may help to establish whether a decision or scheme it is discriminatory or unfair of its very nature, or whether the problem lies in the way that it is being implemented or interpreted.

Similarly, an examination of the structures under which social welfare law is delivered may give a number of options for reform. In an analysis in 1995 of the Irish Social Welfare System in 1995, Mel Cousins [10] said the following:

> *"(T)he development of the social welfare system in the past has owed much more to economic, political and ideological forces in Irish society than to the achievement of any specific identified social policy goals. It is likely that the future development of the system will continue to be shaped by these forces …"*

In "A woman's Model for Social Welfare Reform, Mary Murphy points out that even where the logic for reform seems self explanatory,

> *"(t)here is neither total consensus nor a sense of urgency about reform of the Irish social welfare system."[11]*

In those circumstances, where social policy goals are unclear, or are formed by omission or default, even necessary reforms may need to be addressed by a combination of constituencies. Politicians must and should aim for a coherent, comprehensible system of laws which places the public good at its heart. Meanwhile those who administer the law, the executive must aim to ensure that they observe the requirements of an administrative law system which will include access to justice for all, respect for human rights and equality, respect for natural and constitutional justice, and fair practices and procedures. Those who are entitled to the services and their lawyers must be informed on how the system operates and be alert to failures to comply with the principles of justice. And those of us who campaign for reform will hopefully recognise that we have a lot

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[10] The Irish Social Welfare System, Law and Social Policy. Mel Cousins 1995 Round Hall Press p. 141

[11] A Woman's Model for Social Welfare Reform. Mary Murphy 2003. National Women's Council of Ireland.

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to learn and a lot to give each other to work to the goal of a fair and equitable social welfare system.

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