FLAC statement to the Joint Oireachtas Committee on Justice and Equality meeting to conduct pre-legislative scrutiny of the General Scheme of the European Convention on Human Rights (Compensation for Delays in Court Proceedings) Bill.

FLAC, 6th January 2018

Introduction

FLAC (Free Legal Advice Centres) is a voluntary independent legal rights organisation that exists to promote equal access to justice. Access to justice includes access to legal aid, and also includes access to the courts, access to effective remedies and fair, just and socially inclusive laws. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights. We work particularly in the area of the protection of economic, social and cultural rights. We work with and identify and make policy proposals on laws that impact on marginalised and disadvantaged individuals and groups.

FLAC operates a telephone legal information and referral line and runs a network of legal advice clinics where volunteer lawyers provide basic free legal advice. FLAC also provides specialist legal advice to advisers in MABS and CISs. It also operates PILA, the Public Interest Law Alliance, which operates a Pro Bono Referral Scheme for NGOs, community groups and independent law centres.

FLAC is also an independent law centre and engages in litigation in the public interest, seeking to achieve outcomes which will have benefit beyond the individual, and which may test and possibly bring about change in law and practice. The focus on these services as a way of enabling individuals and groups to assert their rights is a fundamental aspect of FLAC's work in promoting access to justice. [1]

FLAC welcomes the opportunity to contribute to the pre-legislative scrutiny of the General Scheme of the European Convention on Human Rights (Compensation for Delays in Court Proceedings) Bill.

FLAC has previously made two submissions to the Review of the Administration of Civil Justice. It has also made submissions to the Law Reform Commission on its Fifth programme of Law Reform and the Courts Services Statement of Strategy 2018-2020.The contents of these submissions are relevant to this submission and should be read in tandem

[1] FLAC has recently worked to improve access to justice in particular for Roma and Traveller women as part of the JUSTROM (Joint Programme on Access of Roma and Traveller Women to Justice) programme, a Council of Europe initiative. Within JUSTROM, FLAC supported the running of legal clinics for Travellers and Roma. It currently operates a legal clinic for the Roma community, with the financial assistance of the Department of Justice and Equality.

and may be accessed on FLAC's website at: https://www.flac.ie/publications/ or via direct link below.

- FLAC submission to the Review of the Administration of Civil Justice.
  - https://www.flac.ie/publications/flac-submission-to-the-review-of-administration-of/
- FLAC's second submission to the Review of Administration of Civil Justice.
  - https://www.flac.ie/publications/flac-second-submission-to-the-review-of-admin-civi/
- FLAC submission on the Law Reform Commission's Fifth Programme of Law Reform
  - https://www.flac.ie/publications/flac-submission-on-the-fifth-programme-of-law-refo/
- FLAC Submission: Courts Service Statement of Strategy 2018-2020
  - https://www.flac.ie/publications/submission-courts-service-statement-of-strategy-20/

Delay as a systemic issue

FLAC views delay as a major inhibitor of access to justice. It arises in a number of arenas. The waiting times for access to a first consultation at a Legal Aid Board law centre as of the 30th of September 2018 were 42 weeks for Blanchardstown, 36 weeks for Finglas, 31 weeks for Dundalk and Smithfield and 28 weeks in Tralee.[2] Even then the person may still have to wait a further period before they have their application for legal aid determined.

During 2017, the average time taken to process all Social Welfare appeals was 23.6 weeks, with 30.3 weeks in the case of supplementary welfare allowance. The 2017 annual report of the Social Welfare Appeals Office states that 63.6% of oral appeals were successful.

The Court of Appeal that was established to relieve the ever growing back log of appeals pending before the Supreme Court, has now become a victim of the same plight, with individuals now having to wait for up to two years before getting an appeal heard.

FLAC is concerned that this committee would look at the issue of delay not just in relation to the contents of this bill, but as a systemic issue and that this Committee would make access to justice a central focus of its work. There

[2] Legal Aid Board Law Centre Waiting Times – September 2018 https://www.legalaidboard.ie/en/our-services/legal-aid-services/waiting-times/september-2018-pdf__.pdf

has been a growing focus nationally and internationally on access to justice which reflects a growing consensus of the need for urgent change.[3]
FLAC also welcomed the commitment of the Chief Justice to make access to justice a central focus of his tenure and his call for the reform of the civil justice system. [4]

The programme for government contains a commitment to commission an annual study on court efficiency and sitting times, benchmarked against international standards, to provide accurate measurements for improving access to justice. It is critical that this commitment is fulfilled. The review of the Administration of Civil Justice is underway; one of its aims is to improve access to justice. The outcome of this review would be of fundamental interest to this committee. A central focus by this committee on access to justice would be timely, complementing the other initiatives and would assist in strengthening our Constitution, the rule of law and our justice system for the benefit of everyone.

[3] The Fundamental Rights Agency have produced a handbook on European law relating to access to justice **https://fra.europa.eu/en/publications-and-resources/publications**

Further Member countries of the United Nations have adopted "Global Goal 16," which recognizes that access to justice is a critical part of sustainable development of peaceful and inclusive societies.

[4] Statement for New Legal Year 2017, The Hon. Mr Justice Frank Clarke Chief Justice of Ireland

FLAC Observations on the Draft heads:

Quasi-Judicial Bodies/ Tribunals

As presently drafted the Heads of Bill appear to only contemplate delays arising before the Courts and makes no reference to quasi-judicial bodies. Clearly under Article 6(1), which accords an autonomous meaning to courts and tribunals under the ECHR, quasi-judicial bodies such as for example the WRC, RTB, and PIAB would all be bound by the requirements of that Article, including in relation to an expeditious hearing in so far as they determine civil rights and obligations.

The omission of quasi-judicial bodies from the draft scheme may be related to the fact that the European Convention on Human Rights Act, 2003 excludes courts from the definition of "organ of the State", but includes statutory quasi-judicial bodies and tribunals. In turn such organs of the State are already bound to perform their functions in conformity with the State's obligations under the Convention, and so a remedy in damages may, at least in theory, already exist in respect of such bodies. However, even if this is so, this would involve an application to the High Court, the requirement to exhaust any other remedy available, including any theoretical remedy for a breach of constitutional rights, and would accordingly not be regarded as an accessible remedy from the perspective of the case law of the European Court of Human Rights.

In addition, delay may accumulate across quasi-judicial bodies and on appeal the Courts, and it may be the overall cumulative length of proceedings including first tier tribunals and appeal courts that gives rise to the breach, rather than either procedure taken separately. However, the Heads of Bill would appear not to comprehend this cumulative effect as presently proposed.

FLAC would recommend that delays that occur before quasi-judicial bodies and tribunals would be included in the legislation both from the perspective of calculating when proceedings commence and also to be taken into account in determining any compensatory remedy for unreasonable delays that arise in proceedings before such bodies.

Who is a victim of delay? - Head 7

Head 7 specifies that an application for compensation may be made by a party to civil proceedings in any court or an accused in criminal proceedings, on the basis that the proceedings have not been determined within a reasonable time. FLAC has some concern that this may exclude

compensation being awarded to other parties to proceedings, where the delay in the case is caused by delay in another case. For example a victim of a crime may wish to take civil proceedings against an accused in a criminal case. Generally in such a situation the civil proceedings would be issued but not pursued until the criminal proceedings are determined. Excessive delay in the criminal proceedings, might then cause excessive delay in having the civil proceedings determined, not through delay arising in the proceedings themselves, but rather delay in a related case. It does not appear, or at least it is not clear whether the right to seek compensation under the proposed Bill extends to those who may have proceedings delayed because of delay in another case. A further example might arise where a case is picked as a lead case, and other similar cases are placed in a holding list awaiting the determination of the lead case. If the lead case becomes subject to unreasonable delay, shouldn't all the other parties to the cases in the holding list be entitled to seek compensation. FLAC considers that whether delay arises directly in a particular case or arises indirectly through delays in a related case should make no difference to the entitlement to apply for compensation and to be awarded same if merited.

Compensation and Quantum- Head 8

Head 8 of the Draft General Scheme deals with awards and sets out some general guidance as to how an award of compensation should be determined. There are three criteria identified:

1. An award will be made only to the extent that the Applicant has suffered injury, loss or damage.
2. And only to the extent required by Article 13.
3. The assessor shall have regard to the principles and practice applied by the European Court of Human Rights in relation to affording "just satisfaction" to an injured party under Article 41 ECHR.

FLAC considers that the direct linking of any financial compensation payable under the proposed legislation back to the principles and practice of the European Court of Human Rights is problematic and undesirable for a number of reasons:

First, this is inconsistent with the approach taken under the European Convention on Human Rights Act 2003, although both pieces of legislation would be directed to remedying breaches of the ECHR.
Section 3 of the European Convention on Human Rights Act 2003 provides:
"A person who has suffered injury, loss or damage as a result of a contravention of *subsection (1)*, may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to *subsection (3)*, in the Circuit

Court) and the Court may award to the person such damages (if any) as it considers appropriate."
No other criteria in relation to calculating the quantum of damages is provided in the 2003 Act, and therefore the principles applied by the Court are those that apply in relation to any breach of statutory duty, including as regards damages. The present proposed legislation, seen in this light is a piece meal approach to remedying breaches of the ECHR, and this segmented approach, while understandable, is only made worse by applying different principles in respect of remedies and in particular damages.

Second, it is recalled that the proposed legislation is intended to provide an effective domestic remedy for a breach of rights protected under the ECHR raising from Court delays. The purpose of the European Court of Human Rights in determining complaints against States, including in relation to determining just satisfaction is wholly different from the role of the domestic courts. For instance the European Court of Human Rights ('ECtHR') operates on the principle of subsidiarity, it is not a court of appeal and does not seek to substitute its own judgment or remedy for that of the domestic courts. Issues such as damages and so on are largely left to domestic courts which are best placed to determine what is most appropriate in that regard.

Awards of "just satisfaction" at the European Court level are not considered to have precedential value for national courts, and is a remedy that is autonomous to the ECtHR itself. Often the ECtHR will consider that its judgment, in making a finding of a breach of the Convention, is just satisfaction enough and so will frequently not award damages.

Furthermore, the quantum of damages awarded by the ECtHR inevitably reflects a form of compromise between the huge diversity, financially, legally and otherwise that exists between the 47 member states of the Council of Europe, resulting in awards that in the Irish context would often have token value only, and would arguably be neither effective nor dissuasive in relation to any underlying systemic problem.

FLAC submits that the effectiveness of a domestic remedy must be judged, not by reference to Article 41 of the Convention, but rather by reference to its effectiveness in a domestic context, and seeking to import the approach of the ECtHR is not legally sound, and may ultimately undermine the effectiveness of the remedy.

Third, while the Heads of Bill recognise that there may be a constitutional tort arising from delays in having a case disposed of, and that an alternative or additional remedy may be available through the Courts, the absence of real examples of such a remedy combined with the case law that exist in relation

to judicial immunity makes such a remedy notional rather than real. The problem is that the draft heads of Bill is only designed to address breaches of Article 6 ECHR and fails to accommodate a similar cause of action that may arise under EU Law.[5]

In particular, FLAC considers that Article 47 of the Charter of Fundamental Rights of the European Union is an important consideration in the context of the present draft Heads of Bill. Article 47 guarantees the right to an effective remedy for anyone whose rights under EU law are violated and this is further elaborated as being an entitlement to a fair and public hearing "within a reasonable time" by an independent and impartial tribunal previously established by law. Head 8 as proposed would conceivably exclude a person seeking a separate remedy for a breach of EU law arising from delay, and thereby be in the breach of the Charter on this ground, noting that where the Charter protects a right analogous to a right protected under the Convention the extent of the protection will be at least the same, if not more extensive.

While EU law is not prescriptive in relation to the remedies that are required to be available at national level, nonetheless the Court of Justice of the EU has laid down some principles, including ensuring equivalence with national remedies and effectiveness. It is unlikely that Head 8 would satisfy these requirements as presently proposed.

It is FLAC's submission that the removal of the specific references to the ECHR and Article 41 in Head 8, would provide a more fluid and flexible remedy for Court based delays, and therefore more readily provide a remedy for any breach of EU law that might arise in that regard, than the present formulation would allow.

Other matters

FLAC has a further concern in relation to Head 8, and that is the fact that there is a requirement for the High Court to approve awards of compensation while also being the forum for the determination of appeals under the proposed legislation. This may have the unintended effect of undermining the perception of independence and objectivity of the High Court in dealing with appeals if the same Court (all be it a different judge) has already approved the proposed compensation. As it is proposed that the assessor will be a retired

[5] For example FLAC acted for the applicant in *DN (A Minor Suing by his mother and next friend, AS) and AS v The Chief Appeals Officer and Ors*, [2017] IEHC 52, where it was determined that Inordinate delay by the authorities in determining a subsidiary protection application was a breach of the applicant's rights under EU law, and made an order for compensation.

judge in any event, it is unclear why it is considered necessary to include this approval mechanism.

Multiple claims: The proposed bill is silent in relation to further delays that may accrue after an award has been made if the proceedings were not determined by that time. Is it possible that an applicant may have multiple opportunities at seeking compensation for delay, depending on when they determine in the course of the proceedings that they should make an application? While FLAC does not have a particular view on this matter, the legislation should provide clarity in that regard.

Costs: While the intention of the Bill is to make it as accessible and informal as possible, nonetheless an applicant will probably need the assistance of their lawyer to make an application at first instance and deal with any requests for information that may follow and make submissions in support of the application. However, there is no provision under the Heads of Bill for the expenses of making a successful application to be discharged by the State/ Minister, inevitably meaning that such costs will be taken from the award made, again possibly undermining the effectiveness of the remedy. This issue could be dealt with by providing a flat fee for each practitioner who assists a client to make a successful application, but in return requiring the practitioner not to seek further payment from the award.