



FLAC Presentation to the Joint Oireachtas Committee on Justice and Equality on Reform of the Family Law System

13 March 2019

About FLAC

FLAC (Free Legal Advice Centres) is a voluntary independent human rights organisation which exists to promote equal access to justice. 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 areas of the protection of economic, social and cultural rights. We identify and make policy proposals on laws that impact on marginalised and disadvantaged people, with a particular focus on social welfare law, personal debt & credit law and civil legal aid.

FLAC produces policy papers on relevant issues to ensure that Government, decisionmakers and other NGOs are aware of developments that may affect the lives of people in Ireland. These developments may be legislative, Government policy-related or purely practice-oriented. FLAC may make recommendations to a variety of bodies including international human rights bodies, drawing on its legal expertise and providing a social inclusion perspective.

You can download/read FLAC's policy papers at

<https://www.flac.ie/publications/>

For more information, contact us at:

FLAC,

85/86 Upper Dorset Street, Dublin D01 P9Y3

01-8873600 | info@flac.ie | www.flac.ie | fb.me/flacireland | [@flac.ie](https://twitter.com/flac.ie)

FLAC Presentation to the Joint Oireachtas Committee on Justice and Equality on Reform of the Family Law System

FLAC welcomes the opportunity to make a submission to the Joint Oireachtas Committee on Justice and Equality on reform of the family law system. Our broader submission makes recommendations informed by our experience in working on access to justice issues and human rights in Ireland.

Access to justice is a fundamental human right and is recognised as such under a range of regional and international instruments including the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and the International Covenant on Civil and Political Rights. It encompasses access to fair systems of redress and states' obligations to vindicate and protect human rights. In the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.

Socially excluded groups within the general population are more likely to suffer justiciable problems (meaning problems for which there is a potential legal remedy within a civil and/or criminal justice framework) and the lack of effective and accessible mechanisms for resolving legal disputes prevents individuals from protecting and asserting their rights. Unless the right of access to justice (in all spheres of law) is vindicated, the risk of social and economic exclusion particularly for marginalised or vulnerable communities is greatly increased. Access to justice on a truly equal basis will be signified by equality of outcome regardless of resources.

This is no less true for matters of family law.

Currently, civil litigation within a family law setting is easier navigated by persons with the financial resources to access legal representation. Beyond this, there is a general expectation that the impecunious litigant will either manage with a low level of support through legal aid or become a lay litigant. This is antithetical to access to justice.

Those who have rights must have a meaningful and effective way of enforcing them. It is a necessary corollary to this right that there be a right to legal aid to implement the fundamental right of access to justice and to an effective remedy. If the right to legal aid is to be respected, a civil legal aid scheme must address unmet legal need.

Everyone is entitled to apply for legal aid and should be encouraged to apply to have their eligibility judged as intended by the legislation and to have a refusal subjected to the due process of an appeal if they are so entitled. Where an application for legal aid is refused, the applicant is entitled to reasons for the refusal in writing and to appeal this Decision. The reasons currently given are uninformative and it is not possible to judge from a refusal letter exactly why an application has not been granted. The annual report of the Legal Aid Board should contain more detailed information about the number of refusals, the reason for the refusal and the outcomes of any appeals and the reasons for them..

The lawyers who work at the Legal Aid Board Law Centres operate under substantial pressure on both their time and other resources and they deal with large clients lists. FLAC recognises the dedication and high quality of the advice and services of these lawyers and the committed nature of the staff.

At this juncture, FLAC also acknowledges the politicians and public servants who have supported civil legal aid and the right to legal aid within Irish policy over the years.

Contrary to popular belief, civil legal aid generally is *not free*. In most cases a person accessing civil legal aid will have to make a financial contribution means tested on their disposable income and assets. Unlike criminal legal aid, which is assessed based on the need to access legal services, in order for a person to be deemed eligible to be granted civil legal aid by the Legal Aid Board the client must pass an overarching principle test, a merits test and a means test.

The financial test is significant, first because it regulates whether a person is eligible for legal aid at all and secondly because it determines the amount that the person will pay as a contribution to the cost of the service they receive. For the most part, a person's eligibility for civil legal aid will be decided on income but for some, there will also be capital eligibility test.

A person must have a disposable income of less than €18,000 as well as a disposable capital of less than €100,000. Your family home is not considered when assessing disposable capital. Disposable income is total income less deductible expenses including income tax, mortgage repayments, rent, social insurance contributions, interest on loans, child-minding expenses and other items however, the disparity in rent and childcare costs across the state leads to a geographic inequality whereby some people are unfairly penalised by living in an area where their rent and childcare is higher and in turn, so is their cost of accessing justice.

While everyone who requires criminal legal aid is entitled to it free of charge and based on a personal means test by the adjudicating judge, civil legal aid in Ireland is not free and except in cases of undue hardship, all Legal Aid Board clients are expected to pay a contribution. This is based on the calculation of their income and assets in the means test. Thus a discrepancy arises between the access to justice available to a person who is tried for a criminal offence and for those who need to use the law for non-criminal matters even where there may be rights protected by the Constitution in the balance. For instance, a person with a civil legal issue who cannot afford legal advice or representation could face a range of serious consequences such as denial of access to one's children.

The contribution for receiving *advice* through legal aid is €30 and depending on income may be as much as €150. If legal aid *representation* is provided a financial contribution of a minimum of €130 is required. However, if a person has disposable income and disposable capital after the various allowances are deducted, then their contribution for legal aid will be calculated on both

means and capital and may come to several thousand euro. FLAC is concerned that these prohibitive costs may have both excluded and deterred some people from accessing the scheme.

While the Legal Aid Board is permitted to waive an applicant's legal fees where failure to do so would cause hardship, FLAC has continually raised the issue regarding lack of public awareness about the fact that a provision for waiver on grounds of hardship exists and no statistics are currently available detailing the number of applications made for a waiver on hardship grounds. When people make an application to the Legal Aid Board for legal aid, they are not routinely told that a waiver exists, leading to a situation where a person would already need to be aware of it before entering the process.

Lack of affordable legal representation can have other costly implications. First, an applicant may discontinue their case. This results in a rank denial of justice and is of particular concern where the case may concern matters of guardianship, custody and access in which the State has constitutional obligations to uphold the child's best interests in such matters. Secondly, the applicant may pursue their claim on their own, in which case it may be pursued inefficiently, meaning greater costs for the system and delays for other litigants.

The Legal Aid Board is hindered in its work by long delays in the provision of a legal aid to prospective clients. According to the Legal Aid Board statistics, Blanchardstown Law Centre has a waiting period of up to 44 weeks for a consultation. As of January 2019, 147 people were waiting up to 47 weeks for a consultation in Finglas. On this same date there were 129 people waiting for up to 33 weeks for a consultation with the Law Centre in Cork (Pope's Quay). Twenty-eight of the 33 on this Cork waiting list have been identified by the Legal Aid Board as needing a priority appointment with a solicitor. Matters that will be given a priority service include domestic violence, childcare, and child abduction. We recognise the Legal Aid Board has introduced a triage system for allocating appointments but the waiting periods are still substantial and can have severe negative impacts for families. In Longford, a person may wait up to 25 weeks for a first consultation with a solicitor and 22 weeks for a second consultation. Such lengthy delays can discourage potential clients from applying from the outset.

We understand that many are seeking the establishment of a dedicated family law courts structure. FLAC's view is that whether a distinct family law court structure is established or family remains a feature of the regional district courts (with distinct courts in specific areas) that the courts must be resourced properly to cater for the volume of people using them.

Names of the courts can be changed but until appropriate funding is allocated, the state is administering justice on the cheap.