

85/86 Dorset Street Upper
Dublin 1
D01 P9Y3

t 01-887 3600
f 01-874 5320
fb.me/flacireland

e info@flac.ie
w www.flac.ie
@flacireland



FLAC Opening statement to the Joint Oireachtas Committee on Justice and Equality 27th of November 2019:

Access to Justice & Costs

FLAC

November 2019

About FLAC

FLAC (Free Legal Advice Centres) is one of Ireland's oldest civil society organisations. It is a voluntary, independent, legal and human rights organisation which for the last fifty

Chief Executive – Eilís Barry

Directors - Don Crewe, Julie Herlihy, Joanne Hyde, David Fennelly, Peter Ward • Company Secretary - Catherine Hickey

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years has been promoting access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights.

FLAC works in a number of ways.

- Operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information
 - Runs a nationwide network of legal advice clinics in 71 locations around the country where volunteer lawyers provide basic free legal advice to approximately 12,000 people per annum
 - Is an independent law centre that takes cases in the public interest, mainly in the area of homelessness, housing, discrimination and disability
 - During 2017 FLAC was an associate partner of and facilitated the JUSTROM programme, which promoted access to justice for Roma and Traveller women. FLAC currently operates a Roma legal clinic. We hope to re-establish a dedicated legal service for Travellers shortly. We also plan to establish targeted advice clinics for former prisoners and the LGBTQI community
 - Operates the public interest law alliance PILA that operates a pro bono referral scheme, that facilitates social justice organisations receiving legal assistance from private practitioners acting pro bono. In 2018 115 social justice organisations were directly assisted through the pro bono referral scheme
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- Engages in research and advocates for policy and law reform in areas of law that most affect marginalised and disadvantaged, including legal aid, access to the courts, personal debt and social welfare.

The submissions most relevant to the subject matter of this meeting include

- FLAC submission to the Seanad Public Consultation Committee on Travellers (July 2019)
- FLAC Submission to the Joint Oireachtas Committee on Justice and Equality on Reform of the Family Law System, March 2019
- FLAC Submission to inform the Department of Justice and Equality's consultation on the National LGBTI Inclusion Strategy, December 2018
- FLAC Submission to the Legal Services Regulatory Authority on the Legal Practitioners Education and Training Review, August 2018
- FLAC submissions to the Review of Administration of Civil Justice February and June 2018
- FLAC Submission: Multi-Party Actions Bill 2017: February 2018
- FLAC submission to the Courts Service Statement of Strategy 2018-2020, October 2017

Opening statement.

FLAC welcomes the opportunity to make a submission to this Joint Oireachtas Committee on Justice and Equality on the interlinked topics of access to justice and costs. FLAC had requested the Joint Oireachtas Committee on Justice and Equality to further consider legal aid as a stand-alone issue at its hearings on Reform of the Family Law System and we are delighted that this is happening.

It is very fitting given that FLAC is celebrating its 50th anniversary. FLAC has been campaigning for comprehensive legal aid and access to justice for 50 years. This statement is a summary of a more detailed submission that has also been furnished.

Access to justice is both a process and a goal. It is a gateway to the exercise of other procedural and substantive rights. While it has no single precise definition, core elements of access to justice include effective access to legal information, early advice, representation/legal aid access to the courts and access to a fair system of redress, effective remedies, and fair and just outcomes.

Access to Justice is important for a number of reasons. Firstly it enables an individual to know if they have a claim and how to enforce it. Access to justice has broader social value. It is vital to social inclusion. It has been FLAC's experience that people who are socially disadvantaged very often experience legal problems in accessing social welfare, housing and addressing unemployment, many of which might occur at the same time: - the greater the vulnerability the greater the number of justiciable issues and the greater the extent of social exclusion. Solving one of the legal issues has a beneficial impact in and of itself and may also have a knock on beneficial effect in other areas and may improve social inclusion.

There is research which identifies how access to legal advice and assistance can improve people's health and well-being while also reducing pressure on healthcare services. In the UK access to justice is treated as a basic right and a vital element in social inclusion policies and is given a similar priority to health and education.

It is also essential to democracy. Laws made by this Oireachtas, such as the important new socially protective provisions contained in the Domestic Violence Act 2018 and the Land and Conveyancing Law Reform (Amendment) Act 2019 are only effective if they can be enforced.

Access to justice is essential to the rule of law and by that I mean ensuring that the executive branch of government carries out its functions in accordance with the law.

In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by parliament may be rendered nugatory, and the democratic election of parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other”¹

The most pervasive and intractable weakness of our civil justice system is that it does not provide reasonable access to justice for any but individuals and bodies with very significant resources, the small minority in receipt of legal aid, or those with “no foal no fee” arrangements with their lawyers. This failing was exacerbated by the financial crisis, resulting in budget cuts to the Courts Service, as well as by an increase of cases brought as a consequence of the crisis. There is a growing awareness of the problem as well as of a consensus that major reform is required. The Chief Justice has recently on a number of occasions set out the moral and economic arguments for broader and deeper legal aid.

Context

The committee is asked to note a number of matters:-

Firstly there has been no national economic and social analysis of the impact of the failure to provide civil legal aid in certain areas or the potential cost savings brought about by

introducing comprehensive access to justice. Understanding the scale and nature of unmet legal need is vital for designing appropriate government policy and targeting investment.

Secondly 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. Having an annual study providing accurate measurements would be an extremely important addition to our understanding of the problem.

The President of the High Court Mr Justice Kelly is undertaking a Review of the Administration of Civil Justice which includes access to justice in its terms of reference. The review which is expected to be completed shortly should be of significant interest to the work of this committee.

Ireland operates a common law justice system, which places much greater burden of ascertaining facts and researching the law on the parties to the litigation than would be

¹ UK Supreme Court in R (UNISON) V Lord Chancellor

done by the courts in a civil law system. This increased burden on the parties is relevant when looking at access to legal aid, access to the courts and lay litigants.

The 2019 EU Justice Scoreboard figures for expenditure as a percentage of GDP across the EU shows that the Ireland is among the lowest with less than .2% of GDP being spent on the law courts system. In Ireland there is significantly lower expenditure on the courts system than in a common law country. Ireland also came second last in the number of judges per 100,000 inhabitants. This may at least partly explain why expenditure for parties is considerably more in Ireland than would be the case in a civil law system.

Given that we have such a system which weighs so heavily on the parties, the Chief Justice has argued that the percentage of GDP being spent on the courts and legal aid should be far higher.

There is a real need to recognise and treat the Courts Services and the Legal Aid Board as being essential to the administration of Justice and the rule of law and resource them accordingly.

Right to legal aid

It is 40 years since Josey Airey took on the might of the Church and the State and held the State to account in terms of its failure to provide her with legal aid in her High Court family law proceedings. There is a right to legal aid under the ECHR and the Constitution where it is necessary to ensure effective access to justice. It is not an absolute right in all cases but in deciding whether someone gets legal aid, the ECHR has shown that factors such as the importance of the issue, complexity, the capacity of the individual to represent themselves, and emotional involvement, need to be considered.

The EU Charter of Fundamental Rights also provides a directly applicable right to legal aid where it is necessary to achieve access to justice if a claim involves European law. Huge swathes of socially protective law involve European law, for example almost all of our employment and anti-discrimination law has a European element. European law is also present in some aspects of social welfare and in relation to homelessness, environmental law, and privacy law. This requisite assessment of need and breadth of area of laws covered is not reflected in the legal aid system that we have with its wholly inadequate funding, rigid and out of date means test and allowances, strictly applied merits test, and the exclusion of many areas of law that impact on vulnerable groups and individuals. We have also concerns that the method of delivery of legal aid through law centres does not allow for the targeting of services at particularly vulnerable groups and individuals.

The current system of civil legal aid in Ireland was introduced in response to the Airey judgement. It too is 40 years old. At the time it was introduced it fell far short of what had been recommended in the Pringle Report on Civil Legal Aid and Advice. While there has been incremental minor changes, it has proved extraordinarily difficult to bring about substantive changes to this very restricted system and to convince the government that it needs to invest significant increased resources into the legal aid scheme. We hope that this will change on foot of these hearings.

There needs to be a root and branch review of the provision of civil legal aid, to include the funding of the Legal Aid Board, the means test, the allowances, the fees, the merits

test, the exemptions of certain areas of law, the method of delivery of legal services including the targetting of services for particularly vulnerable groups and individuals, the provision of strategic services for particular communities, and the capacity of the Legal Aid Board to engage in education and research.

Access to justice involves more than access to legal aid and includes access to the courts. We made the following recommendations in the more detailed submission

1. Court fees should be poverty and equality proofed and there should be provision for waiver for people on no/low income or in receipt of social welfare
2. Our current court forms and procedures which date back to the 1880s need to be clear, practical and accessible, including for lay litigants and people with disabilities. I have provided examples of some of the complex and obscure procedures in the appendix to the submission
3. Either the Law Reform Commission or a broadly drawn group consisting of relevant stakeholders such as the Court Services, the human rights committees of the law society and the bar, IHREC, the NDA, the Citizens Information Board, the NDA, NALA and relevant NGOS such as FLAC and disability NGOS should be formed to consider the updating of the forms and procedures to ensure accessibility and clarity.

Lay litigants

We need research into the number of lay litigants and the barriers facing lay litigants. A widely drawn working group should be established to examine access to justice for litigants in person which would draw up a report and action plan Any reforms of the administration of civil Justice should factor in that many litigants will not be represented by lawyers.

The Courts Services should provide guides to administrative aspect of the Courts, such as the listing system, call overs, hearing dates. This should also include more accessible formats than just print.

Access to Justice for people with disabilities

The more detailed submission repeats the numerous recommendations that were contained in FLAC's submission to the Review of the Administration of Civil Justice in relation to access to justice for people with disabilities.

Online Court

The development of an online court service in appropriate cases with appropriate safeguards should be given consideration

Barriers to Public Interest Litigation

The more detailed submission sets out the importance of public interest litigation and contains the following recommendations

- Introduce legislation permitting the use of third-party litigation funding and abolishing the rules of champerty and maintenance.
- Amend Section 169 of the Legal Services Regulation Act 2015 to expressly include cases taken in the public interest
- Legislate to place protective costs orders on a legislative basis
- Enact legislation to properly provide for Multi-Party Actions/ class actions
- Liberalise the rules on standing, placing them on a legislative basis if necessary
- The doctrine of mootness should be relaxed particularly in cases of public interest.
- The state should not use strict confidentiality clauses which require parties to keep confidential the fact of the settlement

Developing and embedding pro bono practice

The more detailed submission sets out the importance of and the development of pro bono legal practice. It makes the following recommendations

- Introduce a public procurement model for public legal services requiring all legal services to sign up to a target of pro bono hours per year
- The review of education and training which is being carried out by the Legal Services Regulatory Authority would have regard to the development of pro bono legal services and the training and educational needs of those involved in the provision of pro bono legal services. The development and encouragement of pro bono legal service could be examined by the Legal Services Regulatory Authority.

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