**FLAC Submission to the Joint Oireachtas Committee on Justice and Equality:**

**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 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 are 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
* 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
* FLAC submission on High Court Practice Direction 81

You can access FLAC’s policy papers at: <https://www.flac.ie/publications/category/policy/>

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# Recommendations

1. Implement the commitment in the Programme for Government to commission an annual study on court efficiency and sitting times, benchmarked against international standards, to provide accurate measurements for improving access to justice.
2. Action the existing commitment to introducing legislation to reduce excessive delays to trials and court proceedings including pre-trial hearings
3. Consider the Report on the Review of the Administration of Civil Justice, once it has been completed.
4. The objective of protecting and promoting the right of access to justice should be given a similar priority to health and education and included in all appropriate National Action Plans.
5. Commission a national economic and social analysis of the impact of the failure to provide civil legal aid or the potential cost savings brought about by introducing comprehensive access to justice

**Legal aid**

1. 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 targettted services for particularly vulnerable groups and individuals, strategic services for particular communities, and the capacity of the Legal Aid Board to engage in education and research.

**Recommendations on Court fees, forms and procedures and lay litigants:**

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. Court forms and procedures need to be clear, practical and accessible, including for lay litigants and people with disabilities.
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, 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.
4. Membership of the Rules Committee of the Courts should in addition to including practitioners who practice in an area, should also include the Human Rights Committees of the Law Society and the Bar, IHREC, the Legal Aid Board, FLAC, the Citizens Information Board, the National Disability Authority, NALA and other relevant NGOs, as appropriate.
5. Any significant changes to practice and procedure especially if they limit right of access to courts in actions against the state and public bodies should have some parliamentary oversight and input.
6. Commission research into the number of lay litigants and the barriers facing lay litigants.
7. 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
8. Any reforms of the Administration of Civil Justice should factor in that many litigants will not be represented by lawyers
9. The Courts Services should provide guides to the administrative aspects of the Courts, such as the listing system, call overs, hearing dates. This should also provide material in fully accessible formats. Short videos on aspects of Court procedure would be helpful for those who find written material difficult to access or understand including those with literacy issues or certain disabilities.
10. A liaison person should be available at Court sittings to provide practical information to assist lay litigants
11. **Access to Justice for people with disabilities:**
* the Courts Service should engage in routine data gathering and monitoring of statistics concerning access to justice for persons with disabilities.
* consideration should be given to including Changing Places facilities in new Courts Service building developments.
* FLAC recommends that accessibility of legal spaces for persons with disabilities include the installation of ramps where necessary, railing height adjustments, accessible parking spaces, visual and auditory alarm systems and braille or raised letter for permanent signage where appropriate
* the Courts Service should provide information online indicating which buildings are accessible and the projected date on which a building will be made accessible if it is a work in progress
* an Access Officer be available to assist people with disabilities to access the courts.
* Court documentation during proceedings should be provided in an accessible format for people with disabilities and information guides and forms on the Courts Service website should be amended so that they can be accessed by people with disabilities.
* Wi-Fi should be available in all courtrooms
* the Courts Service work with people with disabilities to develop appropriate and accessible technologies to improve access to their website
* technological measures introduced to open access to the courts also be evaluated for unintended negative side effects for vulnerable groups
* websites providing legal services and information undergo periodic accessibility testing for persons with disabilities
* all legal and court documents be made available in accessible formats (including video and audio where necessary) and accompanied by information leaflets giving specific advice in relation to access to the courts for people with disabilities.
* the Courts Service should provide on its website an easy to read guide on how to request ISL interpretation within the courts themselves, and their offices, including the name and contact details of the persons responsible for ensuring requests are processed
* the Courts Service should list on its website a clear guide on how to lodge a complaint about difficulty in accessing courts services or court facilities due to a lack of access for persons with disabilities
* the Courts Service should introduce training for members of the judiciary and courts staff on deaf people and ISL user needs.
* the Courts Service should fund ISL interpretation for those who need it in order to access the courts

**Online Court**

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

**Barriers to Public interest litigation**

1. Introduce legislation permitting the use of third-party litigation funding and abolishing the rules of champerty and maintenance.
2. Amend Section 169 of the Legal Services Regulation Act 2015 to expressly include cases taken in the public interest
3. Legislate to place protective costs orders on a legislative basis
4. Enact legislation to properly provide for Multi-Party Actions/ class actions
5. Liberalise the rules on standing, placing them on a legislative basis if necessary
6. The doctrine of mootness should be relaxed particularly in cases of public interest.
7. The state should not use strict confidentiality clauses which require parties to keep confidential the fact of the settlement
8. 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
9. 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

# Introduction

FLAC welcomes the opportunity to make a submission to the Joint Oireachtas Committee on Justice and Equality on the interlinked topics of access to justice and costs.[[1]](#footnote-1)

# What is access to justice?

Access to justice enables individuals to protect themselves against infringements of their rights, to remedy civil wrongs and to hold executive power accountable. Access to justice is both a process and a goal and is crucial for individuals seeking to benefit from other procedural and substantive rights. It is inherent in the rule of law.

While it has no single precise definition, core elements of access to justice include effective access to 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 and social inclusion

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 beyond that of the value to the particular individuals involved. Access to justice is vital to social inclusion. Research in the area of social exclusion has suggested that those who may be considered 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.)

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.

It is significant that UK action plans on social inclusion give access to justice a similar priority to health and education, thereby recognising access to justice as a basic right and a vital element in social inclusion policies. The objective of protecting and promoting the right of access to justice should be given a similar priority to health and education and included in all appropriate National Action Plans.[[2]](#footnote-2)

# Access to justice and health

Further there is research that shows that unresolved legal problems are damaging to health and contribute to health inequalities. Professor Gann [[3]](#footnote-3) identifies how access to legal advice and assistance can improve people's health and well being while also reducing pressure on healthcare services.

# Access to Justice and democracy and the rule of law:

It is also essential to democracy and the rule of law.

“At the heart of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make law for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced.

That role includes nearing 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”[[4]](#footnote-4)

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.

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 stated

“But there is little point in having a good court system, likely to produce fair results in accordance with law, if a great many people find it difficult or even impossible to access that system for practical reason ... but it has increasingly become the case that many types of litigation are moving beyond the resources of all but a few”

The Chief Justice has recently on a number of occasions set out the moral and economic arguments for broader and deeper legal aid.”[[5]](#footnote-5)

It is of note that there has been no national economic and social analysis of the impact of the failure to provide civil legal aid or the potential cost savings brought about by introducing comprehensive access to justice. This lack of empirical evidence means that assumptions are made without comprehensive and current national data. This may result in social and legal exclusion of parts of the Irish population and may also mean that scarce public funds may not be targeted at those that most need them. Understanding the scale and nature of unmet legal need is vital for designing appropriate government policy and targeting investment.

# Access to Justice indicators

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. There is also a commitment to introducing legislation to reduce excessive delays to trials and court proceedings including pretrial hearings.

# Review of the Administration of Civil Justice

The Committee is no doubt aware that a process of Review of the Administration of Civil Justice is underway under the chairmanship of the President of the High Court, Mr Justice Kelly, which is shortly to deliver its report. The terms of reference of the Review include looking at access to justice. The findings of the report will be relevant to the subject matter of this Committee. However Mr Justice Kelly has indicated that any changes which the Review Group envisages making would be to the Rules of the Superior Court and would not therefore require legislative scrutiny or debate. Given the importance of the outcome of this review, it would be important that this committee would have an opportunity to consider it.

Providing real access to justice is a complex challenge with many dimensions and requires a broad and nuanced response. Below we examine what FLAC considers to be the current key issues around access to justice and costs and sets out our recommendations as to how they might be effectively addressed.

# Issue 1: Cost of Access to Justice

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 done by the courts in a civil law system. The 2019 EU Justice Scoreboard figures for expenditure as a percentage of GDP across the EU shows that the Ireland is among the lowest at 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 explains which expenditure for parties is considerably more in Ireland than would be the case in a civil law system.

# Issue 2: Duty on the Courts Services and the Legal Aid Board to promote equality and human rights

In considering access to justice, it is important to bear in mind the obligations imposed on statutory bodies such as the Court Services and the Legal Aid Board by section 42 of the Irish Human Rights and Equality Commission Act 2014, to have regard to, in the performance of their functions, the need to eliminate discrimination, promote equality of opportunity and treatment for litigants, potential litigants and staff and to protect the human rights of staff and litigants and potential litigants.

# Issue 3: Right to Legal Aid

The right of access to justice is enshrined in Articles 6 and 13 of the European Convention of Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteed.[[6]](#footnote-6).

It is forty years since the Airey judgment where the EctHR found that Ireland’s failure to provide Josey Airey with legal aid amounted to a violation of her rights under the European Convention of Human Rights. While the right to legal aid is not absolute the Courts have held that the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend on matters such as:

* The importance of what is at stake for the applicant[[7]](#footnote-7), taking into account the vulnerability of the applicant[[8]](#footnote-8)
* The emotional involvement of the applicant which impedes the degree of objectivity required by advocacy in court[[9]](#footnote-9)
* The complexity of the relevant law or procedure[[10]](#footnote-10)
* The need to establish facts through expert evidence and the examination of witnesses[[11]](#footnote-11)
* The applicant’s capacity to represent him or her effectively[[12]](#footnote-12)

# Right to legal aid in a claim involving European Law

A very significant development in relation to entitlement to legal aid has been the European Charter of Human Rights, Article 47 of which provides that

“ Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Article 47 is directly applicable as a matter of law. Therefore there is a Charter obligation to provide legal aid if a claim involves European law, if it is necessary to ensure effective access to the court. European law is engaged in whole swathes of law such as the vast majority of employment law, equality and anti- discrimination, immigration and social welfare. It also arises in certain aspects of housing law.

This clear directly applicable right is not reflected in the current provision of legal aid in a number of respects.

# Issue 4: Civil legal Aid in Ireland

It is also 40 years since the State established a civil legal aid scheme which was put on a statutory basis in 1995. The scheme at the time fell far short of what had been recommended by the Pringle Committee on Civil Legal Aid and advice. While there have been improvements to the provision of civil legal aid over time, it has proved extremely difficult to bring substantive changes to the provision of civil legal aid and to convince the State of the need to invest significantly increased funding in this vital part of the administration of Justice. The current system of civil legal aid while providing invaluable work especially in the area of family law falls far short of what is required by the ECHR and the EU Charter in a number of respects.

The lawyers and staff of the Legal Aid Board operate under substantial pressure on their time and resources. FLAC recognises the dedication and high quality of the advice and services of these lawyers and committed nature of the staff.

**Information, Education & Research**

The principal function of the Legal Aid Board is to provide legal aid and advice to prople who satisfy the requirements. It is regrettable that it does not have an explicit function of providing information to the public on new protective legislative provisions such as those contained in the Domestic Violence Act 2019 or the Land and Conveyancing Law Reform (Amendment) Act 2019. The Legal Aid Board should be empowered to engage in public information campaigns on new protective legislative provisions.

The Legal Aid Board is often described as the largest family law practice in the state. It is therefore regrettable that it does not have the explicit power of engaging in research into the areas of law where it provides services.

**Legal aid audit**

Where legislation is introduced that may impact upon the demand for civil legal aid, an assessment should take place in advance to determine the scale of resources required, alongside the allocation of sufficient financial resources

**No needs based assessment:**

The provision of civil legal aid is not based on a legal needs assessment. In order to qualify for legal aid an applicant must satisfy a number of tests including a merits test and a means test and your claim must come within an area of law that is not excluded from the provision of legal aid.

If you fail to satisfy the means test or the area of law is excluded, you will not be entitled to legal aid, no matter how little resources you have, no matter how important the issue is to you, no matter how complex or sensitive the issue may be, no matter how little capacity you may have to represent yourself and no matter how well resourced the potential respondent may be.

**Applications decisions and appeals**

FLAC is aware of situations in which people have been told in Legal Aid Board Law Centres that their situation would not qualify the for legal aid and are discouraged. from applying. It is important that those who seek legal aid should be given comprehensive and accessible information about legal aid provision and encouraged to apply. Further there needs to be comprehensive and clear refusals of legal aid in writing. The annual report of the Legal Aid Board should contain more detailed information about the number of people applying for legal aid, the number of refusals, the reasons for the refusals and the outcomes of any appeals and the reasons for them.

**Restrictions on granting of private practitioner legal aid certificate**:

The Legal Aid operates a policy whereby only one private practitioner legal aid certificates (one in each rolling twelve month period) for guardianship, access, custody, and maintenance will be granted. This restriction which FLAC believes is legally dubious, does not apply to respondents in proceedings. Again the granting of legal aid should be on the basis of need as opposed to some arbitrary pre-determined figure.

**Strict and outdated means test and allowances**

An applicant’s disposable income must be below €18,000 in order to pass the initial means test with a disposable capital threshold of €100,000.[[13]](#footnote-13) (Your family home is not considered when assessing disposable capital). Once the Board has assessed your annual income it will the then seek to calculate your disposable income by deducting a number of allowances and expenditure, including deductions of childcare expenses of up to a maximum of € 6,000 per child per annum and accommodation costs of up to €8,000 per year.

The Legal Aid Board has no discretion to provide legal aid to someone who does not satisfy the means test. FLAC is aware of a case where a hospital wished to make an application to the High Court in relation to the care of a terminally ill child. The parents of the child were just outside the means test and were therefore not entitled to legal aid.

The means test and allowance are completely out of date and have not be revised since 2008. The imposition of such financial requirements on applicants of civil legal aid means that effectively only "*paupers and millionaires*" can engage with the Irish Courts system.[[14]](#footnote-14) The Department of Justice and Equality indicated in the beginning of 2018 that it was carrying out a review of the means test and the allowances but there has been no outcome to date to this review.

**Civil Legal Aid is not free**

Despite the very strict means test Civil legal Aid is not free. All Legal aid applicants are expected to make a financial contribution. Applicants are expected to pay €130 for legal aid and €30 for legal advice. These are significant figures for anyone in receipt of social welfare. 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 the lack of awareness about the fact that it is possible to apply for a waiver. There are currently no statistics available detailing the number of applications made for a waiver on hardship grounds. Information about the waiver is not in a prominent position on the Legal Aid Board website and people are not routinely told about the waiver when they make an application for legal aid. The annual reports of the Legal Aid Board suggest that the payment of the contribution does not yield significant resources for the Board. FLAC campaigned successfully for the financial contribution to be abolished for victims of domestic violence. However it remains for the same victims when they bring other family law proceedings such as maintenance or custody. Given the strict nature of the means test, the requirement to pay a fee for legal aid does not seem justifiable on any level and should be abolished.

**Strict application of the Merits test**

The Legal Aid Board also applies a merits test to every application of legal aid. In FLAC’s experience the merits test is too rigidly applied and seem to focus too much on the likelihood of a person being able to win their case, rather than the importance of the issue to the person and ignores the fact that legal aid may nonetheless enable a person to obtain a good outcome or settlement of such a case.

The merits test has been used to refuse legal aid to people who may be facing repossession of their family home. FLAC is of the view that anyone facing eviction /repossession hearings should not be denied legal aid simply on the basis that there may be no defence available. An amendment to the Land and Conveyancing Law Reform (Amendment ) Act 2019 which would ensure that legal aid was available in family home repossession cases and evictions by local authorities was ruled out of order.

**Waiting times**

The Legal Aid Board is hindered in its work by long delays in the provision of legal aid. In the High Court judgement of *O’ Donoughue V The Legal Aid Board and the Minister for Justice, Equality and law Reform*,[[15]](#footnote-15) the High Court stated that a client should have to wait no longer than two to four months to get an appointment with a legal aid board solicitor. While the situation has improved since that judgement, the latest figures from the Legal Aid Board show that there is a waiting time for a first appointment with a solicitor of 61 weeks in Finglas, 33 weeks in Tralee and over 6 months in a number of centres.

**Exclusions:**

A number or areas of law are excluded entirely from the provision of legal aid. For example there is no legal aid for social welfare claims and appeals and employment and antidiscrimination claims before the Workplace Relations Commission and the Labour Court. In Flac’s experience vulnerable litigants will experience a number of justiciable problems particularly in areas like social welfare law, discrimination, housing, homelessness, debt, unemployment and family law.

Further there is a lack of clarity as to the extent to which the Legal Aid Board can provide legal aid in arguably the area of greatest unmet legal need namely housing and homelessness and eviction cases, due in part to an exemption in relation to rights and interests over land and an overly rigid application of the merits test. However there is nothing save resources, to prevent the Legal Aid Board from acting in cases concerning the statutory responsibilities of the state and local authorities in relation to the provision of housing and in relation to homelessness. FLAC is aware that the Legal Aid Board has acted in such case in the past and has also acted in some eviction cases. Legal aid should be assessed on the basis of legal need rather than area of law.

In the words of the former United Nations Special Rapporteur on extreme poverty and human rights, the exclusion of such areas of law from the remit of civil legal aid in effect "*discriminates against the poor*".[[16]](#footnote-16)

**Cases of substantial public interest**

Legal aid should encompass provision for litigants who take cases, which are of substantial public interest. The courts recognise that these cases are necessary to test and ensure that the rights guaranteed by law and by our Constitution are maintained. However, FLAC is concerned that this is not specifically recognised in existing legislation. In comparison, in the UK there is funding available for any case of “significant wider public interest” i.e. one where there are “(a) real benefits to the public at large, other than those which normally flow from cases of the type in question; and (b) benefits for an identifiable class of individuals, other than the individual to whom civil legal services may be provided or members of that individual’s family”.[[17]](#footnote-17)

**Models of delivery of legal services**

The Pringle report envisaged that the Legal Aid Board would be able to provide legal services through a variety of models including community law centres, legal advice centres, and other appropriate methods. Currently the Legal Aid Board provides legal aid and advice through law centres, (with no community involvement) and through a panel of private practitioners.

The current model does not allow for targetted services for particularly vulnerable individuals and groups such as members of ethnic minorities, people with disabilities living in institutions, prisoners. There is also scope to consider much wider issue of strategic models of legal aid, which focus on the social problems of groups or communities and the obstacles they face to accessing legal services; obstacles which are not simply the result of a lack of finance but a lack of social capital, capacity and knowledge; as Chief Justice Frank Clarke recently stated "*[t]he more marginalised and disadvantaged individuals are, the more inaccessible justice becomes*."[[18]](#footnote-18)

**Recommendation:**

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 targeted services for particularly vulnerable groups and individuals, strategic services for particular communities and the capacity of the Legal Aid Board to engage in education and research.

# Issue 5: Access to the Courts

Access to justice requires much more than access to legal aid. Ireland has an adversarial common law system of justice. This means that there is a far heavier onus on the individual litigant to ascertain the facts and evidence and research the law, than would apply in a continental inquisitive system of justice where parts of the role of litigants would be carried out by the courts.

The legal system is for the most part designed by lawyers for use by lawyers and is therefore predicated on the assumption that litigants will have legal advice and representation about the procedural aspects of the courts as well as the substantive legal issues at stake. Limitations or preconditions applied to the rights of access to the Courts may undermine the very core of the right to access to justice. Limitations on the right must pursue a legitimate aim and must also be proportionate in light of the legitimate aim which they seek to satisfy. “*The right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court*.[[19]](#footnote-19)

# Outlay Costs

One obstacle to access the courts is caused by the actual cost incurred in the course of litigating before the courts, quite apart from the issue of the cost of legal representation. The European Court of Human Rights takes a broad view of what constitutes legal aid and views the provision of legal aid as not being confined to the provision of legal

representation and advice but it may cover procedural matters such as dispensation from payment of the costs of proceedings

Judicial review is the primary method of holding the state and public bodies to account. The cost of making an application for leave to apply for judicial review is €300 and the cost of stamp duty per affidavit is €20, which is well beyond the means of the of people that FLAC represents, many of whom are homeless and/or seeking to access emergency housing

# Court forms and procedures

Court rules and procedures play a fundamental role as gatekeepers of access to justice and they need to be clear, practical and accessible. In Ireland, our system of civil procedure still very much operates within a 19th century framework. It is outdated and not for the 21st century and requires root and branch review. The rules of the superior courts remain in large part those found in Wylie’s Judicature Acts of the 1880s. These rules have of course been updated over time but in a limited and fairly piecemeal way. Indeed, the amendments over time can add to the difficulty in identifying applicable rules and procedures.

To take just one example, one of the main innovations of the 1986 rules of the superior courts was the introduction of Order 84 on judicial review. To be certain of the rules applicable, unless you have access to a commercial service such as Westlaw, you would have to wade through series of amendments, which is not straightforward even for a lawyer. Examples of the standard wording for the introduction of affidavits and other court rules are set out at appendix 1.

In addition, the court rules are increasingly overlaid by a layer of practice directions – in some cases quite detailed and far-reaching in their scope.

# Practice Direction 81

FLAC, the Law Society, and a number of practitioners have all expressed concern over Practice Direction 81 which applies in the area of asylum and immigration. FLAC contends that the issuing and content of Practice Direction 81 constitutes a disproportionate limitation on access to the courts and inhibits access to justice. It imposes extensive obligations on legal representatives acting for applicants, which are significantly at variance with ordinary judicial review procedures and without any equivalent obligations being placed on the legal representatives for respondents, giving rise to a concern about equality of arms, in the context of duties of disclosure, costs order including wasted costs orders A note of our concerns which has been furnished to Rules of the Superior Courts Committee and Mr Justice Humphreys is contained in appendix 2

# Lay litigants

The current court system is planned and administered on the basis that a litigant will be represented by a lawyer. However in many cases members of the public have no option but to attempt to represent themselves or allow judgement to be entered in default of a response to a claim. In many other cases, members of the public with good claims will be left with no option but to abandon their rights and leave problems unresolved and potentially worsening when they are not entitled to legal aid.

Navigating the court process without representation can be difficult, complicated and emotionally draining on an individual. It can also add significantly to delay in court hearings. The result is no access to justice and compromised access to justice for others. There is a serious disparity of equality of arms when one party is facing into proceedings with no legal representation while the opposing party has representation by a solicitor and possibly junior and senior counsel.

FLAC’s information line regularly receives calls from lay litigants who are representing themselves in complex court cases and who are desperately in need of assistance, advice and representation which FLAC does not have the resources to provide. Due to the limitations on the availability of legal aid, these litigants are unlikely to ever obtain legal representation.

Some of the issues that arise for persons who are lay litigants are a lack of knowledge of legal issues, court procedures and correct terminology, lack of emotional distance from their case, inaccurate reading of laws, incomplete or incorrect documents or misreading procedural issues. Often they will not know where to go, whether to stand or sit, how and when to address a judge, what a call-over is and what does it mean to “go to second call”, that they have to wait for their case to be heard and that they should not leave the court area even if another case is going on. These difficulties are compounded where lay litigants have limited time, poor literacy or language issues, mental health issues or chaotic home lives, such as homelessness.

Research within the Australian Federal courts suggest that representation is relevant to the outcome of a case and that negotiated settlements are more likely with representation.[[20]](#footnote-20)

Unfortunately there is no readily available data or statistics outlining the number of persons who are representing themselves. Anecdotal evidence from legal practitioners suggest that the overwhelming majority of individuals and potentially up to 80% of persons are representing themselves in family law proceedings in the District Court. While there will be a small cohort of people who chose to be unrepresented as a matter of preference, FLAC believes that the majority of lay litigants represent themselves as they cannot afford legal representation and cannot obtain legal aid.

How to respond to some of the challenges faced by lay litigants is addressed in an important study by Grainne Mc Keever and the University of Ulster, called *Litigants in Person in Northern Ireland: Barriers to Legal Participation*. [[21]](#footnote-21)The study recommends a change to recognise that lay litigants have different requirements to solicitors and barristers, including additional time required due to their lack of familiarity and understanding of legal proceedings.

It also recommends establishing a task force to create a charter of rights and responsibilities, which all litigants and court actors are required to comply with. It also recommends that any future reforms of the legal system should be inclusive of multiple perspectives, including that of lay litigants themselves.

In the UK the Civil Justice Council constituted a Working Group to examine access to justice for “litigants in person”. The report of the Group entitled “Access to Justice for Litigants in Person” contains useful recommendations for immediate, medium and long-term focus.

**Recommendations on Court fees, forms and procedures and lay litigants:**

* 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
* Court forms and procedures need to be clear, practical and accessible, including for lay litigants and people with disabilities.
* 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 relevent NGOS such as FLAC and disability NGOS should be formed to consider the updating of the forms and procedures to ensure accessibility and clarity
* Membership of rules committee of the courts should in addition to including practitioners who practice in an area, should also the human rights committees of the Law Society and the Bar, IHREC, the Legal Aid Board, FLAC, the Citizens Information Board, the National Disability Authority, NALA and other relevant NGOS, as appropriate.
* Any significant changes to practice and procedure especially if they limit right of access to courts in actions against the state and public bodies should have some parliamentary oversight and input.
* Commission 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. Short videos on aspects of Court procedure would be helpful for those who find written material difficult to access or understand including those with literacy issues or certain disabilities.
* a liaison person should be available at Court sittings to provide practical information to assist lay litigants

# Access to Justice for people with disabilities

FLAC made a detailed submission to the Review of the Administration of Justice on barriers to access to Justice for people with disabilities. Some of the recommendations made in that submission are repeated here.

* the Courts Service should engage in routine data gathering and monitoring of statistics concerning access to justice for persons with disabilities.
* consideration should be given to including Changing Places facilities in new Courts Service building developments.
* FLAC recommends that accessibility of legal spaces for persons with disabilities include the installation of ramps where necessary, railing height adjustments, accessible parking spaces, visual and auditory alarm systems and braille or raised letter for permanent signage where appropriate
* the Courts Service should provide information online indicating which buildings are accessible and the projected date on which a building will be made accessible if it is a work in progress
* an Access Officer be available to assist people with disabilities to access the courts.
* Court documentation during proceedings should be provided in an accessible format for people with disabilities and information guides and forms on the Courts Service website should be amended so that they can be accessed by people with disabilities.
* Wi-Fi should be available in all courtrooms
* the Courts Service should work with people with disabilities to develop appropriate and accessible technologies to improve access to their website
* technological measures introduced to open access to the courts also be evaluated for unintended negative side effects for vulnerable groups
* websites providing legal services and information should undergo periodic accessibility testing for persons with disabilities
* all legal and court documents be made available in accessible formats (including video and audio where necessary) and accompanied by information leaflets giving specific advice in relation to access to the courts for people with disabilities.
* the Court services should engage with the representative groups for the deaf community to assess their needs in accessing the courts
* the Courts Service provide on its website an easy to read guide on how to request ISL interpretation within the courts themselves, and their offices, including the name and contact details of the persons responsible for ensuring requests are processed
* the Courts Service should list on its website a clear guide on how to lodge a complaint about difficulty in accessing courts services or court facilities due to a lack of access for persons with disabilities
* the Courts Service should introduce training for members of the judiciary and courts staff on deaf people and ISL user needs.
* the Courts Service should fund ISL interpretation for those who need it in order to access the courts

# Online services:

In the UK the recent Briggs report into the state of the civil courts has offered a radically new approach to the resolution of civil disputes, with its recommendations for the introduction of an online court. This would enable individuals and small business to vindicate their right online in a range of smaller cases.

At the FLAC Access to Justice conference in May 2019, Lord Briggs from the UK Supreme Court together with Andrea Coomber from the UK NGO JUSTICE provided a practical example of how an online court would work.

Advances in the sophistication of online services and the large increase in the proportion of court users for whom online communication is both easy and normal make an on-line court a practicable proposition for the first time. It is surely time for consideration of this method in Ireland

# Recommendation

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

# Issue 6: Barriers to Public interest litigation

Public interest litigation is litigation that seeks to establish a new point of law, while also securing a benefit for the individual involved. Public interest litigation may help to determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community, particularly the rights of the marginalised and disadvantaged or may affect the development of law generally and may reduce the need for further litigation.

Public interest law also plays an important role in bringing about more "wholesale change through raising public consciousness and modifying behaviour, attitudes and expectations".[[22]](#footnote-22) Further, "public interest litigation can trigger social or legal change where there is no political will to do so, and obtain redress for injustices experienced by disadvantaged groups"[[23]](#footnote-23)

In Ireland, there are a number of barriers that make it difficult for public interest issues to have their day in court. It is necessary to change to court rules and procedures to facilitate the taking of test cases and class actions, to strengthen standing for NGOs acting on behalf of vulnerable groups, and to develop and increase the use of protective costs orders to reduce the financial risk for those who take legal challenges in the public interest.

# Third-Party Funding

Alternative options to legal aid such as third party funding (where a third party who is not a party to the proceedings provides funding so that the case can proceed) are restricted and subject to what have been described as the “continuing existence of ancient principles of law.”[[24]](#footnote-24) The continuing existence of the common law rules of ‘maintenance’ and ‘champerty’ mean that many forms of third party funding of litigation remain criminal offences and civil wrongs in Ireland. Maintenance is the funding of litigation in which the funder has no interest. Champerty is the funding of litigation in exchange for a share of the proceeds of that litigation if it is successful*.*[[25]](#footnote-25)

In the recent *Persona****[[26]](#footnote-26)*** case, the Irish Supreme Court confirmed that professional “for profit” third party litigation funding remains unlawful in Ireland and falls foul of these rules. McKechnie J., the only judge to dissent, described the outcome of the case as "deeply unsatisfactory". It was acknowledged by Justice Clarke that the issue of funding raised in this case represented ‘‘very real, practical problems in access to justice’’ as the case might not have been able to go ahead without this funding. Crucially, the Supreme Court stated that any change in the law in Ireland relating to professional third party “for profit” litigation funding should come by way of legislation enacted by the Irish parliament rather than by way of a court decision but that “*circumstances could arise where, after a definitive finding that there had been a breach of constitutional rights but no action having been taken by either the legislature or the government to alleviate the situation, the courts, as guardians of the Constitution, might have no option but to take measures which would not otherwise be justified*”.

The current Irish situation is also largely out of line with most other common law countries where the doctrines have been abolished or their impact drastically reduced. [[27]](#footnote-27)

In Ireland, a Private Members Bill, *Contempt of Court Bill 2017* was introduced which includes provisions abolishing of the common law offences of maintenance and champerty, but the Bill has not progressed beyond Second Stage in the Dáil. In the absence of legislation either amending or abolishing the law in this area, the lower courts are likely to continue to take a strong line in opposing third party funding of litigation.

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| Recommendation: Introduce legislation permitting the use of third-party litigation funding and abolishing the rules of champerty and maintenance. |

# Risk of Adverse Costs Orders/ Limited use of Protective Costs Orders

An additional financial barrier for the impecunious litigant is the risk of an ***adverse*** costs order[[28]](#footnote-28). The normal rule on costs is that the losing litigant pays the costs of the successful litigant. While section 169 of the Legal Services Regulation Act 2015 provides that a court may decline to make the ‘normal’ order in certain instances, notably, the section does *not* expressly name cases which seek to clarify the law in the public interest. It is our view that the usual rule for costs has a "chilling effect" in general, but on public interest law in particular.**[[29]](#footnote-29)** It has been described as a "blunt instrument"**[[30]](#footnote-30)** and "one of the biggest barriers to accessing justice" in Ireland.**[[31]](#footnote-31)** The risk that unsuccessful litigants will have to bear not only their own costs but those of the opposing party is often too great to make litigation a viable option.

One potential solution is the use of a protective costs order (PCO), or pre-emptive costs order. This is an order made at the outset of litigation to enable the applicant have certainty as to whether and/or to what extent costs will be awarded if they are unsuccessful.The Irish courts granted their first PCO in 2014 in *Schrems* *v Data Protection Commissioner*.**[[32]](#footnote-32)** This case was of significant public interest, as it concerned the transfer of millions of people's personal data outside the EU without the adequate protections required by EU law. However this was a rare example; the concept of PCOs is much more developed in the UK and their use in Ireland is atypical for reasons which are unclear.

In Australia, some legal aid commissions provide support to public interest litigation including indemnity against adverse costs orders. In New South Wales for example, legal aid is available for ‘public interest human rights matters’[[33]](#footnote-33) and for test cases.[[34]](#footnote-34) Legal aid can also provide an indemnity against adverse cost orders, capping the amount recoverable.[[35]](#footnote-35)

It is the view of FLAC that it would be in ease of both litigants and the State if courts were specifically authorised to take into account the public interest nature of the case and, where protective costs orders were sought at the outset of a case, that these be granted.

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| Recommendation: Amend Section 169 of the Legal Services Regulation Act 2015 to expressly include whether a case has been taken in the public interest as a relevant factor to consider when departing from the normal costs rule |

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| Recommendation: Legislate to place protective costs orders on a statutory basis |

# Multi-party litigation

Multi-party litigation (MPL) refers to instances where a group of cases share sufficient characteristics to be dealt with collectively.[[36]](#footnote-36) If designed carefully, it can be an efficient and cost-effective means of providing access to justice for a large group of litigants. By combining individual claimants together, the problems arising from inequality in bargaining power and any significant discrepancy between the resources of the parties can be minimised.

Class actions can lead to an important clarification of the law and of rights – often against very powerful defendants – but may result in a relatively tiny amount of compensation. e.g. restoration of a small social welfare benefit or refund of the cost of goods or services purchased. For such people, the multi-party or class action can be an appropriate vehicle for challenging unfairness and abuse of rights.

The use of MPL is common mechanism in other jurisdictions.[[37]](#footnote-37) However, there is no specific statutory framework for multi-party litigation in Ireland. Instead, the Irish courts have relied upon two analogous procedures: the representative action and the test case, neither of which provides a wholly satisfactory vehicle for the public interest litigant. For example, representative actions are rarely invoked because they cannot be used for tort claims and damages cannot be awarded[[38]](#footnote-38). The Irish Law Reform Commission published a report on Multi-Party Litigation in 2005, which recommended the introduction of a Multi-Party Action (MPA).[[39]](#footnote-39) Despite the LRC's recommendations, there were no proposals for change in Ireland until 2017 when the Multi-Party Actions Bill was introduced.[[40]](#footnote-40) FLAC provided a detailed *Submission on the Multi-Party Actions Bill 2017* to the Joint Oireachtas Committee for Justice and Equality in February 2018 which can be accessed in full [here](https://www.flac.ie/assets/files/pdf/submission_to_joc_mpa_bill_2017.pdf).

The Bill provides that the appointed judge will have the role of certifying the action where, following common or related legal or factual issues, there is a likelihood of multiple cases arising and the MPA is considered the "appropriate, fair and efficient procedure" for resolving the dispute.[[41]](#footnote-41)

A concern is that there is currently an express restriction on civil legal aid being granted in public interest and multi-party actions, as set out in Section 28(9) (a) of the Civil Legal Aid Act 1995. This barrier needs to be addressed to make the Multi-Party Actions Bill effective, particularly for people on low incomes or claimants whose potential damage may be too low for a firm to take on the risk.[[42]](#footnote-42) The Oireachtas Joint Committee on Justice and Equality completed pre-legislative scrutiny of this Bill and published its report in September 2018.[[43]](#footnote-43) However, as it is a Private Members' Bill involving public expenditure, it cannot progress to Committee Stage until the Government issues a money message supporting the expenditure, which has not yet occurred.

A properly designed MPL framework would provide access to justice to claimants who would not normally bring a claim forward for a variety of reasons including impecuniosity and the relatively small amount of damages being claimed. It would avoid the risk and potential injustice of inconsistent judgments in cases relating to the same subject matter. By use of an opt-out procedure, the liability of a defendant can be determined on a final basis for all group members, although the members of the group are not specifically identified. It would increase the efficiency of judicial resources by hearing a class action instead of a multitude of claims. Most importantly it would go some way to redressing the balance of bargaining power between the parties.

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| Recommendation: Enact legislation to properly provide for Multi-Party Actions/ class actions |

# Rules on Standing

‘Standing’ refers to the ability to demonstrate sufficient connection to the matter at issue to participate in proceedings. In considering this issue in relation to access to justice, it is vital to recognise that those affected most by a breach of their rights simply may not have the resources, nor the time, nor the requisite knowledge to challenge the breach without the assistance of third parties. The use of standing is of particular relevance to what are called diffuse rights, which are public, collective, indivisible, rights belonging to the community or where the enforcement of a right by an individual may have no impact on the right shared by the community for example in the area of privacy rights or environmental rights.

The ability of groups working in social justice to utilise the courts to represent communities is heavily dependent upon how far and flexible the boundaries of legal standing are drawn[[44]](#footnote-44). If the rules on standing are excessively narrow, important public interest litigation will be excluded on procedural grounds. The traditional rules of standing can therefore impose a chilling effect on commencing public interest litigation. In addition, standing has been raised as a preliminary issue in a number of cases, forcing public interest litigants to spend time and money establishing standing before the substantive issue is even considered.

The courts of Australia, England & Wales and Northern Ireland have all liberalised their rules on standing in recent years. These courts have increasingly recognised that effective judicial review is dependent on those with both interest and involvement in an issue being able to legally challenge acts of public authorities. Accordingly, there has been a trend in recent years away from requiring a direct personal interest in order for a claimant to have standing and towards the consideration of both the merits of the case and the wider suitability of the claimant to bring the action in comparison with other members of society.

In England and Wales the standard set by the statute**[[45]](#footnote-45)** is that of “sufficient interest”. It is now not controversial for an organisation to have standing to bring a judicial review claim and is even seen as beneficial. For example, Greenpeace was held to have standing in *R v Inspectorate of Pollution, ex p Greenpeace Ltd (No. 2)*[[46]](#footnote-46) on the basis of the collectively sufficient interest of its members in the outcome of the local processing of radioactive waste. Greenpeace was allowed to challenge the public authority decision, acting as a capable representative of the interests of the affected group as a whole. This doctrine has been extended even further with public interest groups now permitted to bring challenges which do not directly affect their members on the basis of the lack of other viable claimants and the merits of the case. In *World Development Movement Ltd*[[47]](#footnote-47) the court considered that “*the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involv*ed.”[[48]](#footnote-48) This represents a shift towards including the merits of the case as an element of the standing test, with public interest groups given the opportunity to correct public authority error if the alternative is that such errors goes unchallenged. The sufficiency of the interest is less in question than the importance or reason for the interest of the claimant. In summary, where well-established responsible campaigners in particular fields are involved, the courts of England and Wales seem to be taking the view that to deny them standing would prevent important issues from being properly considered.[[49]](#footnote-49)

In Ireland there is a need to examine the standing doctrine afresh to ensure an appropriate balance between the need to deter the vexatious litigant while recognising the valuable service of NGOs bringing legal challenges on behalf of their constituents and the reality of the barriers that can exist for an individual plaintiff, not only the financial costs associated with litigation, but also social, psychological and cultural barriers predominant amongst disenfranchised communities.

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| Recommendation: Liberalise the rules on standing, placing them on a legislative basis if necessary |

# Mootness

The doctrine of mootness means that a court will decline to decide any question which is academic, no longer at issue or moot and the determination of which is not necessary for the determination of the rights of the parties before it, for example if the plaintiff’s claim has been conceded by the defendant in a settlement.[[50]](#footnote-50) In general, the courts will not litigate on theoretical questions with no factual basis, or where the facts are no longer live (current).[[51]](#footnote-51)

The concept of mootness is a particularly relevant one for public interest law which seeks to change the law while also securing a benefit for the individual and often concerns systemic problems. An issue may be settled for the individual (either through litigation or otherwise) and yet be bound to recur because the flaw in the system that has caused the problem remains unaddressed. The strategy of settling cases prevents the issue going to court, and may facilitate the continuing implementation of a problematic policy. This means that social problems go unresolved unless the legislature intervenes, people continue to suffer the effects, and the same issues must be litigated again and again.

However, that rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot “where the alleged wrong was capable of repetition yet evading review”.[[52]](#footnote-52) For example, FLAC has experience of bringing a number of cases challenging the application or misapplication of Circular 41/2012 (*Access to social housing supports for non-Irish nationals – including clarification re Stamp 4 holders)* by local authorities. The individual cases settle but the issue continues to arise.

A prudent use of scarce judicial resources might actually be better served by allowing the Court to clarify the rights of many individuals who are not a party to the litigation, even though the point might now be moot in relation to the particular litigants by virtue for example of an agreed settlement.[[53]](#footnote-53)

# Use of strict confidentiality clause in settlements of proceedings with State

One further issue of concern that has arisen from FLAC casefiles is the use of strict confidentiality clauses in the settlement of proceedings against the State. FLAC has dealt with a number of cases in 2018 where the State body will settle a claim on terms favourable to the client but only on the basis that both the terms and the fact of the settlement are confidential. Both the clients and their legal advisors are bound by such settlement terms and cannot even reveal the fact of settlement. This is despite the fact that the initiation of proceedings may already be in the public domain. The settlement of such claims may be of interest to a wider group of vulnerable people, other legal advisers and the wider public. There is a significant power and resources imbalance between the parties to these settlements and the issue at stake may be of great importance to the applicants. Strict confidentiality clauses prevent legitimate discussion of action or inaction by the State and also make it more difficult for other victims to obtain supporting evidence for similar complaints. Settlement agreements which include a term that the fact of the settlement of proceedings must remain confidential cannot possibly be in the public interest.

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| ***Recommendation:*** 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  |

# Pro Bono Practice

FLAC also operates PILA, the Public Interest Law Alliance which operates a Pro Bono Referral Scheme which facilitates NGOs, community groups and independent law centres in getting legal assistance pro bono from members of the legal profession. PILA works to inspire and engage lawyers in pro bono work by supporting a culture of legal practice that actively delivers free legal assistance to those who are unable to pay for or access legal help. 35 law firms, 350 barristers and 5 in house legal teams are part of this alliance and provide their services free of charge. 115 community and voluntary groups received pro bono legal assistance through PILA in 2018.

Pro bono in Ireland has grown steadily in Ireland over the last number of years and the commitment and dedication of solicitors and barristers who have provided their services pro bono should be publicly acknowledged. Commercial law firms are increasing their commitment to pro bono legal work not only as a form of Corporate Social Responsibility, but also as a practice area. In particular, law firms are developing on-going projects with PILA and a community partner that address an identified unmet legal need.[[54]](#footnote-54). It is significant that two of the largest firms have recently hired an associate with the specific task of managing and delivering the pro bono work of the firm.

Pro bono is a professional responsibility of any lawyer and represents an important part of the puzzle when it comes to tackling unmet legal need. However, pro bono is not, and cannot be a replacement to a properly resourced, community based, national legal aid system.

In Australia, the introduction of ‘pro bono conditions’ in relation to the Commonwealth government’s legal service purchase provisions, has been a significant factor contributing to the growth in law firm pro bono in Australia.[[55]](#footnote-55)

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| Recommendations:* Ensure that any public procurement models for public legal services require all legal services to sign up to a target of pro bono hours per year
* Ensure that any public procurement model includes a provision acknowledging that it is appropriate for providers of legal services, to act against the State and any Agency in pro bono matters where there is no conflict of interest
* 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. |

The new procurement model for external legal services requires all legal services providers to sign up to the National Pro Bono Target (where each lawyer must work 35 pro bono hours a year), use their best endeavours to meet or exceed it, and maintain records and report on Pro Bono Work at the end of the financial year. The Attorney-General’s Department agrees that legal service providers may act against the Commonwealth in Pro Bono Work where there is no conflict of interest.

**APPENDIX 1**

In respect of **representative actions** there are a number of drawbacks:

* legal aid is not available, making it difficult for them to be taken in aid of disadvantaged groups[[56]](#footnote-56) despite the Law Reform Commission suggesting that the Civil Legal Aid Act 1995 can be interpreted as permitting this.[[57]](#footnote-57)
* they cannot be used in tort cases[[58]](#footnote-58)
* all represented parties must authorise the representative action and this requirement of consensus may prove a barrier to proceeding with litigation in some instances.[[59]](#footnote-59)
* they only bind those persons who are party to the action. This means that a judgment (or settlement) in a representative action does not necessarily conclude the matter and similar claims may be taken by third parties against the defendant in future.
* It is possible for certain parties to the action to seek the court's leave to be exempted from the judgment (or settlement), and therefore bring their own action.
* the only remedies available in a representative action are injunctive or declaratory relief. While other jurisdictions have allowed for damages to be awarded in representative actions, there is no evidence of the Irish courts permitting an award of damages to-date.

In a **test case**, where multiple claimants face the same or similar issues, one case is selected to proceed as a "test", while the remaining cases are stayed pending resolution of this test case. Following conclusion of the test case, other individuals with similar cases can issue their own proceedings individually relying on the doctrine of precedent, which in theory should lead to the same verdict being reached. Test cases also have a number of drawbacks:

* In reality, there is no guarantee that the remaining cases will reach the same verdict unless all elements of the claim are identical to the test case.[[60]](#footnote-60)
* the claimant in a test case is required to initiate the claim themselves and is solely responsible for their own legal costs (absent the provision of legal aid) which may be prohibitive.
* there will be a significant economic imbalance between the financial situation of the claimant and the defendant (often a State or business entity). A claimant in a test case may be unable or unwilling to engage suitable representation, which prevents the advancement of such cases.[[61]](#footnote-61)
* conflicts of interest may arise between the claimant in a test case and other prospective claimants. An Irish court will be concentrated on the harm suffered by the claimant in the test case, with the broader harm suffered by other prospective claimants being secondary (if considered at all). The prospective claimants will have limited scope to influence conduct of the test case.
* an Irish court may be less willing to award exemplary or punitive damages against a defendant in a test case which will not be shared between the group of broader prospective claimants.[[62]](#footnote-62)
* a test case may be dismissed by the court as a result of defences or counterclaims peculiar to that particular claimant, without any adjudication of the substantive issues.
* the claimant in a test case may agree to a settlement with the defendant without any conclusive judgment being handed down. Even where the court makes a judgment, it

may be narrowly construed as applicable to that particular claimant in a way that is unhelpful for other prospective claimants, unlike in the English House of Lords, where moot points can be heard in certain circumstances, Irish courts have yet to rule on allowing test cases to be considered beyond the point where the immediate parties are satisfied.[[63]](#footnote-63)

# APPENDIX 2

# Examples of unnecessary formality and complexity

Standard opening wording for an Affidavit

I, Mary O’ Brien, aged 18 years and upwards, make oath and say as follows:- I am the Plaintiff in the above entitled matter and I make this affidavit from facts within my own knowledge, save where otherwise appearing, and where so appearing I verily believe the same to be true.

Order: 18 Joinder of causes of action

1. Subject to the rules of this Order, the plaintiff may unite in the same action several causes of action; but if it appear to the Court that any such causes of action cannot be conveniently tried or disposed of together the Court may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

2. No cause of action shall unless by leave of the Court be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed. Provided that nothing in this Order contained shall prevent any plaintiff in an action for redemption from asking for or obtaining an order against the defendant for delivery of the possession of the mortgaged property to the plaintiff on or after the order absolute for redemption, and such an action for redemption and for such delivery of possession shall not be deemed an action for the recovery of land within the meaning of these Rules.

Order: 12

Appearance

The below amendment(s) have been made to this instrument which can be viewed by clicking on the link(s):

[No12-S.I. No. 14 Of 1989: Rules Of The Superior Courts (No. 1), 1989.](https://protect2.fireeye.com/v1/url?k=8837bda6-d4e3b73a-88308eed-8631fc8bdea5-3aa32518297d5c87&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo12-S.I.%2BNo.%2B14%2BOf%2B1989%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28No.%2B1%29%2C%2B1989.)

[No12-S.I. No. 506 Of 2005: Rules Of The Superior Courts (Jurisdiction, Recognition, Enforcement And Service Of Proceedings) 2005](https://protect2.fireeye.com/v1/url?k=9c647c8f-c0b07613-9c634fc4-8631fc8bdea5-78c85361930011a5&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo12-S.I.%2BNo.%2B506%2BOf%2B2005%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28Jurisdiction%2C%2BRecognition%2C%2BEnforcement%2BAnd%2BService%2BOf%2BProceedings%29%2B2005)

[No12-S.I. No. 14 Of 2007: Rules Of The Superior Courts (Statutory Applications And Appeals) 2007](https://protect2.fireeye.com/v1/url?k=ff022b28-a3d621b4-ff051863-8631fc8bdea5-9d3854591933368e&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo12-S.I.%2BNo.%2B14%2BOf%2B2007%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28Statutory%2BApplications%2BAnd%2BAppeals%29%2B2007)

[No12-S.I. No. 31 Of 2008: Rules Of The Superior Courts (Cape Town Convention) 2008](https://protect2.fireeye.com/v1/url?k=d4dd2269-880928f5-d4da1122-8631fc8bdea5-b54b1b434a51432a&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo12-S.I.%2BNo.%2B31%2BOf%2B2008%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28Cape%2BTown%2BConvention%29%2B2008)

[No12-S.I. No. 307 Of 2013: Rules Of The Superior Courts (Lugano Convention, Maintenance And Service) 2013](https://protect2.fireeye.com/v1/url?k=f35ded54-af89e7c8-f35ade1f-8631fc8bdea5-7890d9fde999cb86&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo12-S.I.%2BNo.%2B307%2BOf%2B2013%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28Lugano%2BConvention%2C%2BMaintenance%2BAnd%2BService%29%2B2013)

[No12-S.I. No. 9 Of 2016: Rules Of The Superior Courts (Jurisdiction, Recognition And Enforcement Of Judgments) 2016](https://protect2.fireeye.com/v1/url?k=f86d007d-a4b90ae1-f86a3336-8631fc8bdea5-3d4a91b6c0f396f9&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo12-S.I.%2BNo.%2B9%2BOf%2B2016%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28Jurisdiction%2C%2BRecognition%2BAnd%2BEnforcement%2BOf%2BJudgments%29%2B2016)

[No12-S.I. No. 475 Of 2017: Rules Of The Superior Courts (Service) 2017](https://protect2.fireeye.com/v1/url?k=e1858460-bd518efc-e182b72b-8631fc8bdea5-4ec4dc9602746a45&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo12-S.I.%2BNo.%2B475%2BOf%2B2017%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28Service%29%2B2017)

1. Appearances shall be entered in the Central Office, Four Courts, Dublin, except in the case of lunacy and minor matters, when the appearance shall be entered in the Office of Wards of Court, Four Courts, Dublin or except as otherwise provided in these Rules.

2. (1) An appearance to any plenary summons, or summary summons shall be entered within eight days after the service of the summons, exclusive of the day of service, unless the Court shall otherwise order.

(2) A defendant in proceedings commenced by special summons may enter an appearance thereto at any time, but shall not, without the leave of the Court, be entitled to be heard in such proceedings unless he has entered an appearance.

3. A defendant shall enter his appearance to an originating summons by delivering to the proper officer a memorandum in writing dated on the day of its delivery and containing the name of the defendant's solicitor, or stating that the defendant defends in person. He shall at the same time deliver to the officer a duplicate of the memorandum which the officer shall mark with an official stamp, showing the date on which the appearance is entered and then return it to the person entering the appearance, and the duplicate memorandum so marked shall be a certificate that the appearance was entered on the day indicated by the official stamp.

Order: 15

Parties

The below amendment(s) have been made to this instrument which can be viewed by clicking on the link(s)

[No15-S.I. No. 149 Of 2010: Rules Of The Superior Courts (Land And Conveyancing Law Reform Act 2009) 2010](https://protect2.fireeye.com/v1/url?k=0fec221c-53382880-0feb1157-8631fc8bdea5-b5005f00532e98bb&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo15-S.I.%2BNo.%2B149%2BOf%2B2010%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28Land%2BAnd%2BConveyancing%2BLaw%2BReform%2BAct%2B2009%29%2B2010)

[No15-S.I. No. 503 Of 2010: Rules Of The Superior Courts (Derivative Actions) 2010](https://protect2.fireeye.com/v1/url?k=135d4d8a-4f894716-135a7ec1-8631fc8bdea5-d97fae7e1abe3d2b&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo15-S.I.%2BNo.%2B503%2BOf%2B2010%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28Derivative%2BActions%29%2B2010)

[No15-S.I. No. 255 Of 2015: Rules Of The Superior Courts (Companies Act 2014) 2015](https://protect2.fireeye.com/v1/url?k=69a7f772-3573fdee-69a0c439-8631fc8bdea5-4ee8b3288057b887&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo15-S.I.%2BNo.%2B255%2BOf%2B2015%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28Companies%2BAct%2B2014%29%2B2015)

[No15-S.I. No. 83 Of 2016: Rules Of The Superior Courts (Order 15) 2016](https://protect2.fireeye.com/v1/url?k=43054726-1fd14dba-4302746d-8631fc8bdea5-654bc9acc4641f42&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo15-S.I.%2BNo.%2B83%2BOf%2B2016%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28Order%2B15%29%2B2016)

I. General.

1. (1) All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise; provided that if, upon the application of any defendant, it shall appear that such joinder may embarrass or delay the trial of the proceeding, the Court may order separate trials or make such order as may be expedient.

Order: 27

Default of pleading

The below amendment(s) have been made to this instrument which can be viewed by clicking on the link(s):

[No-S.I. No. 585 Of 2001: Rules Of The Superior Courts (No. 4) (Euro Changeover), 2001](https://protect2.fireeye.com/v1/url?k=4cfa4b90-102e410c-4cfd78db-8631fc8bdea5-c9df724135d8777a&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo-S.I.%2BNo.%2B585%2BOf%2B2001%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28No.%2B4%29%2B%28Euro%2BChangeover%29%2C%2B2001)

[No27-S.I. No. 63 Of 2004: Rules Of The Superior Courts (Order 27 (Amendment) Rules), 2004.](https://protect2.fireeye.com/v1/url?k=329e73f4-6e4a7968-329940bf-8631fc8bdea5-3f7bdfd5cb6f43cc&q=1&e=9b39f3b2-3e86-471c-84da-4e4093b66a4d&u=http%3A%2F%2Fwww.courts.ie%2Frules.nsf%2FSuperiorAmdLookup%2FNo27-S.I.%2BNo.%2B63%2BOf%2B2004%3A%2BRules%2BOf%2BThe%2BSuperior%2BCourts%2B%28Order%2B27%2B%28Amendment%29%2BRules%29%2C%2B2004.)

1. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court to dismiss the action, with costs, for want of prosecution; and on the hearing of such application the Court may order the action to be dismissed accordingly, or may make such other order on such terms as the Court shall think just.

2. Subject to the provisions of rules 15 and 16, if the plaintiff's claim be only for a debt or liquidated demand, or for the recovery of land, or for the delivery of specific goods, and the defendant does not within the time allowed for that purpose deliver a defense, the plaintiff may at the expiration of such time enter final judgment in the Central

Office for the amount of such debt or liquidated demand, or that the person whose title is asserted in the statement of claim shall recover possession of the land, or for the delivery of the specific goods without giving the defendant the option of retaining such goods upon paying the value thereof, as the case may be, with cost

Order: 18

Joinder of causes of action

1. Subject to the rules of this Order, the plaintiff may unite in the same action several causes of action; but if it appear to the Court that any such causes of action cannot be conveniently tried or disposed of together the Court may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

2. No cause of action shall unless by leave of the Court be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed. Provided that nothing in this Order contained shall prevent any plaintiff in an action for redemption from asking for or obtaining an order against the defendant for delivery of the possession of the mortgaged property to the plaintiff on or after the order absolute for redemption, and such an action for redemption and for such delivery of possession shall not be deemed an action for the recovery of land within the meaning of these Rules.

**Appendix 3: Practice Direction 81**

* FLAC notes that Practice Direction 81 is one- side and uneven in the obligations it imposes. It imposes extensive obligations on legal representatives acting for applicants, which are significantly at variance with ordinary judicial review procedures and without any equivalent obligations being placed on the legal representatives for respondents, giving rise to a concern about equality of arms, in the context of duties of disclosure, costs order including wasted costs orders.
* Asylum and immigration proceedings appear to be the only area subject to the extensive range of obligations set out in the Practice Direction.
* The Explanatory note sets out that the purpose of the Practice Direction was to give practical effect to the principle of uberrima fides applying to ex parte applications and the general duty of applicants to put all relevant material before the court. Existing case law indicates that there should be equivalent obligations on both applicants and respondents. Thus the application of the principle of uberrima fides in the context of ex parte applications is matched by the equal responsibility on respondents to place their cards on the table.
* FLAC submits that it is discriminatory and disproportionate to treat all applicants in the asylum and immigration field as if they are inherently suspect
* This Practice Direction may also be challenged on vires grounds. Any practice direction can only properly be made within the scope of the rules already prescribed by the Rules Committees. Practice Directions are subservient to the Rules of Court and cannot prescribe requirements that are nor already provided for in the Rules of Court. To do so would involve the making of rule witout lawful authority. A practice direction is an administrative notice that cannot change the law or alter it.
* The Rules Committee are empowered by section 36(1) of the Courts of Justice Act 1924 to make rules but such powers are limited to making rules dealing with “pleading and practice and procedure generally” A Rules Committee is limited to making rules that regulate the manner in which a substantive power of the Court is exercised. It is not a legislative body.
* Several elements of the provisions of the practice Direction go beyond regulating the conduct of proceedings before the court. These elements exceed what is permitted in a practice direction and also go beyond what is permitted by the Rules of Court.
* The following elements of the Practice Direction go beyond what is permitted either by a Practice Direction or by the Rules of Court.
* Section 5(1) provides that every ex parte application must be supported by an affidavit of each and every adult applicant who appears on the proceedings. No such requirements exists in general judicial review proceedings involving multiple applicants
* Section 7(8) of the Practice Direction imposes unprecedented obligations in terms of averments of verification. It provides that “each and every statement or representation made by or on behalf of the applicant or any other member of the applicant’s family, including by any solicitor for the applicant or any member of the applicant’s family , to any immigration or protection body, whether in the Stae or elsewhere.. The scope of this requirement is enormous, on the face it requires disclosure of each and every visa, asylum or immigration application made by or on behalf of the applicant or other members of the applicant’s family(even where those family are not the subject of the judicial review proceedings. On a practical level ther are very real concerns about the ability of applicants , and their legal representatives to comply with this requirement which would result in thousands of pages of material
* Section 7(8)(b- requires the applicant’s solicitor to swear an affidavit containing averments mirroring the applicant’s averments of verification in relation to a number of matters. This requirement does not exist in other Judicial review proceedings.
* Practice Direction HC 81 seeks to create a set of discrete obligations on solicitors and enforce these through exposure to an adverse costs order pursuant to Order 99 rule 6 RSC. This order prescribes in very limited circumstances where a case cannot proceed due to the actions or omissions of a solicitor, then an adverse order may be made against that solicitor. It does not contemplate a wider set of circumstances as potentially founding such an adverse costs order against a solicitor and cannot be relied upon in general terms to provide for adverse costs orders against solicitors where they have not complied with requirements that fall outside the specific scope of Order 99 rule 6 RSC.
* Further Paragraph 7 (8)(b) (iv) appears to offend against Article 9 of the ECHR on the right not to disclose one’s religion.
1. 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. [↑](#footnote-ref-1)
2. FLAC has called on the government to include the objective of protecting and promoting the right of access to justice should be included inn the new National Action Plan on Social Inclusion. . It also recommended that Access to Justice should be a central focus of the National LGBTI Inclusion Strategy and that the strategy should recognise that access to justice addresses social exclusion and should seek to enable access to justice as a tenet of social inclusion. [↑](#footnote-ref-2)
3. Dean of the Faculty of Laws and Professor of Socio-Legal Studies at University College London where she is Director of the Centre for Access to Justice. [↑](#footnote-ref-3)
4. UK Supreme Court in R (UNISON) V Lord Chancellor [↑](#footnote-ref-4)
5. Including at the FLAC access to Justice conference in May 2019 and also see the report in the Law Society Gazette 16 September 2019 [↑](#footnote-ref-5)
6. The right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights which guarantee the rights to a fair trial, to an effective remedy and to legal aid to those who lack sufficient resources so far as this is necessary to ensure effective access to justice. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteed. [↑](#footnote-ref-6)
7. Steel and Morris v The United Kingdom, no 68416/01, 15 February 2005 [↑](#footnote-ref-7)
8. Nemov v Bulgaria, no 33738/02, 16 July 2002 [↑](#footnote-ref-8)
9. Airey v Ireland, [↑](#footnote-ref-9)
10. Airey v Airey [↑](#footnote-ref-10)
11. Airey v Ireland [↑](#footnote-ref-11)
12. Airey v Ireland [↑](#footnote-ref-12)
13. Legal Aid Board <<https://www.legalaidboard.ie/en/our-services/legal-aid-services/do-i-qualify-/>>. [↑](#footnote-ref-13)
14. Mr Justice Peter Kelly in interview with Ann-Marie Hardiman, 'Voice of Experience' (2018) 23(1) Bar Review 10 <[https://www.lawlibrary.ie/news/bar-review/2016-(2).aspx](https://www.lawlibrary.ie/news/bar-review/2016-%282%29.aspx)>. [↑](#footnote-ref-14)
15. [2004] IEHC 413 [↑](#footnote-ref-15)
16. Magdalena Sepúlveda Carmona, above, n. 15, 14. [↑](#footnote-ref-16)
17. Civil Legal Aid (Merits Criteria) Regulations 2013, reg 6(1). [↑](#footnote-ref-17)
18. 'Chief Justice Frank Clarke, 'Opening Address' (Access to Justice Conference, Trinity College Dublin, 17 May 2019) <<https://www.flac.ie/news/2019/05/28/watch-chief-justice-frank-clarkes-opening-address/>>. [↑](#footnote-ref-18)
19. Zubac V Croatia, Application *No 40160/12* [↑](#footnote-ref-19)
20. Australian law Reform Commission. 2000 Managing Justice: A review of the Federal Civil Justice System. 12.2018 12, 221 [↑](#footnote-ref-20)
21. The results of this study were set out by Les Allemby Chief Commissioner of NIHRC at the FLAC Access to Justice conference in May 2019. [↑](#footnote-ref-21)
22. Andrea Durbach, Luke McNamara, Simon Rie and Mark Rix, 'Public interest litigation: making the case in Australia' (2013) 38(4) Alternative Law Journal 219, 219. [↑](#footnote-ref-22)
23. Eliza Ginnivan, 'Public interest litigation : mitigating adverse costs order risk' (2016) 136 Precedent 22, 22. [↑](#footnote-ref-23)
24. McKechnie J in Persona Digital Telephony Ltd v Minister for Public Enterprise [2017] IESC 27.

 ibid 6. [↑](#footnote-ref-24)
25. Fraser v Buckle in Murdoch and Hunt's Encyclopaedia of Irish Law (Bloomsbury Professional, 2018). [↑](#footnote-ref-25)
26. Persona Digital Telephony Ltd v Minister for Public Enterprise [2017] IESC 27. [↑](#footnote-ref-26)
27. Modern English jurisprudence confirms that third party funding will not itself breach the rule against maintenance; nor will funding by third parties in return for a share of the proceeds amount to champerty. In Northern Ireland, the Lord Chief Justice's Office confirmed that *"The law of champerty had impeded the development of third-party funding in Northern Ireland…However, as the law of champerty has now been abolished in Northern Ireland as in the rest of the UK, third-party funding represents a potential alternative to legal aid and, subject to the terms and conditions attached to such funding, could facilitate access to justice for members of the public".* Similarly, in 2006, the High Court of Australia handed down its decisions in *Fostif* and *Trendlen* cases which abolished champerty and maintenance noting that a number of States had already passed laws abolishing the crimes and torts of maintenance and champerty. [↑](#footnote-ref-27)
28. This refers to the risk that an unsuccessful litigant will be required to pay the legal costs of their opponent as well as their own costs [↑](#footnote-ref-28)
29. ibid, 6 quoting T. Humby, 'The Biowatch case: major advance in South African law of costs and access to environmental justice' (2010) 22(3) Journal of Environmental Law 125, 129. [↑](#footnote-ref-29)
30. ibid. [↑](#footnote-ref-30)
31. FLAC, 'Review of the Administration of Civil Justice' (Dublin, February 2018), 18 [↑](#footnote-ref-31)
32. Ex tempore ruling on costs of Mr Schrems delivered by Hogan J. on 16 July 2014 in [2014] IEHC 351 <<https://www.pila.ie/resources/bulletin/2014/07/30/update-on-ireland-s-first-protective-costs-order-europe-v-facebook-org>>. [↑](#footnote-ref-32)
33. Eliza Ginnivan (2016)'Public interest litigation: mitigating adverse costs order', 136 Precedent 22 at 24; Legal Aid NSW, ‘6.14 – Public Interest and Human Rights Matters’, http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.14.-public-interest-human-rights-matters [↑](#footnote-ref-33)
34. Eliza Ginnivan, above n 33, at 24; Legal Aid NSW, ‘3.8 Test Cases’ http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/guidelines/3.-civil-law-matters/3.8.-test-cases [↑](#footnote-ref-34)
35. In the Northern Territory the *Local Court Rules 1998* (NT) r 38.10 explicitly allows the Court to make public interest costs. Under r 38.10(1), a party may apply to the Court for a public interest costs order at any time during the proceedings, including at commencement. In accordance with r 38.10(2), the applicant must satisfy the court that the proceedings (a) ‘will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community’, (b) ‘will affect the development of law generally and may reduce the need for further litigation’, and (c) ‘has the character of a public interest or test case proceedings’.

In Northern Ireland the principles of the Aarhus Convention were implemented by the *Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013* (as amended) (the Aarhus Regulations). The Aarhus Regulations provide for fixed costs in litigation involving challenges to environmental decisions. The maximum amount of costs which can be recovered from an individual Applicant is £5,000 (£10,000 where the Applicant is a legal entity or an individual applying in the name of a legal entity or unincorporated association. In return, the maximum amount recoverable from the Respondent is £35,000 (all excluding VAT). [↑](#footnote-ref-35)
36. Law Reform Commission, Report on Multi-Party Litigation (LRC 76-2005) 3. [↑](#footnote-ref-36)
37. In England and Wales, the Group Litigation Order (GLO) allows a number of separate claims to be formally managed together by the same court, where the claims cover one or more “common or related issues of fact or law”. GLOs provide a mechanism for the court to manage multiple claims in an efficient and cost effective manner and are intended to provide access to justice to a large group of people whose individual claims are too small to make individual actions economically viable including environmental claims, industrial disease claims, product liability claims, tax disputes, child abuse claims and claims relating to data breaches and other human rights issues. [↑](#footnote-ref-37)
38. See Appendix 1 for more on this [↑](#footnote-ref-38)
39. Law Reform Commission, Report on Multi-Party Litigation (LRC 76-2005). [↑](#footnote-ref-39)
40. Multi-Party Actions Bill 2017 <<https://data.oireachtas.ie/ie/oireachtas/bill/2017/130/eng/initiated/b13017d.pdf>>. [↑](#footnote-ref-40)
41. ibid. section 2(4). [↑](#footnote-ref-41)
42. FLAC, Submissions on the Multi-Party Actions Bill 2017 <<https://www.flac.ie/download/pdf/submission_to_joc_mpa_bill_2017.pdf>>. [↑](#footnote-ref-42)
43. Joint Committee on Justice and Equality, 'Report on Scrutiny of the Multi-Party Actions Bill 2017 [PMB]' (32/JAE/28, September 2018) <<http://opac.oireachtas.ie/AWData/Library3/Report_on_Scrutiny_of_the_Multi-Party_Actions_Bill_2017_PMB_152920.pdf>>. [↑](#footnote-ref-43)
44. Cian Henry, ‘Standing on Thin Ice: Standing Rules and Public Interest Litigation in Ireland and the United States’ [2018] 21 TCLR 315. [↑](#footnote-ref-44)
45. Section 31(3) of the Senior Courts Act 1981 [↑](#footnote-ref-45)
46. [1994] 2 CMLR 548. Note that in this case it was ultimately held that the public authority had not acted unlawfully. [↑](#footnote-ref-46)
47. [1995] 1 WLR 386. [↑](#footnote-ref-47)
48. Ibid, 395; William Wade, Administrative Law (7th edn, OUP 1994), p 712. [↑](#footnote-ref-48)
49. (R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd [1995] 1 All ER 611, at 620 (per Rose LJ)). [↑](#footnote-ref-49)
50. Murphy V Roche [1987] IR106 [↑](#footnote-ref-50)
51. Brady v Donegal Co Council [1989] I.L.R.M. 282. [↑](#footnote-ref-51)
52. V v Courts Service[2009] 4 IR264 [↑](#footnote-ref-52)
53. See further Gerry Whyte, Social Inclusion and the Legal System (2nd edn IPA 2015),178. [↑](#footnote-ref-53)
54. For instance, A&L Goodbody collaborates with the Irish Refugee Council (IRC) and Mercy Law Centre to provide representation to asylum seekers with their applications and appeals, as well as people who are homeless in addressing their housing needs. McCann Fitzgerald collaborates with Women’s Aid in setting up a legal clinic for victims of domestic violence who are representing themselves in family law proceedings [↑](#footnote-ref-54)
55. On 1 July 2008 the Commonwealth government implemented reforms to the Commonwealth’s procurement of legal services by amending the Directions made by the Attorney-General under section 55ZF of the Judiciary Act 1903 (Cth). The 2008 reforms introduced ‘pro bono conditions’ into the Directions which required Commonwealth agencies, departments and statutory authorities (together agencies) to take into account a firm’s pro bono commitment when making their decision as to whether or not to engage that firm, in particular the amount and kind of pro bono legal work the provider has undertaken. See further [Submission to the Secretary’s Review of Commonwealth Legal Services, Issues Paper 1, Australian Pro Bono Centre, 9 December 2015](https://www.probonocentre.org.au/wp-content/uploads/2016/02/Submission-to-the-Secretarys-Review-of-Commonwealth-Legal-Services-Australian-Pro-Bono-Centre.pdf) [↑](#footnote-ref-55)
56. Civil Legal Aid Act 1995, section 28(9)(a)(ix). [↑](#footnote-ref-56)
57. Law Reform Commission, Report on Multi-Party Litigation (LRC 76-2005) 61. [↑](#footnote-ref-57)
58. Moore v AG for Saorstát Éireann [1930] I.R. 471. [↑](#footnote-ref-58)
59. Madigan v Attorney General [1986] I.L.R.M. 136. [↑](#footnote-ref-59)
60. Ricardo Savona Siemens, 'Between Sector-Specific and Horizontal: A New Proposal for Ireland's Implementation of Collective Litigation Mechanisms' (2018) 17 Hibernian Law Journal 92–95. [↑](#footnote-ref-60)
61. For a detailed analysis of the role of legal costs as a barrier to public interest litigation and some potential remedies, see PILA, 'Report on the Costs Barrier and Protective Costs Orders' (FLAC October 2010) <<https://www.pila.ie/download/pdf/flac_pila_report_final.pdf>>. [↑](#footnote-ref-61)
62. Mel Cousins, 'How Public Interest Law and Litigation Can Make a Difference to Marginalised and Vulnerable Groups in Ireland' (Public Interest Law in Ireland – The Reality and the Potential FLAC Conference, Dublin, 2005) <[https://www.flac.ie/download/pdf/cousins\_flac\_061005.pdf 25/06/2019](https://www.flac.ie/download/pdf/cousins_flac_061005.pdf%2025/06/2019)>. A number of respondents to the report noted that they were sceptical of judicial attitudes to public interest litigation in the wake of Sinnott v. Minister for Education [2001] IESC 63; [2001] 2 I.R. 505. [↑](#footnote-ref-62)
63. ibid, 15. [↑](#footnote-ref-63)