

1. Introduction

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all. FLAC was established in 1969 by law students to provide legal information, advice and representation to people who could not afford to pay for legal services and to campaign for a state civil legal aid system. Today FLAC has a full-time head office in Dublin and works for law reform for the benefit of disadvantaged and marginalised people.

In pursuit of the goal of promoting access to justice, FLAC works in a number of ways. It operates a telephone information line and supports a network of 88 legal advice centres where volunteer solicitors and barristers impart legal advice. Through these services FLAC keeps statistics on legal queries received and conducts research on people's ability to access justice around the country. The organisation also generates publications and guides on legal topics aimed at informing the public about their rights and promoting access to justice. FLAC campaigns on core issues, carrying out strategic litigation and conducting research into areas of law and policy where it can bring about positive social change.

2. Civil Legal Aid

The Right of Fair Procedures and Access to Justice in relation to Civil Legal Aid

The State-run civil legal aid scheme is not a free service and is subject to a number of restrictions which limits the scope of the scheme. The scheme was established in 1979 on an administrative basis and was placed on a statutory footing in 1995ⁱ. It is administered by the Legal Aid Board (LAB).

The legal aid scheme operates a number of exclusions in relation to housing rights, representation before tribunals including the Social Welfare Appeals Office, the Equality Tribunal and the Employment Appeals Tribunal and defamation. These areas of law can have a major impact on already vulnerable people and exclusion from the legal aid scheme may deny people on lower incomes access to the legal systemⁱⁱ.

The number of applications for legal aid rose by 77 per cent over the period 2007 – 2010 and by March 2011 almost 3000 people were awaiting a first appointment with a legal aid solicitor. The general budget of the LAB suffered a six per cent cut in 2009/2010 while the asylum service Refugee Legal Service (RLS) was subject to a 21 per cent cut in funding for 2011ⁱⁱⁱ on top of a total combined decrease of ten per cent for 2009 and 2010.

The budget cuts to the LAB, in combination with the failure to replace staff who have left, has resulted in long waiting times exceeding the LAB's own target of two to four months; 15 State-run centres have a waiting list of five months or more (of which four have a waiting list of seven months or more) as of March 2011. In addition there is a proposal that the LAB will also administer the criminal legal aid scheme, mental health representatives and the Attorney General's scheme but it is not clear if additional resources will be made available.

These developments are interfering with the right of access to justice for a group of people who may already be susceptible to marginalisation. Furthermore, they are having a negative impact on the accessibility of civil legal aid as stressed by the Commissioner in his country report on Ireland.

Recommendation: The State must take steps to ensure that all those in need of civil legal aid will be able to gain access to the appropriate legal information and representation in a timely fashion. Legal services should be treated as frontline services so that the current minimum service would be maintained. Nobody should be excluded from accessing legal aid simply because of the area of law for which he or she requires it.

3. Debt and Consumer Credit

3.1 The Right to Housing in relation to Over-Indebtedness

The State has not incorporated the right to housing into its domestic legislative framework and has opted out of Article 31 of the European Social Charter which affords the right to housing. The right to housing, framed in terms of the consequences of consumer over-indebtedness and potential repossession as a result of mortgage arrears, forms a major part of FLAC's work.

In July 2009, FLAC published its report, *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System*^{iv} which examined the impact of an out-of-date legal system on over-indebted consumers amidst the culture of consumer borrowing which had developed during the Celtic Tiger years. This in turn has led to an increase in the number of insolvent consumers, chronic mortgage arrears and house repossessions.

The latest figures at the end of March 2011 indicate that 49,609 (or 6.3%) of residential mortgages are now in arrears for three months or longer. 35,341 (over 70%) of this total have been in arrears for over six months. 62,936 (or 8%) have been rescheduled, with nearly 40% of these involving an interest-only payment. 26,274 (or 3%) have been rescheduled and are in arrears over three months. In effect, this means that some 86,000 (or one in nine) residential mortgages are in difficulty. 136 new orders for repossession were granted by the courts in the first quarter of 2011 and 140 houses were actually repossessed by lenders; 49 by way of court order and 91 following voluntary surrender or abandonment by the borrower.

Against this backdrop, in March 2010, the Expert Group on Mortgage Arrears and Personal Debt, of which FLAC was a member, issued its Interim Report in July 2010 and a final report in November 2010. Despite the growing number of arrears cases, a number of the Group's recommendations remain to be implemented, for example, that assessment of housing need should not have to await legal proceedings for repossession being brought against the borrower where a mortgage is unsustainable or that practical changes should be made to the Mortgage Interest Supplement scheme. In addition, a number of critical areas were inadequately addressed by the group, for example, the failure to recommend that a mortgage to rent scheme be introduced.

To compound this situation there are already flaws in the State's social housing policy generally. Many have been left without access to appropriate housing supports due to difficulties including family breakdown, over-indebtedness or unemployment. Those who cannot sustain mortgages require a court ordered repossession before they can be deemed eligible for housing supports. The social housing budget has been cut by 36 per cent in 2011 and changes made to limit access to the rent supplement scheme despite an increased need for housing supports.

Recommendation: The State must put in place appropriate policies and supports to ensure that those at risk of homelessness because of over-indebtedness or unsustainable mortgages have access to supports which would permit them to remain in their homes or access suitable alternative accommodation

4. Social Welfare and Social Protection

4.1 The Right to an Adequate Standard of Living including Adequate Food, Housing and Mental and Physical Health in relation to Direct Provision Residents

The direct provision and dispersal system accommodates asylum seekers and others seeking protection on a full-board basis and has been in place as a nationwide scheme since 2000. In its concluding observations on Ireland's third and fourth national periodic report^v, examined in February 2011, the UN Committee on the Elimination of Racial Discrimination (CERD) expressed concern at the "negative impact that the policy of 'direct provision' has had on the welfare of asylum seekers who, due to the inordinate delay in the processing of their applications, and the final outcomes of their appeals and reviews, as well as poor living conditions, can suffer health and psychological problems that in certain cases lead to serious mental illness"^{vi}. The recommendations of the Committee echo those made by the Commissioner in his report following his visit to Ireland in 2007, in which he called on the Government to expedite claims for protection and improve living conditions for asylum seekers.

FLAC's report *One Size Doesn't Fit All*^{vii} examined the direct provision and dispersal system in Ireland and concluded that the scheme does not comply with a number of the State's international and domestic human rights obligations. The report concluded that the direct provision system does not provide an environment conducive to the enjoyment or fulfilment of the most basic human rights, including the rights to health, food, housing and family life.

Recommendation: The State should carry out an audit of its policy of direct provision and dispersal to ensure it meets human rights standards in Irish law and in international human rights treaties that it has ratified. The State should respect, protect and promote the fundamental human rights of all people seeking its protection regardless of their immigration status.

4.2 The Right to Social Security in relation to the Habitual Residence Condition (HRC)

The Habitual Residence Condition is an additional qualifying condition for all means-tested social welfare payments and Child Benefit by which an applicant has to show a connection to the State. It was introduced to prevent welfare tourism following the enlargement of the European Union in May 2004. However, as it was found to prevent freedom of movement for EU migrant workers and no longer applies to them. It has since impacted on other vulnerable groups including asylum seekers, migrant women who are victims of domestic violence and Travellers.

FLAC took a series of cases in 2008 and 2009 which clarified that asylum seekers were not excluded by law from being able to satisfy the Condition. However, a week after the Chief Social Welfare Appeals Officer issued these decisions the government changed the law to exclude all people seeking a form of protection in Ireland from accessing social welfare payments other than once-off emergency payments or the small weekly allowance of €19.10 for an adult or €9.60 for a child^{viii}. The fact that a person seeking protection may live in the State for a number of years while awaiting a final decision on his or her immigration status^{ix}, is not regarded as relevant in the context of being found habitually resident for the purposes of social welfare.

Recommendation: The State should recognise that residence while awaiting a State decision on protection or immigration status should be taken into account for the purposes of habitual residence.

4.3 Non-Discrimination, Best Interests of the Child and the right to Social Security in relation to Child Benefit

While Child Benefit is classified as a universal payment and has been described by the Irish Government as "an important means of reducing child poverty"^x, a number of children living in the State are denied this payment due to the application of the Habitual Residence Condition.

Prior to the introduction of the Condition, Child Benefit was paid to the parents of all children living in the State regardless of their immigration status. However, the children of asylum or protection applicants and other persons not regarded as habitually resident are now denied the payment. This creates an inequality between children within the asylum process as parents who were in receipt of the payment before May 2004 continue to receive it, as do parents who have been granted the payment on appeal, whereas the parents of children who were born here or arrived after the introduction of the Condition do not. The Government maintains that the best interests of the child are met through the direct provision scheme but FLAC's report shows that this is not so.

Recommendation: The State should carry out a poverty impact assessment on how the Habitual Residence Condition impacts on vulnerable groups, in particular children. Furthermore, Child Benefit should be universal and paid to every child living in the State.

5. Public Interest Law

5.1 Recognition of the Person before the Law, the Right to Privacy and Family Life and the Right to Non-Discrimination in relation to Transgendered Persons

In October 2007, the Irish High Court held that the failure of the State to provide legal recognition of a transgender woman in her acquired gender amounted to a violation of her rights under Article 8 of the European Convention on Human Rights^{xi}. The Irish Government has accepted this finding and set up a body to advise on a change in the law but no action has been taken to date.^{xii}

Recommendation: The State should take urgent action to provide for legal recognition of transgender persons.

5.2 Non-Discrimination and Equality before the Law and Access to Public Service in relation to Deaf Jurors

Deaf persons are excluded from serving on juries in civil and criminal trials in Ireland. This prevents them from taking part in an important aspect of public affairs and from having access on an equal basis to public service, when they could do so with the assistance of sign language interpreters operating under rules to protect the integrity and confidentiality of jury deliberations^{xiii}.

Recommendation: The State should take steps to enable deaf persons to serve as juries with appropriate assistance and safeguards.

6. Conclusion

FLAC recognises that the State provides some excellent services however in all areas of our work FLAC encounters people who seek to access public services but who are met with a lack of consistency, a failure to respect their dignity and who are denied their fundamental human rights. The Commissioner made a number of recommendations following his previous visit to Ireland in relation to the accessibility of civil legal aid, the improvement of living conditions for asylum seekers and the consideration of the rights of the child especially in relation to reducing the number of children experiencing poverty. However, these recommendations and others have not been implemented and with the onset of the economic downturn standards have deteriorated. The newly formed coalition Government needs to review its policies and commit to realising its human rights obligations to ensure that people's rights are upheld in a fair and efficient way.

End Notes

ⁱ Civil Legal Aid Act 1995

ⁱⁱ For further information see FLAC, ICCL & IPRT (2008) *Shadow Report to the Third Periodic Report of Ireland under the International Covenant on Civil and Political Rights*, pages 84 and 85

ⁱⁱⁱ See <http://www.budget.gov.ie/budgets/2011/Documents/Estimates%20Budget%202011.pdf>

^{iv} See FLAC (2008) *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* available at http://www.flac.ie/download/pdf/to_no_ones_credit_june09.pdf

^v For further information see the NGO Alliance Against Racism (2011) *Shadow Report on the Third and Fourth Periodic Reports of Ireland under the UN International Convention on the Elimination of Racial Discrimination* available at http://www.flac.ie/download/pdf/2011_naar_shadow_report_to_cerd_final.pdf and Smyth J., *Government defends record on racism and human rights*, Irish Times, 23 February 2011.

^{vi} *Concluding Observations of the Committee on the Elimination of Racial Discrimination on Ireland's Third and Fourth Periodic Report* available at http://www2.ohchr.org/english/bodies/cerd/docs/co/Ireland_AUV.pdf

^{vii} See FLAC (2009) *One Size Doesn't Fit All: A legal analysis of Direct Provision, 10 years on* available at http://www.flac.ie/download/pdf/one_size_doesnt_fit_all_full_report_final.pdf

^{viii} For more information see page 8 of FLAC (January 2011) *Briefing for UN Independent Expert on Human Rights and Extreme Poverty* available at http://www.flac.ie/download/pdf/briefing_for_un_independent_expert_on_human_rights_and_extreme_poverty_january_2011.pdf

^{ix} According to the latest figures available from the end of February 2011 (available at [http://www.ria.gov.ie/en/RIA/RIAFeb\(A4\)2011.pdf/Files/RIAFeb\(A4\)2011.pdf](http://www.ria.gov.ie/en/RIA/RIAFeb(A4)2011.pdf/Files/RIAFeb(A4)2011.pdf)), there are currently 5975 asylum seekers in Direct Provision accommodation of which over 35% are children. The Government originally envisaged that a person would remain within the direct provision system on 'on a short term basis (not more than six months) however the latest figures show that 2791 (47%) of residents have spent more than 3 years in such accommodation.

^x See page 71 of the *National's Children's Strategy 2000 – 2010* available at http://www.dohc.ie/publications/pdf/childstrat_report.pdf?direct=1

^{xi} *Foy -v- An t-Ard Chláraitheoir, Ireland and the Attorney General* [2007] IEHC 470

^{xii} FLAC has made a submission to the Advisory Group available at http://www.flac.ie/download/pdf/flacs_submission_to_the_gender_recognition_advisory_group.pdf

^{xiii} For a briefing note on the *Clarke* case taken by FLAC see http://www.flac.ie/download/pdf/2010_07_14_clarke_case_briefing_document.pdf and for further details on a subsequent case involving a deaf man called for jury service go to <http://www.flac.ie/news/2010/11/29/judge-rules-deaf-man-can-sit-on-jury/>