Response to Law Reform Commission Consultation Paper on Multi Party Litigation (Class Actions)
by
FLAC (Free Legal Advice Centres)

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all and it campaigns through advocacy, strategic litigation and authoritative analysis for the eradication of social and economic exclusion.

FLAC welcomes the Commission's Consultation Paper on class actions. As an organisation which works for social change through methods which include strategic public interest litigation, FLAC's position is that the introduction of class actions could significantly improve access to the courts of disadvantaged groups.

In this paper we focus on the issue from the perspective of improving access to justice and from experience of conducting public interest litigation under the present regime.

It is FLAC's view that the promotion of access to justice is the single strongest argument for reform in this area. It should also have a bearing on the type of reform recommended.

I. Public Interest Law in Ireland

Since 1969 FLAC has been working to promote and develop public interest law in Ireland. Seeking to secure the constitutional right of *all* citizens to access the courts, FLAC has engaged in a variety of different strategies including litigation, lobbying and educating the public. FLAC was successful in proving the need for civil legal aid services and in placing this issue in to the political arena, and its campaigning work has also contributed to reform in the areas of family law, employment law, social welfare and consumer law.

FLAC continues to move forward in its effort to develop and foster a culture of public interest in Ireland. Particular interest has been focused in lobbying for the introduction of representative actions as they are an effective mechanism for marginalised groups to vindicate their rights and to broaden access to justice.

FLAC is of the view that one of several reasons for the lack of a coherent and developed public interest law culture in Ireland is the absence of a class action procedure.

The term "public interest law" is generally accepted as the use of litigation and public advocacy to advance the cause of minority or disadvantaged groups and individuals, or the public interest.

Public interest law organisations, as is the case of FLAC, promote social change by applying and challenging existing laws and advocating changes in legislation that serve the public interest. They engage in activities such as human rights monitoring, advocacy in support and defence of specific interests such as the rights of a specific minority, the establishment of legal clinics, representation of individuals who cannot afford to pay for private legal services, and strategic litigation, to name a few.

Commentators have noted that the use of the public interest litigation model has been directed towards finding a social and legal voice for the disadvantaged and other vulnerable groups emphasising that "the very act of litigation affords a juridical space in which those who lack formal access to power become visible and find expression."[1]

In Ireland, the traditional vehicle used to tackle social exclusion through public interest litigation has been the test case, where one individual or a small group of individuals take a case, the outcome of which has a broader effect either through the establishment of a precedent in the courts or by causing a provision to be declared either unconstitutional or contrary to European law, and thereby leading to legislative change.

Airey –v-Ireland [2] established the right to legal aid and led directly to the establishment of the State scheme of Legal Aid and ultimately the Civil Legal Aid Act 1995. This is a classic example of a case brought by one individual which impacted both on a large number of other individuals and on society in general.

However, there are certain cases where the requisite benefit cannot be spread to others by one individual taking a case. The Married Women's Social Welfare Arrears case illustrates this.

Between 1984 and 1994, FLAC instituted proceedings on behalf of 1800 married women claiming arrears of social welfare payments which had accrued due to the failure of the Irish Government failed to implement Directive 79/7/EEC on the progressive implementation of equal treatment of men and women in matters of social security. A smaller number of cases were brought to the European Court of Justice.

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[1] Helen Henshkoff, Public Interest Litigation: Selected Examples - Reading on Access to Justice - Representative Actions and Similar Procedural Reforms. Prepared for the World Bank Workshop on Access to Justice: Dutch & British Experiences - December 11, 2002

[2] (1979-80) 2 EHRR 305

The case can be contrasted with a test case like *Airey*. While one case could have established the principle that the Irish Government erred in failing to implement the EU Directive in time, this of itself would not have achieved redress for the thousands of women affected. Only by individual action on behalf of named women - and ultimately through achieving an undertaking from the Department to review its files in all such cases - could the financial redress due to each woman be obtained.

The case occupied a considerable portion of FLAC's resources for a number of years. The settlement applied only to the 1800 named women and further litigation involving discrimination under the EU directive ensued at a total estimated cost to the State of 260 million pounds[3]

A class action mechanism would arguably have been ideally suited to this type of issue where the class was clearly identifiable and the issue of law was common to all members of the class. Certainly, aside from lessening the burden on FLAC, a class action may have provided benefits to all parties involved in this litigation. For example, the notice given to all potential class members may have reached more women, including those who might not have been able to afford to contact a solicitor individually or who were unaware of their entitlement, or a settlement for even more women may have been obtained if FLAC did not have to gather facts and be accountable to every individual in the group. Moreover, a class action would have also benefited the State saving the cost of repeated litigation.

Thus FLAC is of the view that the availability of a class action procedure would be a significant factor in allowing for the development of a public interest law culture in this jurisdiction.

II. Access to Justice and Case for introducing class actions

In "Access to the Courts - the limitations of a Human Rights Approach" Mel Cousins[4] identified the lack of collective procedures as one of a number of institutional barriers preventing access to the Courts.

"In the case of the individual, the claim may involve a relatively small amount of money or it may involve opposition to a particular government decision or the resolution of a complex issue of law. This will increase the difficulty for any one individual to bring the issue before the courts. However, the same issue or point

[3] O'Morain Padraig, "Governments ignored EU directive", The Irish Times, Feb, 4, 1995, p.e3; O'Morain Padraig, "Bill to give before law to narrow the flaws of the civil legal aid scheme are not adequately addressed in the new Bill," The Irish Times, May 11, 1995, p. 14

[4] Cousins, Mel. "Access to the Courts- the limitations of a Human Rights Approach" in "Human Rights: A European Perspective" (1994), ed. Heffernan, Round Hall Dublin

of law may affect many individuals for example in social security claims. The lack of any collective procedures will effectively bar such persons from obtaining effective access to the courts."[5]

It is important to note that the class action is not without its problems, both from an access to justice standpoint and in a more general context. Gerry Whyte[6] identifies a variety of concerns including the possibility of conflict of interest between the interests of the class representative and absent class members, the potentially prohibitive cost of notification, and the extent of judicial involvement in the management of class actions.

He suggests that public interest lawyers working for disadvantaged clients should look at alternative methods of extending the impact of the case beyond the parties immediately involved. This would include arguing for the existence of a duty on a "public body which has been found to be in breach of its legal obligations to review all cases in which such unlawful behaviour occurred and, where appropriate, to compensate the individuals affected."[7] This approach, as Whyte mentions, was accepted by the Department of Social Welfare in two cases taken by FLAC, one (discussed above) relating to Directive 79/7/EEC on the progressive implementation of equal treatment of men and women in matters of social security, and the other relating to the application of EC Regulation 1408/71 to Deserted Wife's Benefit.

While the approach outlined above may in some circumstance be preferable to a class action, it applies only to public bodies and only to cases where the class of beneficiaries can be identified from the public body's files. In addition, it should be noted that the Irish courts have not yet taken a stance on the existence of such a duty. Further, there is no reason why it should not be seen as complementary to a class action procedure. It is obviously desirable to have access to as broad as possible a range of methods of extending the impact of a judgment to a wider disadvantaged group.

One of the objections to a class action which the Consultation Paper identifies is the possibility that it will undercut the principle of party autonomy that characterises our adversarial system. In particular there is the concern that litigants would lose the right to represent themselves or to secure legal representation of their choice. It bears emphasising that the litigants who stand to benefit most from the introduction of a class action procedure are those who neither have the educational background or resources to represent themselves nor the financial resources to employ legal representation.

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[5] Ibid.
[6] Whyte Gerry, "Social Inclusion and Legal System- Public Interest Law in Ireland," p109 (IPA 2001)
[7] Ibid

FLAC is aware that the introduction of class actions would not by any means act as a panacea to counteract exclusion from the legal system. In particular, it points to the absence of a comprehensive State scheme of legal aid as a far more fundamental barrier. In this respect FLAC particularly welcomes the Commission's recommendation (5.20) that class representatives who are otherwise eligible should be entitled to apply for civil legal aid. It endorses wholeheartedly the Commission view that the inclusion of class actions within the civil legal aid framework is central to achieving [the] goal of equality of access to justice (para. 4.125). This would require the deletion of Section 29(9) (a)(ix) of the Civil Legal Aid Act 1995.

III. Access to Justice and the proposed Class Action Procedure

The Commission in making its recommendations on the specifics of the proposed class actions procedure considers inter alia, the Canadian and Australian requirements that the class action be the "preferable procedure" in any given case. Three objectives have been identified by the courts in Canada in considering whether the "preferable procedure" requirement is satisfied. These are access to justice, judicial economy and deterrence of wrongdoing.

Margaret Shone of the Alberta Law Reform Institute comments as follows:

> "Of the three objectives recognized by the Supreme Court of Canada, the argument that a class action will enhance access to justice has been the most persuasive in convincing courts that a class action is the preferred procedure. Access to the courts to redress civil wrongs is often beyond the financial means of individual citizens. Allowing many persons who are similarly situated to seek relief in a single action facilitates access to justice by eliminating the need for each class member individually to bear the cost of proving all of the facts and making the arguments necessary for the claim to succeed. The courts have considered the prospect that a class action will put the parties on a more even economic footing when deciding whether or not to certify an action."[8]

The Commission adopts the concept behind the "preferable procedure" test but recommends that it is "better encapsulated in the requirement that the class action be an appropriate, fair and efficient procedure". It then sets out a non-exhaustive list of factors which are relevant to determining this. These include "whether it would promote fairness among the parties" and "whether it will secure access to justice for individual class members or whether a significant number of them have a valid interest in individually controlling the prosecution of separate actions."

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[8] Shone Margaret A, "Facilitating access to the Courts through Class actions: Canadian Developments" Canadian Forum on Civil Justice Newsletter, Issue 4. Spring, 2002

In this respect FLAC submits that in order to carry over the emphasis on access to justice evident in the Canadian model, the "fairness" test should be "whether it would promote fairness among the parties having regard to a variety of factors including the difference in resources between the parties".

IV. Matters on which the Commission specifically seeks views

5.13 Opt-in or opt-out

As the Commission points out **"the automatic inclusion of an opt-out regime increases access to justice, particularly for disadvantaged litigants".** Those who stand to benefit most from the class action procedure are people who do not have the resources to actively pursue their rights even to the extent of exercising the choice to opt-in to a class action. As mentioned earlier, the principle of autonomy so cherished in the Irish system, which an opt-in system would preserve, is not in most cases a reality for many people suffering from severe social disadvantage.

5.18 Liability of class members

If an opt-out regime is to be recommended it would appear to follow that **only the representative member(s) of the class should be liable for costs.**

5.21 Liability for Costs

FLAC concurs with the Commission's observation that the current costs regime can be a significant disincentive to plaintiffs and that civil legal aid is likely to be available only to a limited number of plaintiffs and notes that there is a precedent for a no-costs regime as currently applied in family law cases.

However, where plaintiffs are represented by organisations such as human rights bodies or Community Law Centres which are prepared to waive fees, the recovery of costs by the organisation providing representation can be an important factor both in allowing it to mount such cases and in continuing to represent plaintiffs who could not otherwise access the legal system. Gerry Whyte's point mentioned above, as to the potentially prohibitive cost of notifying class members of the existence of the litigation is relevant in this regard.

Moreover, such plaintiffs are often "men of straw" in that costs would not in any event be recoverable against them. It is also fair to say however, that in FLAC's experience, even where potential plaintiffs are aware that the likelihood of an order for costs being pursued is slim, the prospect of the order hanging over them remains a disincentive to litigation.

In the US, fee-shifting statutes have allowed for the payment of fees despite the no-cost rule where the plaintiff is regarded as acting as a "private attorney general" in establishing a point of public interest, and have facilitated the development of organisations such as ACLU, the NAACP and Legal Services Corporation who specialise in public interest law.[9]

In test cases, the Irish courts have traditionally taken the view that costs should not be awarded against a plaintiff who though unsuccessful has taken an action in good faith where a point of public interest is at stake. However recent Supreme Court Case law indicates that this can no longer be relied on by the plaintiff.

The two possible approaches in relation to class actions would appear to be a no costs system like that in British Columbia which permits the courts discretion to award costs in exceptional circumstances, or a system in which costs follow the event but again the courts have the discretion to decline to award costs in particular circumstances. **In both cases FLAC submits that the existence of a genuine point of public interest, the willingness of the plaintiff or plaintiffs to put themselves forward in order to establish such point, and the nature of the organisation providing representation might be factors which should be considered in diverging from the general principle.**

Conclusion

In summary FLAC enthusiastically welcomes the Commission's recommendation to introduce class actions, on the basis that to do so can only strengthen public interest litigation and increase access to justice. In particular it notes the necessity of amending the Civil Legal Aid Act, 1995 to allow for legal aid in representative actions. It emphasises that the objective of increasing access to justice should underpin all decisions taken in relation to the specifics of the procedure, including those relating to costs.

[9] Kelly O'Connell and Erin Healy, "A Social Justice Perspective on the American Class Action in Ireland."