

Submission on the Legal Services Regulation Bill 2011

FLAC

February 2012

About FLAC

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all.

FLAC Policy

Towards achieving its stated aims, FLAC produces policy papers on relevant issues to ensure that government, decision-makers and other NGOs are aware of developments that may affect the lives of people in Ireland. These developments may be legislative, government policy-related or purely practice-oriented. FLAC may make recommendations to a variety of bodies drawing on its legal expertise and bringing in a social inclusion perspective.

You can download/read FLAC's policy papers at <http://www.flac.ie/publications/policy.html>

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1. Introduction & context for FLAC's submission

FLAC is a non-governmental, voluntary organisation which exists to promote the fundamental human right of access to justice. In pursuit of that aim, we identify how the law excludes marginalised and disadvantaged people and we propose fairer solutions than currently exist; we work to advance the use of law in the public interest – including through our Public Interest Law Alliance – and we co-ordinate and support the delivery of basic legal information and advice. FLAC recognises that access to justice includes knowledge of and access to the legal system and to such legal services as are necessary to achieve a just outcome.

In 2011, FLAC provided legal information to more than 13,400 people¹ via our telephone information line. In relation to our centres, some 650 FLAC volunteer lawyers around the country gave information and gathered data on 12,656 consultations given in 69 different FLAC advice centres which are typically based in and run in collaboration with Citizens Information Centres and with those Centres considerable support. FLAC believes that this work helps people to order their affairs and understand the systems in which they live. For those who need more constant advice or representation in court, our first-stop advice service acts as a bridge between a person's legal need and actual legal practitioners. Where appropriate, we refer those who are eligible to the state-funded legal aid services offered by the Legal Aid Board and the State's criminal law service. We also direct people to other public services, such as MABS or mediation services or we advise people that they need to consult a private lawyer where applicable.

This role of bridge between the law and those who need to access it, as well as our underlying mission as a human rights organisation promoting equal access to justice for all, forms the underlying rationale for our submission on the Legal Services Bill 2011.

Issues raised by the public in relation to lawyers

Inevitably, FLAC tends to hear more negative than positive reports on people's contact with lawyers and the law. Regular issues around legal services include **fees, quality of service** and **complaints mechanisms**. About 1.2% of those who visited FLAC centres and about 2.8% of the calls to our information line in 2011 had a direct question or concern about legal services and the professionals that supply them. This proportion increases when we take into account those who called with a principal concern relating to some other topic but also raised concerns about the legal service they receive.

On the question of fees, people ask about the typical cost of a particular legal exercise or how to deal with a legal bill which is higher than anticipated. Concerns raised about lawyers will often question the quality of the service received, including the length of time it took to provide the service. Even in these cases, the concern will often be that the cost of the service was too high, given the quality of the service received.

In turn, those who are dissatisfied with any of these aspects want to know how to complain about the service and how to hold legal practitioners accountable. FLAC's experience with our callers is that people who distrust their legal practitioner are similarly distrustful of existing complaints mechanisms. Generally they do not believe that they will get a fair hearing as the complaints systems are operated by the

¹ Statistics from FLAC's Data Collection Programme.

professional bodies and thus cannot be independent. They also find the system for adjudication disputes on legal costs to be circuitous, complicated and unsatisfactory.

Many who contact FLAC perceive the cost of legal services to be too high. Even where they are entitled to access civil legal aid, they are often unable to access it because of delays and attendant waiting lists. Many, however, do not qualify for civil legal aid in any case and are left to deal with a complex legal and court system with little direction and where they often have frustrating and upsetting experiences. Ultimately, they feel the legal system has failed them on all counts.

Contribution of the legal profession to FLAC's work

It is important to acknowledge the support that the legal profession has provided to FLAC over more than 40 years. Its support through organising and volunteering at FLAC centres and indeed taking cases until 1980, when the Legal Aid Board was established, along with its continued, multifaceted backing of FLAC's work, enables us to provide a vital service to the public.

FLAC's centres, which also depend on the valued and valuable support we receive from Citizens Information Centres, are only sustained because of the goodwill of barristers and solicitors. Over the years, thousands of practising lawyers have given and continue to give their time on a voluntary basis, evening after evening, to provide legal advice to the public for free all over the country.

FLAC has benefitted from financial contributions from members of the legal professions over many years. Since 2001, the Law Society has included FLAC as a beneficiary on the Practising Certificate Application form. Most solicitors therefore contribute €15 to FLAC annually and this income is an important part of our annual budget. In 2007, Ballymun and Northside Community Law Centres were added as beneficiaries and share an additional €15 contribution. The Bar Council has also had a scheme over many years where they collect contributions from members for FLAC on an annual basis. This contribution is another important part of the organisation's annual budget.

Along with other independent law centres, FLAC has also benefited greatly from the generosity of the Law Society in funding the practising certificates of its solicitors. This represents a considerable saving for financially hard-pressed independent law centres.

Practising barristers and solicitors have also always donated and continue to donate their time and services to FLAC and its Public Interest Law Alliance for legal advice and legal representation for those who seek to vindicate their rights through law and if necessary through the courts.

For all the reasons set out above, FLAC recognises that those who need access to justice are indebted to the free and generous support of both individual lawyers and the legal professions over decades. This is a necessary and important counterweight to the evidence in this submission that aspects of legal practice are not working to advance access to justice and do need reform.

The need for reform

Modern society is based on complex legal and administrative systems which people must be able to navigate, regardless of their income or background. People need to be able to understand the various ways

law impinges on their lives. They must be able to express their point of view and present their case in legal decisions affecting them. People need to be able to depend on the law to protect their rights and to clearly understand and meet their responsibilities. Unfortunately, for many people in Ireland today, the law remains intimidating and inaccessible.

Clearly a balance must be struck between the needs of the public to access justice and have recourse to a well-functioning legal profession at a fair cost, and the needs of lawyers to carry out their work in an appropriate environment and for reasonable remuneration. The UN's *Basic Principles on the Role of Lawyers*² state that people are entitled to be satisfied that they have a legal system where they can call upon the assistance of lawyers to protect and establish their rights and defend them where necessary. While the onus is on the legal profession to be aware of its duties and responsibilities to clients, in turn the legal system must be structured so that lawyers can perform all of their professional functions independently without intimidation, hindrance, harassment or improper interference.³

FLAC welcomes reform of the legal system which supports these basic principles. In this context, aspects of the current Bill are relevant, particularly those relating to costs and fees, accountability for service and access to a lawyer. The submission will also include matters relevant to the delivery of legal services but not specifically addressed in the Bill.

Finally, FLAC notes that since the Bill was initiated and published, the Minister for Justice & Equality has indicated that there will be amendments to aspects of the Bill. FLAC submits that there must be adequate opportunity in the chamber and committees of the Oireachtas to debate and analyse the impact of such amendments and FLAC may seek to make further submissions on them.

This submission focuses on comments and recommendations under four main headings:

- Certain matters relating to the Legal Services Regulatory Authority;
- Matters in relation to legal fees and expenses;
- Additional provision needed for public interest law issues;
- Access to law and to lawyers.

2. Legal Services Regulatory Authority

2.1 Objectives of the proposed Authority

A radical substantial change is envisaged in how legal services are supervised, regulated and held accountable. Therefore the objectives, role, functions and structure of the proposed Legal Services Regulatory Authority are central.

² The UN *Basic Principles on the Role of Lawyers* constitutes a compilation of the international norms relating to the key aspects of the role of lawyers and a person's right to independent counsel. The *Basic Principles* were unanimously adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1990. Subsequently, the UN General Assembly welcomed the *Basic Principles* in their 'Human rights in the administration of justice' resolution, which was adopted without a vote on 18 December 1990 in both the session of the Third Committee and the plenary session of the General Assembly. Available online on 9 February 2012 at <http://www2.ohchr.org/english/law/lawyers.htm> ..

³ UN *Basic Principles on the Role of Lawyers* No.16(a).

The objectives of the Legal Services Regulatory Authority are set out as:⁴

- Protecting and promoting the public interest;
- Supporting the proper and effective administration of justice;
- Protecting and promoting the interests of consumers relating to the provision of legal services;
- Promoting competition in the provision of legal services in the State;
- Encouraging an independent, strong and effective legal profession; and
- Promoting and maintaining adherence to certain professional principles specified in subsection 5.

It is notable that objectives which would protect and promote the fundamental human right of access to justice are not included. There is no specific mention of an objective of increasing access to justice. Nor is there any objective to support the rule of law. In the neighbouring jurisdiction of England and Wales, the Legal Services Act 2007 contains an objective for its authority of “supporting the constitutional principle of the rule of law and increasing the public understanding of citizens rights and duties”. While the encouragement of an independent, strong and effective legal profession is clearly necessary, the current Bill does not encourage diversity.

Recommendation 1: FLAC recommends that protecting and promoting the fundamental human right of access to justice and the rule of law be included as specific objectives of the Legal Services Regulatory Authority.

Recommendation 2: FLAC recommends that the word ‘diverse’ be added to the objective ‘Encouraging an independent, strong and effective legal profession’.

2.2 Professional Principles

Lawyers play a unique role in public life with various levels of responsibility:

- In the application and maintenance of the rule of law, lawyers protect people's interests while upholding the law. Lawyers have a duty to the court and to their clients to defend their rights;
- They have duties of trust and honesty towards their clients who depend on lawyers to handle their most important and most intimate rights to liberty, to family life or to earn a livelihood, amongst many others.
- Lawyers also have a moral duty to the community. The legal profession must have the confidence of the public if it is to function effectively; lawyers must provide, in the words of Justice Kirby of the Australian High Court, “...more effective, real and affordable access to legal advice and representation by ordinary citizens. To preserve and where necessary, to defend the best of the old rules requiring honesty, fidelity, loyalty, diligence, competence and dispassion in the service of clients, above mere self-interest and specifically above commercial self-advantage.”⁵

In Ireland as elsewhere, legal professionals already adhere to specified standards of ethics and principles.

⁴ S.9(4) of the Legal Services Regulation Bill 2011.

⁵ Hon Justice Michael Kirby; speech to The St. James Ethics Centre, Sydney, July 1996. Available online on 10 February at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_stjames2.htm

Nonetheless, it is useful that such principles are examined and explicitly specified in this piece of essentially regulatory and reforming legislation. The Bill lists the professional principles as follows:⁶

- that legal practitioners shall—
 - act with independence and integrity,
 - act in the best interests of their clients, and
 - maintain proper standards of work,
- that legal practitioners who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court by virtue of being legal practitioners, shall comply with such duties as are rightfully owed to the court, and
- that, subject to any professional obligation of a legal practitioner, including any obligation as an officer of the court, the affairs of clients shall be kept confidential.

These principles are less comprehensive than those set out in the UN *Basic Principles on the Role of Lawyers* which require lawyers to adhere to the following tenets:⁷

- Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
- The duties of lawyers towards their clients shall include:
 - Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
 - Assisting clients in every appropriate way, and taking legal action to protect their interests;
 - Assisting clients before courts, tribunals or administrative authorities, where appropriate.
- Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.
- Lawyers shall always loyally respect the interests of their clients.

Recommendation 3: To accord with best international practice, FLAC recommends that the entire professional principles outlined in the UN's *Basic Principles on the Role of Lawyers* be incorporated into the new legislation.

2.3 Functions of the Authority

The proposed Authority has a very wide array of functions as outlined in the Bill.⁸ Many are geared towards exercising control over legal practitioners by focusing on functions relating to the education and admission of lawyers, dealing with complaints and disciplinary matters, and professional codes. One proposed function is the promotion of awareness in relation to legal services and their cost. FLAC's experience is that there is a substantial need for education for the general public in relation to the law and the legal system as it affects them, as well as promoting awareness in relation to legal services.

⁶ S.9(5) of the Legal Services Regulation Bill as initiated.

⁷ UN *Basic Principles on the Role of Lawyers*, 12 -15.

⁸ S.9 of Legal Services Regulation Bill 2011.

Recommendation 4: FLAC recommends that the Legal Services Regulatory Authority's functions should include the promotion of understanding of law and the legal system as well as awareness in relation to legal services and their costs.

2.3.1 Structure of the Legal Services Regulatory Authority: It is clear that the Authority is intended to specify and regulate most matters in relation to professional practice. It will also set the standards of education and codes by which legal professionals are to operate.

Thus even in the absence of any difficulty between client and practitioner or of any alleged infraction, the Authority as currently described will directly control the working of the profession. The Authority is also set to guard against dishonesty and malpractice, with its powers to inspect solicitors' accounts and the power and duty to investigate complaints and impose penalties. Here the Minister would have wide powers to request information and reports from the Authority on such matters.

A number of concerns have been raised about how closely the Legal Services Regulatory Authority would be controlled by the government, specifically through the Office of the Minister for Justice & Equality. There is a need for an independent legal profession with attendant safeguards to prevent government from exercising undue control. In addition, any system proposed must not only be independent, but must be seen to be independent to avoid a perception of bias.

With regard to the perception of bias, one of the absolute constants in complaints from the public to FLAC is around suspicion and lack of confidence in the current system of complaints and discipline for lawyers. Although it aims to build independence and accountability into the procedure, with a complaints mechanism, an Independent Adjudicator and recourse to an independent Disciplinary Tribunal and ultimately to the High Court, the reality is that many people who contact FLAC do not trust the current system to sanction solicitors. They believe that it is run by the Law Society and that, as the Law Society is the representative body for solicitors, it cannot be fair to the complainant. No matter how much the case is made that by objective standards the system is totally independent and entirely fair to all parties, it is not transparently fair. As long as it is seen as being based in the Law Society – and similarly for as long as the Bar Council is seen as the foundation of the barristers' disciplinary system – then justice will not be seen to be done.

Therefore the introduction of a system which is independent of the legal professions will be welcome to people who seek an independent adjudication of their dissatisfaction or complaint relating to lawyers, the law or the legal system. However, in dismantling a system which is regularly perceived as dependent rather than independent, unfair rather than fair, the replacement must not suffer from the same fatal flaw.

The current structure of s.8 of the Bill has a regulatory authority which will be appointed by Government. Four nominees are to come from the legal professional bodies (two each from the Law Society and the Bar Council) but are appointed by Government, and the other seven are to be appointed by Government directly. The Authority members would have a 4-year term, and would then be eligible for re-appointment –

by Government. Members could be removed if 'in the opinion' of Government, they had a significant 'conflict of interest' or the member's removal 'appeared to be necessary'.⁹

Consequently, the proposed new Authority is rooted in and controlled by Government in the same way that the current system is based in and operated by the professional bodies. The perception of bias will remain as before, albeit from a different source.

Nor does the proposed structure as it is now proposed properly represent the key stakeholders who can properly inform and have a legitimate interest in the regulation and oversight of legal services. A better model would be statutorily independent. The necessity for independence is not just a concern for the court of public opinion, or just a matter of transparent justice. It is also a problem concerning genuine access to justice and compliance with general principles of human rights and fundamental freedoms. The model chosen should be perceived as being unbiased and more representative and authoritative. As a result, a client with a complaint and a legal practitioner will both get a fair independent hearing; and where a lawyer who regularly challenges the State in a politically sensitive area will be satisfied that such work to uphold rights does not mean that his/her practice is unfairly scrutinised or targeted. It will be fair, and transparently fair. It will also be informed by the knowledge of each and every member of the Authority.

There are a number of models already in existence. Among them are the Medical Council of Ireland or an Bord Pleanála. An outline of the manner in which members are drawn for the Council or for An Bord are set out in the appendix. Both models provide for representation on the respective Boards drawn from relevant sectors of the community.

As noted above, four of the nominees to the proposed Authority would be designated; two by the Law Society and a further two by the Bar Council. FLAC submits that the range of bodies concerned is substantially wider than just the 2 professional bodies. This is an opportunity to represent that wider range of diverse interests. Thus the Authority should consist of:-

- 2 persons nominated by the Bar Council;
- 2 persons nominated by the Law Society;
- 2 persons nominated by the Deans of Law or heads of all the Law Schools;
- 1 person representing the independent law centres, all of which are not-for-profit law offices;
- 1 person representing FLAC as a legal rights organisation with a nationwide remit and a strong volunteer base¹⁰;
- 1 person representing business interests;
- 1 person representing the consumer interest;
- 1 person representing the community and voluntary sector;
- 1 person who is an officer of the Minister.

Members of the Authority should have sufficient security of tenure and care should be taken to ensure that values of diversity and gender balance are built in to the nominating and appointment process.

⁹ S. 12 of the Legal Services Regulation Bill 2011.

¹⁰ FLAC is also designated as an independent law centre.

2.3.2 Structure of the Legal Practitioners Disciplinary Tribunal: Comments made in relation to the Legal Services Regulatory Authority are also relevant to the structure of the Legal Practitioners Disciplinary Tribunal. The UN *Basic Principles* require that:

Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.¹¹

As the office of the High Commissioner for Human Rights has pointed out, it follows from these principles that any disciplinary proceedings against lawyers must be truly independent of the Executive.¹² An Authority which is wholly appointed by Government without independent process and whose members are subject to removal if they fail in their duties in the opinion of Government is not able to meet these standards.

Recommendation 5: FLAC recommends that alternative models for the structure and operation of the Legal Services Regulatory Authority and the Legal Practitioners Disciplinary Tribunal be examined. The proposed structure should represent the key stakeholders who can properly inform and have a legitimate interest in the regulation and oversight of legal services.

2.4 Complaints

Subject to the concerns raised about the structure of the Authority, an independent adjudication of complaints is to be welcomed. A comprehensive structure for dealing with complaints is outlined in the Bill. What seems to be missing is a simple, low -cost mechanism in cases where people may just need to identify whether there are grounds for a complaint at all, or where the complaint is at such a minor level that the complexity of the proposed structure would deter them from raising it. Many of those who contact FLAC only need a better knowledge of the legal system or legal practice in order to understand their rights and obligations. Lawyers too should be entitled to a low-cost, simple procedure to deal with minor issues. This is true for complaints about cost and about performance.

Recommendation 6: FLAC recommends that there be a pre-complaint/ investigation process where those who need information about their concerns will receive it. This may obviate the need for a complaint at all and might filter minor issues into a simple process – not unlike the Small Claims Court, which is quicker and cheaper for all concerned. This could include a mediation function within the new office.

¹¹ UN *Principles* 28: “Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.”

¹² UN *Guidelines on the Role of Prosecutors*. Available online on 10 February at <http://www2.ohchr.org/english/law/pdf/prosecutors.pdf>

3. Legal Costs

The other reform that is proposed is in relation to legal costs. Many callers to FLAC's telephone information line and legal advice centres have little understanding of how much a legal service will cost or should cost. In addition, the National Consumer Agency's recent survey demonstrated significant difference between the fees charged for basic legal services.¹³ This Bill as a radical reforming measure is an opportunity to take a wide view of legal costs and their impact on access to justice.

3.1 *The cost of legal services.*

While FLAC welcomes certain aspects of the Legal Services Bill dealing with costs, we are concerned that, overall, the provisions of the Bill will not reduce costs for those who are exercising their legitimate right to access to the courts or who must go to court as the only viable dispute resolution mechanism available to them. In particular, the costs associated with litigation can be extremely onerous. Court proceedings are often long drawn out and uncertain in the steps that may have to be taken and in the duration of the litigation and are always uncertain in outcome. Apart from providing that costs must have been reasonably incurred in the adjudication of any account,¹⁴ the Bill is silent on what might encourage or force down the cost of the legal services that people need to pursue or defend litigation. Any current or future schemes seeking to divert litigation into mediation or other alternative dispute resolution will not be the answer. There must be a right of access to the courts, including a right of access to lawyers. This Bill does not address this substantial barrier which now forces people either to abandon their right of access to the courts or forces them into engaging in litigation at an excessive burdensome cost.

Recommendation 7: FLAC recommends that the Minister for Justice & Equality set up a time-limited working group of legal practitioners, legal costs accountants and representatives of the community & voluntary sector and consumers to identify in detail why legal costs are as high as they are and to propose how the costs of legal services in litigation could be reduced to ensure access to justice is more affordable.

3.2 *Potential for increasing rather than reducing costs*

There is potential that this Bill will actually increase legal costs. This may come about through higher costs of doing business for legal practitioners, which inevitably will be passed on to consumers.

In addition, the proposals to permit barristers to form partnerships and the proposals relating to multi-disciplinary partnerships must be examined as potentially reducing access to lawyers and increasing the cost of access. These proposals are likely to impact particularly heavily on those who are not commercial, regular users of legal services. In addition, the failure to address the ongoing delays and inefficiencies of the court system is a problem that hampers the provision of effective and cost efficient legal services. The failure to provide adequate resources to meet the need for civil legal aid, addressed in a later section of this submission, also has the potential to increase costs rather than reduce them. FLAC notes that the Regulatory Impact Assessment is in course of preparation and would seek to further examine the impact of the proposed new scheme on the cost of legal services following publication of that assessment.

¹³ Available online on 14 February 2012 at http://www.corporate.nca.ie/eng/Research_Zone/price-surveys/cost-of-solicitors-ireland.html

¹⁴ S.90, s.95, Schedule 1

3.2.1 Partnerships: An area where radical reform is proposed is in the area of legal partnerships. The Bill proposes to permit partnerships amongst barristers and to examine how to permit multi-disciplinary partnerships.

The current system of legal services, while far from perfect, has some features which should only be dismantled after thoughtful study and debate. One of those features is the capacity of people to obtain the skills of any practising barrister for exactly as long as they need those skills, and no longer. The current arrangement is achieved by an ad-hoc partnership between a person's solicitor and any barrister who is a member of the Law Library. Thus a client can obtain occasional expertise and knowledge either for an opinion or for court representation as needed.

Similarly, an independent law centre such as FLAC, working mainly with volunteer and *pro bono* legal expertise, or a small legal firm working in the suburbs or outside of a big city may be regularly engaged in issues of human rights or social justice issues where administrative law or constitutional or human rights law issues occur or where specialist advocacy is needed. Neither FLAC nor the other law centres, nor indeed small legal firms can afford to employ all of the expertise needed. We too are able to call on and hire in the specialist administrative lawyers that we require from time to time and, depending on their own capacity, they can work with us.

Under the new proposal, it is at least conceivable and perhaps likely that specialists would be absorbed into large firms, where they would of course be bound by the terms of that partnership, which would be a permanent arrangement. Because of the strong commitment experienced in FLAC from lawyers in large and small practices, self-employed or in partnership, we believe that FLAC and its fellow independent law centres will continue to be able to call on the services of specialist lawyers to advise and advocate for our clients as we need them. But it is at least highly arguable that there will be more structure and less capacity even among willing barristers than there is now when people have obligations to other partners as well as barristers' current obligations to themselves, their clients and their need to run a sole-trader's business.

Whatever about those such as the independent law centres, who can access *pro bono* services, the real potential for loss is for those who need specialist services only occasionally. Thus non-commercial clients of small firms who only need to engage specialist expertise occasionally could find that they will have to seek that expertise from a much smaller number of firms, thus reducing access for the occasional consumer of legal services, and decreasing the capacity for competition in the legal profession.

Even if new structures are required, the Authority should be authorised to examine a wider variety of structures than the partnerships proposed. For example, co-operative ventures might be an alternative model which would better suit the not-for-profit Independent Law Centres than would a partnership. This is only one alternative structure. There may be others.

Recommendation 8: FLAC recommends no change to the current arrangement whereby the expertise of the Bar is widely available to solicitor firms both large and small. The Authority might be mandated to examine whether partnerships of lawyers or multi-disciplinary ones or other alternative structures are in the interests of access to

justice and in the interests of the general public with a view to further substantial debate upon publication of reports on these topics.

3.2.2 Inefficiencies in the legal system: FLAC is also concerned that a major source of cost for most people arises from delays and inefficiencies in the legal system. Examples of such inefficiencies occur when litigants appear for court but the case is not heard on time, where legal forms and procedures are unduly complex or where the requisite official personnel are overstretched. These inefficiencies also limit access to the legal system and thus access to justice. In spite of advances in court management, and innovative use of technology and alternative dispute resolution, the reality is that much time and energy is spent coping with a system which is not operating in an integrated way. This Bill is silent on how efficiencies might be advanced.

Recommendation 9: FLAC recommends that this Bill provide resources and mechanisms to immediately identify how to improve the efficiency of the administration of justice and the legal system.

3.3 Information to be given by practitioners relating to costs

FLAC welcomes the proposals in relation to how the costs of a legal transaction should be set out initially, and how it should be updated as the transaction proceeds. The emphasis on communication with clients and some helpful descriptions of what must be communicated should allow people to understand their accounts more clearly. It also modernises the approach to legal contracts between practitioner and client. Indeed, what is suggested is already emerging as good practice in many legal practices and a statutory basis should help standardise such good practice. As a consequence, if this system is put in place, FLAC anticipates that the percentage of calls that we get from people who appear confused about how much their transaction costs, will cost or should cost, should fall.

3.4 Adjudication of legal costs

Apart from a change of name, the system for assessment of legal bills still seems to be onerous and complex. Callers to FLAC's telephone information line or centres are rarely enthusiastic when told that their remedy is to take a bill of costs to the Taxing Master of the High Court in order to resolve a dispute. Changing the name of the office to that of the Legal Costs Adjudicator is unlikely to give them any greater cheer. Adding in a proposal that a bill may also be sent to mediation (terms unspecified) is unlikely to give them comfort but rather will delay the ultimate resolution of the dispute. A small claims/ investigation stage as previously recommended in this submission relation to complaints may assist in the determination of small claims. In addition, the strategic plan and business plan to be prepared by the Legal Costs Adjudicator should have an obligation to ensure that as far as possible, the systems and rules of courts for adjudication of costs should be clear, simple and capable of being implemented quickly.

Recommendation 10: FLAC recommends that in addition to a general preliminary stage for complaints there be a specific pre-complaint/ investigation process where those who need information about their concerns on costs will receive it and which has a simple mechanism for the determination of minor complaints.

Recommendation 11: FLAC recommends that the mandate of the Legal Costs Adjudicator's Office includes a provision to focus on the dissemination of easily understood information and procedures which will determine costs disputes quickly and fairly.

3.4.1 Publication of the adjudication of legal costs: The provisions in the Bill for publication of the results of adjudication of costs, and provisions for the publication of guidelines in relation to costs from time to time are welcome. However it is not clear how sections 82(3) - which provides that the outcome of fee adjudications relating to *in camera* matters, matters settled and solicitor/ client costs are not to be published - and 82(4) - which seems to allow for some limited publication in those areas - are to work together.

Solicitor and client costs as well as family law matters are areas where people are particularly and intimately concerned with the costs and are routinely perplexed at how fees are arrived at, and how they are justified. In the interest of fairness to all, it would seem that if the names of the legal firms and clients involved are to be published in some cases, they should be published in all, with exceptions for the *in camera* rule being applied very restrictively. Finally, the provision in 82(4)(d) that information which is commercially sensitive is not to be disclosed – even though presumably it may have been part of an open court case - has the potential to give rise to many disputes and potentially to damage the capacity to publish at all.

Recommendation 12: FLAC recommends that fee adjudications in all categories be published, with suitable obscuring of personal details for *in camera* cases.

4. Public Interest Law issues

4.1 Protection of litigants pursuing public interest cases

Part 10 of the Bill, Legal Costs in Civil Proceedings,¹⁵ provides for when and how a court may order someone involved in proceedings to pay the costs of a case, including the costs of another party. Section 108 provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against the unsuccessful party. However, a court may choose not to make this order in certain instances which are outlined in the same section. These do not include cases which seek to clarify the law in the public interest.

In the experience of FLAC, as recently examined by our Public Interest Law Alliance (PILA), the costs incurred by litigants of vindicating rights is one of the biggest barriers to accessing justice. Not only do applicants incur their own legal fees, they also run the risk of incurring those of their opponent.

Public interest law cases are brought to clarify the law, or to examine the law in order to ensure that rights are being vindicated. In our legal system, such cases are almost always brought by an individual who is personally concerned with the outcome. Such cases are almost always against the State or some manifestation of the State, because ultimately it is the responsibility of the State to protect, defend and promote the rights of its people. In the nature of new examinations of the law, the public interest litigant is bringing a benefit to the public but bears a personal risk over and above that normally borne by someone who goes before the courts.

¹⁵ s.107-108 of the Legal Services Regulation Bill 2011.

The Bill provides that costs should ‘follow the event’ with some limited exceptions.¹⁶ FLAC would like to see these exceptions include provision for litigants who take cases which are of substantial public interest, and for ensuring that such people are not punished by costs and the worry about costs as they seek to vindicate their rights and the rights of others. In practice, the courts already allow for this through their decisions at the end of cases not to award costs against public interest litigants even if they lose. 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 the Bill. Further, it would be in ease of both these litigants and of 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 made.¹⁷

Recommendation 13: FLAC recommends that the courts should be specifically authorised to take into account the public interest nature of a case and that s.108 be extended to expressly include a section permitting the granting of protective costs in public interest law cases.

4.2 Multi-party actions

Another barrier for litigants whose cases advance the public interest is the absence of a multi-party or class action. Class actions can advance the rights of consumers or vulnerable groups whose cases may lead to an important clarification of the law and of rights – often against very powerful defendants – but may only result in a pittance in 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 Law Reform Commission has provided recommendations in this regard already and it would be helpful in advancing access to legal services and to justice if these proposals were to be seriously examined as a priority by the Minister and/or the Legal Services Regulatory Authority with a view to enacting a scheme to permit such actions.

Recommendation 14: FLAC recommends that a request be made to the Legal Services Regulatory Authority to review how the Law Reform Commission’s recommendations¹⁸ on multi-party actions might be advanced over the early years of the Authority’s existence.

4.3 Appeal against administrative adjudications

The section requiring costs to follow the event does not take account of the enormous costs that a person may incur in seeking to pursue an appeal against various administrative adjudications. The cost of appealing decisions from administrative tribunals can prohibit and impede the administration of justice. An example of this is the appeal system from decisions of the Financial Services Ombudsman. The legislation governing this

¹⁶ Legal Services Regulation Bill 2011, Explanatory Memorandum .

¹⁷ Public Interest Law Alliance Report: *The Costs Barrier and Protective Costs Orders*, October 2010. Available at http://www.pila.ie/download/pdf/flac_pila_report_final.pdf

¹⁸ Law Reform Commission *Report on Multi-Party Litigation* (LRC 76-2005). Available online on 10 February at http://www.lawreform.ie/Reports_Published/Default.135.html

provides for a full appeal for a dissatisfied customer of financial services,¹⁹ however the mechanism for such an appeal is to the High Court. Apart from the complication nature of the process which few litigants can understand, the cost of bringing such an appeal is a very extensive deterrent. If a person loses their appeal, they risk having the costs of the Financial Services Ombudsman's legal team, and the cost of the legal team of the financial institution involved in the appeal both awarded against them. Alternatives exist. In particular, a full appeal is available from the Employment Appeals Tribunal to the Circuit Court – a much more straightforward, cheaper and more local procedure.

Recommendation 15: FLAC recommends that the Bill provides that appeals from administrative adjudications be to the Circuit Court rather than the High Court.

5. Civil Legal Aid

5.1 Provision of a legal aid service

And finally, it is unrealistic to discuss the cost of legal services and access to them without a consideration of their impact on those who are least able to access the services, because of limited incomes.

A civil legal aid system exists in Ireland to 'make provision for the grant by the State of Legal Aid and Advice to persons of insufficient means in civil cases'.²⁰ Even at its height, the service was always under-resourced. As we noted in the preface to a report published in 2005, the structure of civil legal aid had "fallen into serious disrepair through neglect".²¹ Since we published that report, a more realistic means test was introduced. In addition, for a period, waiting times for clients were introduced through the contracting out of work to private legal practitioners. Throughout the years however, the system has remained stretched and underfunded.

Now, that system is in serious crisis. As Minister Shatter told the Dáil in June 2011,

"At this time when an increasing number of people are using the civil legal aid system there are decreasing resources. For example, the board's grant-in-aid, which accounts for the vast majority of its funding, other than in regard to asylum, has been as follows since 2008 - €26,988,000 in 2008; €26,310,000 in 2009; €24,225,000 in 2010; and €24,125,000 in 2011, based on the funding provided in budget 2010..."²²

At the same time as the budget has been reduced by almost 3 million, the demand for civil legal aid has risen enormously, resulting in a situation where right now, almost 5,000 people were waiting for a first appointment with a solicitor.²³ The staff and board of the Legal Aid Board deserve great respect and recognition for the Trojan work that they do to try to keep the service operating. Even at this point, when it is so stretched, the Board is clearly working to increase its capacity to deliver a service. However, with less money and more demand, the impact on people waiting is enormous. In addition, for every person who

¹⁹ Central Bank and Financial Services Authority of Ireland Act 2004, s.16.

²⁰ Long title to the Civil Legal Aid Act 1995.

²¹ Preface to *Access to Justice: A right or a privilege?*, FLAC, 2005.

²² Dail Debate Priority Questions. Legal Aid Service. Available online on 10 February at <http://debates.oireachtas.ie/dail/2011/06/23/00010.asp>

²³ Figures provided by the Legal Aid Board, December 2011, indicating number waiting for first appointment countrywide and longest length of delay.

cannot get the representation that they need for court hearings, there is someone on the other side whose access to the courts is being frustrated and ultimately, the entitlement to a fair hearing for all is being denied. FLAC recognises that all state services are under pressure but without doubt, the current blocks on access to a lawyer for those who need it are denying people their fundamental right of access to justice. As the Department of Justice noted when they introduced a private practitioner scheme to clear long waiting lists, for a very small investment, a significant advance was made for people who needed legal aid.

In a case decided in 2004,²⁴ the Legal Aid Board had itself set a target of two to four months for the provision of a legal service. This exceeded the time by which a private law client might be expected to wait, but took into account the exigencies of a state funded service. That length of waiting time is now exceeded in 21 of the State's 29 Legal Aid Board Law Centres.²⁵

Recommendation 16: FLAC recommends that the budget of the Legal Aid Board be sufficient to ensure that no one who is entitled to legal aid should have to wait more than 2-4 months to receive it.

5.2 Unmet legal need

The context of a reforming Bill is also an opportunity to re-examine what legal services are actually required. As one of the purposes of the provision of legal services is to promote access to law and access to justice, this Bill presents an opportunity to identify whether the necessary legal services exist to enable those who are marginalised or have reduced resources to access justice. According to a leading report of Dame Hazel Genn²⁶ which examines social exclusion and its impact on access to legal services in the UK, it emerged that the following characteristics were prevalent amongst social groups who were generally inclined not to take action to resolve their legal difficulties:

- An annual income of less than £10,000
- Legal advice never obtained previously
- Rented accommodation the most frequent form of housing
- A lack of educational qualifications
- An history of money and employment related problems

No national representative study has ever taken place in Ireland of the legal needs of the Irish population. Therefore, it is unclear what legal need should be targeted by legal services. This is particularly relevant where legal services are provided by the State in one form or another. The lack of empirical evidence means that assumptions are made without underlying data. This may result in social and legal exclusion of parts of the Irish population and may also mean that scarce public funds are not being targeted at those that most need them.

Recommendation 17: FLAC recommends that the Legal Services Authority conduct a national representative study into unmet legal need in Ireland.

²⁴ *O'Donoghue v Legal Aid Board, the Minister for Justice Equality and Law Reform, Ireland and the AG* (2004) IEHC 413, 21 December 2004, Kelly J.

²⁵ Statistics from FLAC's Data Collection Programme, December 2011.

²⁶ *Paths to Justice – What People Do and Think About Going to Law*, Hart Publishing, 1999.

Summary of FLAC recommendations

1. **FLAC recommends that protecting and promoting the fundamental human right of access to justice and the rule of law be included as specific objectives of the Legal Services Regulatory Authority.**
2. **FLAC recommends that the word ‘diverse’ be added to the objective ‘*Encouraging an independent, strong and effective legal profession*’.**
3. **To accord with best international practice, FLAC recommends that the entire professional principles outlined in the UN’s *Basic Principles on the Role of Lawyers* be incorporated into the new legislation.**
4. **FLAC recommends that the Legal Services Regulatory Authority’s functions should include the promotion of understanding of law and the legal system as well as awareness in relation to legal services and their costs.**
5. **FLAC recommends that alternative models for the structure and operation of the Legal Services Regulatory Authority and the Legal Practitioners Disciplinary Tribunal be examined. The proposed structure should represent the key stakeholders who can properly inform and have a legitimate interest in the regulation and oversight of legal services.**
6. **FLAC recommends that there be a pre-complaint/ investigation process where those who need information about their concerns will receive it. This may obviate the need for a complaint at all and might filter minor issues into a simple process – not unlike the Small Claims Court, which is quicker and cheaper for all concerned. This could include a mediation function within the new office.**
7. **FLAC recommends that the Minister for Justice & Equality set up a time-limited working group of legal practitioners, legal costs accountants and representatives of the community & voluntary sector and consumers to identify in detail why legal costs are as high as they are and to propose how the costs of legal services in litigation could be reduced to ensure access to justice is more affordable.**
8. **FLAC recommends no change to the current arrangement whereby the expertise of the Bar is widely available to solicitor firms both large and small. The Authority might be mandated to examine whether partnerships of lawyers or multi-disciplinary ones or other alternative structures are in the interests of access to justice and in the interests of the general public with a view to further substantial debate upon publication of reports on these topics.**
9. **FLAC recommends that this Bill provide resources and mechanisms to immediately identify how to improve the efficiency of the administration of justice and the legal system.**
10. **FLAC recommends that in addition to a general preliminary stage for complaints there be a specific pre-complaint/ investigation process where those who need information about their concerns on costs will receive it and which has a simple mechanism for the determination of minor complaints.**

11. **FLAC recommends that the mandate of the Legal Costs Adjudicator's Office includes a provision to focus on the dissemination of easily understood information and procedures which will determine costs disputes quickly and fairly.**
12. **FLAC recommends that fee adjudications in all categories be published, with suitable obscuring of personal details for *in camera* cases.**
13. **FLAC recommends that the courts should be specifically authorised to take into account the public interest nature of a case and that s.108 be extended to expressly include a section permitting the granting of protective costs in public interest law cases.**
14. **FLAC recommends that a request be made to the Legal Services Regulatory Authority to review how the Law Reform Commission's recommendations on multi-party actions might be advanced over the early years of the Authority's existence.**
15. **FLAC recommends that the Bill provides that appeals from administrative adjudications be to the Circuit Court rather than the High Court.**
16. **FLAC recommends that the budget of the Legal Aid Board be sufficient to ensure that no one who is entitled to legal aid should have to wait more than 2-4 months to receive it.**
17. **FLAC recommends that the Legal Services Authority conduct a national representative study into unmet legal need in Ireland.**

Appendix

Medical Council of Ireland

On its composition, the Council's website states:

The Council has a membership of 25 including both elected and appointed members. Under the provisions of the Medical Practitioners Act, 2007, the new Council is comprised of 13 non-medical members and 12 medical members representing a range of medical specialties, teaching bodies and members of the public and stakeholders, all of whose appointments have been approved by the Minister for Health and Children.²⁷

The Council's Terms of Reference further stipulate that "[a]ll Members of the Council ... are accountable to the Oireachtas through the Minister for the development and implementation of policy." The Council's CEO is appointed by the Council itself.

An Bórd Pleanála

The website of An Bórd Pleanála contains the following information in relation to the method of appointment of Board members²⁸:

The Chairperson is appointed by the Government from a list of candidates selected by an independent committee in accordance with section 105 of the 2000 Act, chaired by the President of the High Court. The Government is generally required to make the appointment from among not more than three persons selected by that committee and found by them to be suitable for appointment. The Chairperson of the Board normally holds office for seven years and may be re-appointed for a second or subsequent term of office provided he or she is Chairperson at the time of the re-appointment.

The Planning and Development Acts 2000 to 2011 provide for the appointment of nine other members of the Board. Eight of the members are appointed by the Minister for the Environment, Community and Local Government from among persons selected from four groups of organisations prescribed by regulations and representative of:

- Professions or occupations that relate to physical planning, engineering and architecture.
- Organisations concerned with economic development, the promotion and carrying out of development, the provision of infrastructure or the development of land or otherwise connected with the construction industry.
- Organisations representative of local government, farming and trade unions.
- Organisations representative of persons concerned with the protection and preservation of the environment and of amenities/voluntary bodies and bodies having charitable objects /rural and local community development, the promotion of the Irish language or the promotion of heritage, the arts and culture/bodies representative of people with disabilities / bodies representative of young people.

²⁷ For information on the composition and function of the Medical Council, see <http://www.medicalcouncil.ie/What-we-do/>. Terms of Reference are available at <http://www.medicalcouncil.ie/What-we-do/Terms-of-Reference.pdf>. For guidelines on professional conduct laid down under the Medical Practitioners Acts, 1978 and 2007, at <http://www.medicalcouncil.ie/Professional-Standards/>. Both links available online on 10 February 2012.

²⁸ <http://www.pleanala.ie/about/members.htm>. Link available online on 18 February 2012.

The other member is appointed by the Minister from among persons who in the Minister's opinion have satisfactory experience, competence or qualifications as respects issues relating to the environment and sustainability. These members normally hold office for a term of five years and may be re-appointed for a second or subsequent term provided that the person concerned is an outgoing member at the time of the re-appointment.