FLAC Submission

Proposals for the Law Reform Commission's Fifth Programme of Law Reform

About FLAC

FLAC (Free Legal Advice Centres) is a voluntary independent human rights organisation which exists to promote equal access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights. We work particularly in the areas of the protection of economic, social and cultural rights. We identify and make policy proposals on laws that impact on marginalised and disadvantaged people, with a particular focus on social welfare law, personal debt & credit law and civil legal aid.

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 including international human rights bodies, drawing on its legal expertise and providing a social inclusion perspective.

You can download/read FLAC's policy papers at
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FLAC welcomes the opportunity to make proposals to the Law Reform Commission on its Fifth Programme of Law Reform.

Introduction

FLAC operates a telephone legal information and referral line and runs a network of legal advice clinics where volunteer lawyers provide basic free legal advice. FLAC also provides specialist legal advice to advisers in MABS and CISs. FLAC has recently worked to improve access to justice in particular for Roma and Traveller women as part of the JUSTROM (Joint Programme on Access of Roma and Traveller Women to Justice) programme, a Council of Europe initiative. Within JUSTROM, FLAC supported the running of legal clinics for Travellers[1] and Roma.[2]

More than 25,700 people received free legal information or advice from FLAC in 2016 from the telephone information line and the network of legal advice clinics at 67 locations around the country. It also operates PILA the Public Interest Law Alliance which operates a Pro Bono Referral Scheme for NGOs, community groups and independent law centres. FLAC is also an independent law centres and engages in strategc litigation, seeking to achieve outcomes which will have benefit beyond the individual, and which may test and possibly bring about change in law and practice. The focus on these services as a way of enabling individuals and groups to assert their rights is a fundamental aspect of FLAC's work in promoting access to justice.

[1] In relation to Travellers 40 casefiles were opened with accommodation and housing constituting 75% of them, discrimination 20% and civil cases 5%. FLAC is engaged in advocacy on behalf of 26 others (Accommodation/Housing: 18 (69.2%); Civil Issues: 5 (19.2%); Discrimination: 2 (7.7%) and Social Welfare: 1 (3.8%).

[2] Arising from the Roma clinic, FLAC opened 39 case files: (Social Welfare Cases: 13 (33.3%): Accommodation/Housing Cases: 11 (28.2%); Citizenship Cases: 7 (17.9%); Civil Cases: 3 (7.7%); Discrimination Cases: 3 (7.7%); Criminal Cases: 1 (2.6%); Administrative law Cases: 1 (2.6%). FLAC also provided advocacy in respect of 89 Roma with the following breakdown:-Citizenship: 28 (31.4%): Social Welfare: 19 (21.3%): Accommodation/Housing: 17 (19.1%); Discrimination: 12 (13.4%); Administrative Issues:10 (11.2%); Civil Issues: 2 (2.2%) and Criminal: 1 (1.1%).

Public Sector Duty

FLAC notes the Law Reform Commission's Fourth Programme of Law Reform covered the period 2013 – 2017. Since then the Public Sector Duty has been introduced pursuant to section 42 of the Irish Human Rights and Equality Act 2014. The Public Sector Duty provides one of the most important national mechanisms for mainstreaming equality and human rights. It imposes a positive obligation on a broad range of statutory and public bodies to have regard to in the performance of their functions, the need to eliminate discrimination, promote equality of opportunity and protect the human rights of its members, staff and persons to whom it provides services. The Fifth Programme of Law Reform is a key instance of strategic planning by the Law Reform Commission to which the Public Sector Duty applies. FLAC suggests that the Fifth Programme of Law Reform should show how the duty has influenced the process for developing the programme and be reflected in the outcome. FLAC urges the Law Reform Commission to make the Public Sector Duty a core consideration in the process of developing, implementing and monitoring the Commission's future work.

Recommendation

Make the Public Sector Duty a core consideration in the process of developing, implementing and monitoring the Law Reform Commission's Fifth Programme of Work.

Access to Justice

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

The right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights, which guarantee the rights to a fair trial, to an effective remedy and to legal aid to those who lack sufficient resources so far as this is necessary to ensure effective access to justice. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteed. While it has no single precise definition, core elements of access to justice include effective access to information advice, legal aid, access to the courts and access to effective remedies.

There has been a growing focus nationally on internationally on access to justice which refects a growing consensus of the need for urgent change. FLAC welcomed the commitment of the Chief Justice to make access to Justice a central focus of his tenure and his call for the reform of the civil justice system. We also agree with the comments of the Chief Justice that there is little point in having a good court system if a great many people find it difficult or even impossible to access that system for practical reasons.[3]

The programme for government contains a commitment to commission an annual study on court efficiency and sitting times, benchmarked against international standards, to provide accurate measurements for improving access to justice.[4] The review of the Administration of Civil Justice is underway; one of its aims is to improve access to justice.

The Council of Europe recently adopted a recommendation on improving access to justice for Roma and Travellers in Europe[5]. The Fundamental Rights Agency have produced a handbook on European law relating to access to justice.[6] Member countries of the United Nations have adopted "Global Goal 16," which recognizes that access to justice is a critical part of sustainable development of peaceful and inclusive societies. [7] In the US the Conference of Chief Justices and the Conference of State Court Administrators passed Resolution 5 on Meaningful Access to Justice for All [8]

In the UK the Bach Commission which was established in 2015 to develop realistic but radical proposals with cross- party appeal for re-establishing the right to justice as a

[3] Statement for New Legal Year 2017, The Hon. Mr Justice Frank Clarke Chief Justice of Ireland

[4] There is also a commitment to introducing legislation to reduce excessive delays to trials and court proceedings including pre-trial hearings.

[5] www.roma-alliance.org/.../223-the-committee-of-ministers-of-the-council-of-europe-a. Key recommendations given by the Committee of Ministers included facilitating equal access to legal aid or other free legal services for Roma and Travellers; and facilitating equal access to court and ensure the effectiveness of judicial remedies for Roma and Travellers.

[6] Fra.europa.eu › Home › Publications & resources › Publications

[7] https://sustainabledevelopment.un.org/sdg16 [7]Goal 16 is part of a set of 17 "sustainable development goals" intended to end extreme poverty by the year 2030. Following in the path of the highly successful Millennium Development Goals, the new Global Goals call on all countries to use the power of the data revolution to both drive and manage change

[8] That resolution envisions state systems in which everyone has access to effective assistance for their essential civil legal needs through a comprehensive approach that provides a continuum of meaningful and appropriate services. It also calls on courts, Access to Justice commissions and similar entities , civil legal aid organizations, the bar and other essential partners to work together in each state to develop strategic plans with "realistic and measurable outcomes" to reach the goal of 100 percent meaningful access

fundamental public entitlement, equivalent to that of education or healthcare published its final report.[9] The primary recommendation of the report is for a new Right To Justice Act.

The implementation of a progressive fifth law reform programme which has access to justice as a central focus would be timely and complement the other initiatives and would assist in strengthening our Constitution, the rule of law and our justice system for the benefit of everyone.

Recommendation

FLAC requests that the Law Reform Commission make access to justice a central focus of its fifth programme of law reform.

Access to Justice and Legal Aid

The provision of legal aid is a critical matter for access to justice and is central to the administration of justice and the rule of law.[10] The right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights, guaranteeing the right to a fair trial, to an effective remedy and legal aid for those who lack sufficient resources in order to to ensure effective access to justice. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteed.

The current system of civil legal aid provided by the Legal Aid Board under the provisions of the Civil Legal Aid Act 1995 is limited. The applicant's disposable income must be below €18,000 and the disposable capital threshold is €100,000. Applicants must also pay a financial contribution which in some instances may be quite significant. There are lengthy waiting times in many law centres. The 1995 Act excludes a number of areas of core areas of law, including defamation and housing, from the civil legal aid scheme. The operation of the merits and means test means that many people facing

[9] https://www.fabians.org.uk/wp.../Bach-Commission_Right-to-Justice-Report-WEB.pd

[10] The European Court of Human Rights has held that the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively (Eur. Court H.R., judgments in *Airey v. Ireland*, § 26; *McVicar v. the United Kingdom*, §§ 48 and 49; *P., C. and S. v. the United Kingdom* of 16 July 2002, ECHR 2002-VI, § 91, and *Steel and Morris v. the United Kingdom*, § 61)

family home repossessions are not entitled to legal representation. In addition, legal aid is not available for a range of quasi-judicial tribunals that make legally binding decisions outside of the court, including the Workplace Relations Commission, the Labour Court and the Social Welfare Appeals Office.

There is a high degree of likelihood that some provisions of the Civil Legal Aid Act 1995 as presently drafted are incompatible with the protections afforded to the right to a fair hearing guaranteed by Article 6 of the ECHR and may deny access to an effective remedy pursuant to Article 13 and article 47 of the EU Charter of Fundamental Rights. The Legal Aid Board itself has acknowledged that the continued exclusion of some areas of the law from the civil legal aid scheme leaves the State open to a legal challenge. In July 2015, the UN Committee on Economic, Social and Cultural Rights expressed concern at the lack of legal aid services in Ireland "which prevents especially disadvantaged and marginalised individuals and groups from claiming their rights and obtaining remedies, particularly in the areas of employment, housing and forced evictions, and social welfare benefits". The Committee recommended that the remit of the civil legal aid scheme be expanded.

In recent years, demand for statutory civil legal aid has risen dramatically while resources have been reduced and the workload of the Board widened. This has led to increased pressure on the service and longer waiting times for people who need legal help.

The current court system is planned and administered on the basis that a litigant will be represented by a lawyer. FLAC's information line regularly receives calls from lay litigants who are representing themselves in complex court cases and who are desperately in need of assistance, advice and representation which FLAC does not have the resources to provide.

In many instances members of the public have no option but to attempt to represent themselves or allow judgment to be entered in default of a response to a claim. In many other cases, members of the public with good claims will be left with no option but to abandon their rights and leave problems unresolved and potentially worsening. Navigating the court process without representation can be difficult, complicated and emotionally draining on an individual. It can also add significant delay to court hearings. The result is no access to justice for some and compromised access to justice for others.

There is a clear need for a review to be undertaken of the Civil Legal Aid Act 1995 by reference to the requirements of Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights.

Recommendation

FLAC recommends the that the Law Reform Commission as part of its fifth programme of Law Reform would conduct a root and branch review of the scheme of Civil legal aid and advice including eligibility criteria, means tests, contribution requirements and exclusion of areas of law and the resourcing model.

Access to Justice: Better first and second tier decision making.

Many socially protective laws are adjudicated in the first and second instance by quasi-judicial bodies, regulatory bodies, and regulatory appeal bodies.

Among this wide range of adjudicating bodies are WRC adjudicators, deciding officers in the Department of Social Protection, the Social Welfare Appeals Office, the Residential Tenancies Board, the International Protection Office, International Protection Appeals Tribunal, Labour Court, the Legal Aid Board to name a few – all having differing forms, time limits, procedures, as well as the different forms of appeal from such bodies. Where appeal on points of law are concerned, there are differing approaches with some allowing appeal to the courts on a point of law, either to the Circuit Court or High Court.

These quasi-judicial bodies should provide accessible, low cost mechanisms for dispute resolution. However the current system of ad hoc bodies is cumbersome, costly and operates in an unwieldy manner where legal aid is unavailable and often gives rise to disputes concerning the procedures rather than the substance of the dispute.

The UK Courts and Tribunals service may provide some guidance in seeking to improve first and second-tier quasi-judicial decision making. These tribunals are administered by a single body where appointed persons make legally binding decisions at a layer just below the courts. Decision makers are appointed in much the same way as ordinary judges, though they are not always lawyers. They have clear rules set out governing their operation, appeals and the routes to the higher courts.

Recommendation

FLAC recommends that the Law Reform Commision as part of its fifth programme of Law Refrom would review the current system of first and second-tier quasi-judicial decision for the purposes of establishing a more streamlined system with common procedures, where the focus of the dispute would be on the substantive rights.

Access to Justice: Barriers to Public Interest Law and Litigation

Public interest litigation is inherently unpredictable, as the case is often being litigated because the law is not clear and needs clarification. In our legal system, such cases are almost always brought by an individual who is personally concerned with the outcome. Such cases are usually 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. The public interest litigant is bringing a benefit to the public in facing the significant resources of the State, bears a personal risk over and above that normally borne by someone who goes before the courts.

It is the experience of FLAC, that the costs incurred by litigants in vindicating their rights is one of the biggest barriers to accessing justice.[11] Not only do applicants incur their own legal fees, they also run the risk of incurring those of their opponent. Part 11 of the Legal Services Regulation Act 2015, Legal Costs in Civil Proceedings,[12] sets out when a court may order someone involved in proceedings to pay the costs of a case, including the costs of another party. Section 169 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.

FLAC would like to see the exceptions to the rule that costs 'follow the event' expanded to include Protective Costs Orders (PCO) for litigants taking cases that are in the public interest. This would provide certainty as to costs at the outset of litigation. Such an

[11] Public Interest Law Alliance Report: *The Costs Barrier and Protective Costs Orders,* October 2010. Available at https://www.pila.ie/resources/public-interest-litigation-the-costs-barrier-prote/

[12] s.168-169 of the Legal Services Regulation Act 2015.

order could provide that there will be no order as to costs, that the plaintiff's liability for costs will be capped at a certain amount, or that the defendant will pay costs, even if the plaintiff is unsuccessful.

PCOs are already in existence in Ireland in relation to environmental cases under the Aarhus Convention,[13] which provides that costs should not be so unduly prohibitive as to prevent the public participating in environmental decision-making and procedures. The Irish courts have accepted in principle that a PCO could be granted in other matters,[14] however it was not until 2014 that the first such order was granted in the public interest. In the case of *Schrems v Data Protection Commissioner*[15] the costs of the litigant were limited to €10,000 by the High Court on the basis of financial barriers facing the applicant in pursuing his challenge and the considered importance of the case in the wider public interest. In practice, while the Irish courts have occasionally departed from the usual costs rules in public interest cases, they have not developed specific rules or guidance for public interest litigation comparable to other common law jurisdictions. FLAC is concerned that the availability of PCOs is not specifically recognised in legislation.

The Law Reform Commission produced a report[16] in 2005 on multi-party litigation which concluded that *ad hoc* arrangements have been used to deal with multi-party litigation and that a more structured approach should be available based on principles of procedural fairness, efficiency and access to justice. The Superior Court Rules Committee[17] has the power of making and changing the rules of the Superior courts but has not as yet implemented the LRC proposal.

Recommendation:

FLAC recommends that the Law Reform Commission as part of its fifth programme of Law Reform would conduct a comprehensive review of barriers to public interest

[13] Implemented under Part 2 of the Environment (Miscellaneous Provisions) Act 2011.

[14] **Friends of the Curragh Environment Ltd -v- An Bord Pleanála & Ors [2006] IEHC 243.**

[15] Record No. 2013/765/JR.

[16] Law Reform Commission *Report on Multi-Party Litigation* (LRC 76-2005) http://www.lawreform.ie/_fileupload/Reports/Report%20Multi-party%20litigation.pdf

[17] Section 67 of the Courts of Justice Act 1936 and, under section 68 of that Act

litigation for the purposes of increasing access to justice for disadvantaged groups and individuals, including but not limited to

- Multi-party and class actions
- the granting of Protective Costs Orders in public interest law cases
- developing the laws on standing to to make it easier for NGOS to bring actions on behalf of their members
- allowing a greater use of the amicus curiae applications
- increasing the discretion of a judge to award costs to an unsuccessful litigant
- modifying the doctrine of mootness so that courts can deal with issues which may be moot for the immediate parties but which may continue to affect many others
- devising more effective methods of extending the benefits of judicial decisions to those who are not directly party to the litigation
- examine the rules of funding of litigation.[18]

Access to justice:Effective remedies fro breaches of human rights: The Equal Status Acts: 2000-2015.

Pursuant to Article 6 ICERD, the State must assure to everyone within the jurisdiction effective protection and remedies, through the competent national tribunal and other State institutions, against all acts of racial discrimination which violates his human rights and fundamental freedoms as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

The Equal Status Acts 2000 – 2015 prohibit discrimination on the grounds of race and membership of the Traveller community in the provision of goods and services, the provision of accommodation and access to education. However, Section 14 of the Equal Status Acts precludes complaints against legislative provisions. In practical terms, this means that any legislation which discriminates on the grounds of race or membership of the Traveller community or has a disproportionately negative impact in this regard

[18] Social Inclusion and the Law: The Implication of Public Interest Litigation for Civil Procedures and Remedies, pages 117-197.

falls outside the scope of the Equal Status Acts and cannot be challenged under domestic equality legislation.

In February 2017, the UN Committee on the Elimination of all forms of Discrimination against Women expressed concern that section 14 of the Equal Status Acts 2000 – 2015 precludes the use of the equality framework to challenge other discriminatory laws. Thereafter, the Committee recommended that Ireland amend section 14 of the Equal Status Acts to ensure that an effective remedy is available for discrimination that has a legislative basis.

While the definition of "services" in section 2 of the Equal Status Acts is broad enough to include the services provided by public bodies it does not extend to the performance of the functions of public bodies generally not within the definition of "services" under the Equal Status Acts. Therefore, it is unclear to what extent the prohibition on discrimination on the ground of race and the Traveller community ground apply to public authorities such as An Garda Síochána and immigration services in performing functions which may not come within the definition of "services". The definition of "services" in the Act should, with only necessary and proportionate exceptions, include functions of the State most relevant to discrimination on grounds of race and membership of the Traveller community such as immigration, citizenship and police powers. The absence of this definition denies persons whose rights are infringed access to an effective remedy.

Access to Justice; Effective remedies for breach of Human Rights:Incorporation of the European Convention on Human Rights into domestic law

The impact of the European Convention Of Human Righst Convention in Ireland has been limited in that it has not been "incorporated" into Irish law beyond the European Convention of Human Rights Act 2003. The Convention itself remains international law that is not, per se, binding in domestic law. Instead of traditional incorporation of an international treaty, what was done in the 2003 Act was the creation of a scheme by which parts of the Convention were placed into legislation and therefore became domestic law; it is perhaps more accurately termed the transposition of the Convention than its incorporation. The focus, whenever we speak about the role and operation of the Convention in Irish law, must therefore be on the role and operation of the ECHR Act 2003. Irish Courts will interpret the meaning of the domestic law by reference to

the interpretation of the Convention in other legal systems, including in the European Court of Human Rights itself, but fundamentally the meaning and operation of the Act is a matter of domestic law governed by Irish courts.

Currently the High Court may make a declaration of incompatibility under Section 5 of the ECHR Act, allowing the Court to award damages where the State has breached a person's Convention rights but this declaration does not affect the validity, operation or enforcement of the law in question. While the requirement to interpret legislation in a manner compliant with the Convention, the facility to declare a legislative provision as incompatible with the ECHR is not available to the Circuit or District Court.

Where a declaration of incompatibility has been set out by the High Court, it is possible that the law will be changed but it remains the case that even where the High Court agrees a person's ECHR rights have been breached, their rights will remain breached in the absence of Government action.

FLAC represented Lydia Foy, a transgender woman who was seeking legal recognition of her prefered gender, as the Civil Registration Act 2004 did not allow for recognition of Dr. Foy's preferred gender, preventing her from obtaining a birth certificate that adequately reflected her status as a woman. The High Court held that the failure to recognise Lydia Foy in her preferred gender was in breach of the ECHR and made a Declaration of Incompatibility, the first to be made by an Irish court. Judge Mc Kechnie indicated that he expected the Government to respect the decision of the court and act upon it promptly.

It is well-known now that it took another eight years and a third application to the courts before the Gender Recognition Act 2015 was finally passed. It took a whole new campaign by FLAC, working with Transgender Equality Network Ireland (TENI), which had grown out of the publicity and mobilisation around Lydia Foy's case, to secure the change. FLAC enlisted the support of European and UN human rights monitoring bodies to express their concern and worked hard to spread awareness of the High Court decision and of Ireland's increasing isolation as the last EU member to refuse to allow any form of gender recognition.

The Government eventually dropped an appeal against the High Court decision and agreed to introduce new legislation. It was the Declaration of Incompatibility that won

the support of international human rights agencies and persuaded the Government to move at last. But the cost was unacceptable and unsustainable in terms of the eight year delay and the personal toll on Lydia Foy, and the commitment of time and effort required from FLAC, TENI and other bodies was on a scale that could not be replicated in other cases.

It is clear that to be an effective mechanism for vindicating human rights and securing social justice the ECHR Act needs to be radically amended. Under the current structure, it remains difficult for people to assert their rights under the Convention unless the Government displays a willingness to amend laws swiftly where a declaration of incompatibility is set out.

While the ECHR Act can potentially protect rights not provided for in the Constitution, it will not provide an effective remedy unless it is amended to allow the courts to award remedies other than damages and to require the Government to act upon Declarations of Incompatibility within a strictly limited time frame.

Recommendation

FLAC requests that the Law Reform Commission as part of its fifth programme of Law Reform examine the availability of effective remedies for human rights breaches in Irish law and including but not limited to

- the availability of an effective remedy for discrimination that has a legislative basis
- the availability of an effective remedy in relation to discrimination by public authorities in the exercise of their functions
- the operation and effectiveness of the European Convention on Human Rights Act 2003 the accessibility of any such remedies and any gaps in protection.