

Civil Legal Aid in Ireland: Forty Years On

"The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."
Airey v. Ireland,
European Court of
Human Rights, 1979.

"It is not enough to set up a scheme for the provision of legal aid to necessitous persons and then to render it effectively meaningless for a long period of time."
Kelly J. in O'Donoghue v. The Legal Aid Board,
the Minister for Justice, Equality and Law
Reform & Ors, 2004.



flac

promoting access to justice

FLAC wars over poor funding of legal aid scheme

CAROL COULTER, LEGAL AFFAIRS CORRESPONDENT

The underfunding of the civil legal aid scheme can now be challenged in the courts, FLAC (Free Legal Advice Centres) has warned.

Ms Catherine Hickey, FLAC's executive director, said yesterday that the European Commission on Human Rights would be asked to force the Government to provide adequate legal representation in a forum which required it.

She was speaking at a conference of the Independent Law Centres Network held to celebrate the 75th anniversary of the Justice Act 1952.

Ms Hickey said that the Government's failure to provide legal aid on the basis that his or her right to effective access to the courts had been breached.

According to Ms Moya de Paor, a solicitor with the Northside Community Law Centre, a person challenging his or dismissal before this tribunal, who cannot afford a private solicitor, cannot challenge the Government's failure to provide legal aid on the basis that his or her right to effective access to the courts has been breached.

The Strasbourg court ruled in the Airey case that rights such as access to the courts should be "practical and effective".

The terms of the incorporation of the European Convention on Human Rights into Irish law will be considered by the High Court in the coming months.

Civil Legal Aid in Ireland: Forty Years On

The queue for justice gets longer

By MARIANNE HERON

FLAC is a charity which provides legal aid to people who cannot afford to pay for legal services. It has been operating since 1952, and has a long history of providing legal aid to people who are unable to pay for legal services. The queue for justice gets longer and longer as the Government's funding of the scheme is cut.



Lawyers and judges feel pressure

The pressure on lawyers and judges to take on cases for free legal aid is increasing. Many lawyers are unable to take on these cases due to the lack of funding. Judges are also feeling the pressure to deal with a backlog of cases.



the criticism which has already been levelled at the Government scheme.

State legal aid brings help only to some

THE DOORS of the first two of seven new legal aid centres opened at 45 Lower Gardiner Street and Aston House, Aston Quay in Dublin on Friday, August 15th, 1980. Some 700 people will be one step closer to the help of legal aid and advice in this country. Few would dispute this is a very necessary perspective of their means, to equal access to the law. But what are some of the people charged with a limited number of criminal offences are entitled to any assistance from the State.

The new centres will eventually provide a total of 20 centres in urban areas. In each centre, staff will be available to provide legal aid and advice. The centres will be open to all people who are unable to pay for legal services. The centres will be open to all people who are unable to pay for legal services.

It was the first of a number of similar centres and bodies which have been set up in other parts of the country. The Government has announced that it will provide a total of 20 centres in urban areas. In each centre, staff will be available to provide legal aid and advice. The centres will be open to all people who are unable to pay for legal services.

Inadequate
The 1980 estimate of the cost of the scheme was published by the Free Legal Advice Centres (FLAC). The 1980 report shows that the Government's funding of the scheme is inadequate. The Government's funding of the scheme is inadequate. The Government's funding of the scheme is inadequate.

The provision of criminal legal aid and employment appeals and social welfare appeals, categories of non-urgent cases, is also inadequate. The Government's funding of the scheme is inadequate. The Government's funding of the scheme is inadequate.

Biological
The 1980 report also shows that the Government's funding of the scheme is inadequate. The Government's funding of the scheme is inadequate. The Government's funding of the scheme is inadequate.

giving of legal aid and advice to 15 centres in Ireland. The Government's funding of the scheme is inadequate. The Government's funding of the scheme is inadequate.

The 1980 report also shows that the Government's funding of the scheme is inadequate. The Government's funding of the scheme is inadequate. The Government's funding of the scheme is inadequate.



1978: FLAC (Free Legal Aid Centres) members protesting outside the Ombudsman's Office to mark the 25th anniversary of the scheme. The protesters are demanding more funding for the legal aid scheme.

Printing Information
ISBN: 1 87353214 8

© FLAC, April 2009

Copyright declaration:

You are free to copy, distribute or display this publication under the following conditions:

- ▶ You must attribute the work to FLAC;
- ▶ You may not use this report for commercial purposes;
- ▶ You may not alter, transform or build upon this report.

For any reuse or distribution, you must make clear to others the licence terms of this publication. Any of these conditions can be waived if you get permission from FLAC.



FLAC - 13 Lower Dorset Street, Dublin 1

LoCall: 1890 350 250
E-mail: info@flac.ie
Tel: 01-874 5690
Web: www.flac.ie

Table of contents

1.	Introduction	1
2.	The civil legal aid scheme	3
3.	Scope of the civil legal aid scheme	4
4.	Practice of the Legal Aid Board	8
	4.1 Waiting times	10
5.	Financial eligibility to qualify for civil legal aid	12
	5.1 Assessment of income	12
	5.2 Assessment of capital	14
	5.3 Contributions	14
6.	Funding of the Legal Aid Board	17
7.	Access to justice and unmet legal aid	18
	7.1 Awareness of the Legal Aid Board	21
	7.2 FLAC services	23
8.	Conclusions and recommendations	26

— Box index —

Box 1.	Summary of “designated matters” excluded under the Civil Legal Aid Act 1995	4
Box 2.	Case study: Exclusions	7
Box 3.	Sample of allowances 1996-2006	13
Box 4.	Case study: Contributions (autumn/winter 2005)	16
Box 5.	Most common legal problems dealt with by organisations surveyed as part of FLAC’s unmet legal need project	19
Box 6.	Type of information available to clients at organisations surveyed as part of FLAC’s unmet legal need project	19
Box 7.	Awareness of Legal Aid Board, FLAC Survey October-December 2008	22
Box 8.	Who accesses FLAC services?	24
Box 9.	Areas of law discussed at FLAC centres in 2008	25

1.

Introduction

“The purpose of the 1995 Act is that persons who meet the necessary criteria shall receive legal aid. That carries the implication that the entitlement to legal aid will be effective and of meaning.”¹

For forty years, FLAC (Free Legal Advice Centres) has been working towards the achievement of more equitable access to justice for all in Ireland. Established in 1969 in order to provide free legal advice to those who could not afford legal fees, FLAC also lobbied the government to establish a civil legal aid scheme. Having achieved this primary aim,² a central tenet of FLAC’s work today, forty years on, is continuing to pressurise the government to provide a comprehensive scheme.

Over the years, FLAC has produced reports which highlight the right to civil legal aid and the inadequacies in the current system. In the 2005 report *Access to Justice – A Right or a Privilege?* FLAC incorporated not only an up-to-date review of the scheme as it was at the time, but also a blueprint for action to improve the scheme. FLAC’s *Data Collection Programme* consistently reinforces the findings of the report. The Legal Aid Board has overseen a number of improvements in the period since the report’s publication in 2005. These include an increased emphasis on Alternative Dispute Resolution in family law matters, an updated website, a lowering of the means test threshold for qualification for legal aid and a wider range of information leaflets.

In 2009, Ireland, like many countries worldwide, is in an economic recession. The Irish government faces enormous challenges and there are ramifications for all kinds of service provision. But the recession cannot be used as a reason to deny access to legal services and

representation to those who need it the most. Equal access to justice is a fundamental human right for all. A right to legal aid exists in order to implement the rights of equal access to justice and to an effective remedy.³ In human rights law, access to justice concerns not only formal and procedural rules granting access but it also relates to equality before the law, equality in the law and non-discrimination. Access to justice should be non-discriminatory; thus the purpose of a legal aid scheme is to help to achieve real access to justice for everyone, especially the increasing number of people without the resources to pay for it themselves.

This document aims to provide an overview of the current position of civil legal aid in Ireland today,⁴ highlighting recent developments. Following the introduction, section two outlines the operation of the civil legal aid scheme today, followed in section three by an overview of the scope of the current scheme. Section four examines the practice of the Legal Aid Board including a look at waiting times faced by applicants for civil legal aid. The fifth section involves a discussion on the financial qualification process for civil legal aid with a focus on the means test and contributions to be made. The sixth section presents a short note on the funding of the Legal Aid Board. The final section on conclusions and recommendations is preceded by section seven which examines the issue of unmet legal need in a sample area of north east inner city Dublin as well as a general awareness of the existence and services of the Legal Aid Board. An overview of FLAC's work is also provided.

2. The civil legal aid scheme

“An act to make provision for the grant by the state of legal aid and advice to persons of insufficient means in civil cases.”

– Long title for the Civil Legal Aid Act 1995

The civil legal aid scheme in Ireland is established according to the provisions of the Civil Legal Aid Act 1995 and regulations of 1996, 2002 and 2006 made by the Minister for Justice, Equality and Law Reform. The services of the scheme are administered by the Legal Aid Board which was put on a statutory footing by the Act in 1995.

FLAC has noted that section 5(1) of the Act states that the principal function of the Legal Aid Board is to provide “[...]within the Board’s resources and subject to the other provisions of this Act, legal aid and advice in civil cases to persons who satisfy the requirements of the Act.” Legal aid is defined as “representation by a solicitor of the Board, or a solicitor or barrister engaged by the Board under *section 11*, in any civil proceedings to which this section applies and includes all such assistance as is usually given by a solicitor and, where appropriate, barrister in contemplation of, ancillary to or in connection with, such proceedings, whether for the purposes of arriving at or giving effect to any settlement in the proceedings or otherwise.”⁵ The definition of legal aid under the Act has been extended to include representation of a rape complainant, by a solicitor or barrister engaged by the Legal Aid Board, who is liable to examination on his or her past sexual history.⁶ The Minister for Justice, Equality and Law Reform retains the power to issue general directives as to policy concerning legal aid and advice.⁷ No such directives have been published.

3. Scope of the civil legal aid scheme

Box 1

Summary of “designated matters” excluded under the Civil Legal Aid Act 1995

- i. Defamation (unless as part of some counterclaims);
- ii. Most disputes concerning rights and interests in or over land;
- iii. Civil matters within the jurisdiction of the District Court (Small Claims Procedure) Rules 1993;
- iv. Licensing;
- v. Conveyancing;
- vi. Election petitions;
- vii. Where an application for legal aid is made in a representative, fiduciary or official capacity and the Board is of the opinion that legal aid should not be granted, having respect to any source from which the applicant is or may be entitled to be indemnified in respect of the costs of proceedings concerned and any resources of the persons who would be likely to benefit from a successful outcome of the proceedings for the applicant;
- viii. A matter which in the opinion of the Board, involves a case being brought by applicant as a member of a group or by arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest;
- ix. Any other matter relating to an application for legal aid which is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.

3. Scope of the civil legal aid scheme

Because of the restrictive nature of the civil legal aid service in Ireland, many of the people who require legal aid are denied it and as a result are effectively denied access to justice. Serious problems remain with the scope⁸ of the legal aid scheme which is determined by the Civil Legal Aid Act 1995 and the subsequent Civil Legal Aid Regulations of 1996-2006.

The Civil Legal Aid Act provides for the exclusion of nine areas from the scope of the legal aid scheme. It does not prevent legal advice being delivered in these areas. Therefore, an applicant should always be able to receive this advice and should have the knowledge that he or she is entitled to such advice from a solicitor. The Minister for Justice, Equality and Law Reform, with the Minister for Finance, has the power to extend the Legal Aid Scheme but to date has not done so. The blanket exclusion of any area of law will deny some deserving people their right of access to justice. As will be seen under section 7 of this document, of the three areas of law most frequently dealt with by organisations based in the north east inner city area of Dublin who participated in research by FLAC in 2007-2008, the civil legal aid scheme only provides assistance in one of the areas.

Currently, the scheme is confined to certain specified proceedings at the District, Circuit, High or Supreme Courts. It is worth giving thought to the manner in which the marginalised access the law. It is often through tribunals yet the Minister for Justice, Equality and Law Reform, who has the power to do so by Ministerial Order, has not allowed the scheme to be extended to prescribed administrative tribunals such as the Employment Appeals Tribunal, the Social Welfare Tribunal or the Equality Tribunal.⁹ While civil legal aid may be granted to a person to take a case before the High Court for example, it is not available to access the Social Welfare Appeals Tribunal or most other tribunals. This is in spite of the fact that these tribunals are a common means by which many poor people will attempt to access justice. These groups are left with no legal support.

The recognition of the need to extend the civil legal aid scheme to representation at the Refugee Appeals Tribunal (RAT) is welcome.¹⁰ A number of various ad hoc schemes such as the Mental Health Legal Aid Scheme,¹¹ the Attorney General's Scheme¹² and the Coroners Court Legal Aid Scheme¹³ which provide assistance to people with specific needs, have been established.

The lack of availability of legal aid for persons facing all tribunals, other than the RAT, is not consistent with a vindication of the right to a fair hearing as guaranteed by the Irish courts and international human rights law. The European Court of Human Rights has held that in terms of the scope of the right to a fair trial under the European Convention on Human Rights, there was a positive duty on the state to provide legal aid in matters where the rights and obligations of the individual were in question and the matter was of such complexity that the applicant could not reasonably be expected to effectively represent him or herself.¹⁴ Given that an appearance before a tribunal can involve complex issues of law, both Irish and European Union law, and that it could result in a significant impact in a person's rights and circumstances, everyone appearing before such a tribunal should have the right to legal representation through legal aid, subject to the usual qualification criteria.

FLAC has followed up with some of the matters which arise through the telephone information line or through Data Collection Forms from the FLAC clinics, by appealing decisions against refusals of civil legal aid.

Box 2

Case study: Exclusions (autumn/winter 2006)

Eviction proceedings were taken by a local authority against a tenant pursuant to Section 62(3) of the Housing Act 1966 on the basis of alleged anti-social behaviour. The tenant applied for legal aid and fulfilled the financial eligibility criteria, but on meeting with a solicitor of the Legal Aid Board, she was refused legal aid because the case fell outside the remit of the Legal Aid Board, that is, it was said to be a dispute concerning rights and interests in or over land. She called FLAC's information line for help. FLAC appealed the refusal on the grounds that:

1. This is not so much a dispute concerning a "right or interest over land" as a dispute concerning alleged anti-social behaviour;
2. The tenant deserved representation as the case involved the fundamental human rights of the applicant and involves complicated matters of law, and it is a matter of the utmost personal importance to her or;
3. A refusal of legal aid would cause hardship to the applicant.

This appeal was granted in December 2006, on the basis that to refuse it would cause hardship to the applicant.

4. Practice of the Legal Aid Board

The Legal Aid Board predominantly deals with family law issues in spite of its broader remit.¹⁵ The Board consistently maintains that all Law Centre staff are aware of its remit. Nonetheless, people who have contacted FLAC's telephone information line have reported that they have been advised at Legal Aid Board Law Centres that they cannot apply for civil legal aid if their case relates to areas of law other than family law such as debt for example, which is in fact within the remit of the Board. While family law is a very important area of law for the work of the Legal Aid Board and those who use its services, FLAC's data shows that only approximately one-third of the queries received at FLAC centres relate to family law.

Other areas of law such as local authority housing, for which there is a great need for legal assistance, are not covered by the civil legal aid scheme.¹⁶ This shows that there is a need for access to legal aid and advice relating to other areas of law, which while they are well within the mandate of the Legal Aid Board, there is either no knowledge of the Board's services in these areas, or some people are informally discouraged from applying in areas other than family law. On the FLAC telephone information line in 2008, there has been an increase in queries relating to debt and employment for example, with queries on family law issues dropping from a quarter to a fifth of all queries since 2006.¹⁷

In 2008, a High Court judge asked FLAC to assist in a case relating to a family issue involving children. He said that in such cases, it is essential that both parties are represented as he did not think that the court could have come to the nuanced conclusion that had been reached without such representation. He said that the court would

4. Practice of the Legal Aid Board

have found it very difficult if the client had not been represented in the case. The judge stated that he was grateful to FLAC and the Bar Council's Voluntary Assistance Scheme for the assistance provided by both organisations in the case.

Anyone who satisfies the requirements of the Civil Legal Aid Act 1995 has a statutory right to receive civil legal aid.¹⁸ Anyone who fails to advise a client of this is denying the client their entitlement to assistance in accessing justice. Anecdotally, FLAC is aware of situations in which people have been told in Legal Aid Board Law Centres that their situation would not qualify them for legal aid and thus, are discouraged from applying. Quite apart from the fact that only the Board's head office is entitled to make a decision to refuse legal aid, this leaves the person in a vulnerable position as they have been unofficially denied legal aid without any knowledge of the recourses open to them. Everyone is entitled to apply for legal aid and should be encouraged to apply to have their eligibility judged as intended by the legislation and to have a refusal subjected to the due process of an appeal if they are so entitled. Where an application for legal aid is refused, the applicant is entitled to reasons for the refusal in writing and to appeal this decision.¹⁹ The reasons currently given are uninformative and it is not possible to judge from a refusal letter exactly why an application has not been granted. The decisions made by the Board are final; there is no access to the office of the Ombudsman.

Applicants with urgent cases are not always aware of the Private Practitioners Scheme. The scheme exists for those who have a court date in the District Court only relating to a family law matter and who cannot get an appointment with the Legal Aid Board before the court date. The scheme deals with barring and protection orders, maintenance, guardianship, custody and access, as well as variation and discharge of these orders.

The lawyers who work at the Legal Aid Board Law Centres operate under substantial pressure on both their time and other resources and

they deal with large clients lists. FLAC recognises the dedication and high quality of the advice and services of these lawyers and the committed nature of the staff. At this juncture, FLAC also acknowledges the politicians and public servants who have supported civil legal aid and the right to legal aid within Irish policy over the years.

4.1 Waiting times

Until relatively recently, the Legal Aid Board was hindered by long delays in the provision of a solicitor to prospective clients. In the High Court decision of *O'Donoghue v. The Legal Aid Board, the Minister for Justice Equality and Law Reform & Ors*,²⁰ Kelly J stated that a client should have to wait no longer than two to four months to get an appointment with a solicitor at the Legal Aid Board. Ms. O'Donoghue had been waiting 25 months to get an appointment with a solicitor at the Legal Aid Board. After that, waiting lists in most cases were reduced and have decreased consistently since 2005. Recent months however have seen lists creep up again. In December 2008 four Legal Aid Board centres had waiting lists of five or six months²¹ and sixteen of the Legal Aid Board's twenty-nine law centres had waiting lists of three or four months. In a FLAC survey conducted over a three month period in the latter part of 2008, of those who had successfully applied for civil legal aid, 42% of people had waited for three months before their first consultation with a solicitor. One man who contacted FLAC in July 2008 reported that the Legal Aid Board Law Centre had advised him that it would take six months to get an appointment with a solicitor and a further one month to make the initial application and to carry out the means test. One client was unable to contact her Legal Aid Board solicitor and was consequently unable to secure an early hearing date as a result. This can result in potential clients being discouraged from applying from the outset. On the other hand, it is worth noting that some centres do conduct the means assessment on the same day that the client submits his or her application.²²

4. Practice of the Legal Aid Board

Applicants are not always informed of the possibility of asking the judge for an adjournment while they are waiting for an appointment with a legal aid solicitor. The appointment systems seem to lack flexibility in dealing with urgent cases, with little support and information for such applicants. The Legal Aid Board states that some 22% of applicants receive a priority appointment and that managing solicitors in Law Centres have flexibility in dealing with urgent cases. This is principally in family law cases.

Judicial practice also varies and not all judges are prepared to wait the length of time required for the applicant to actually access legal aid. There is a need for more information for clients of the Legal Aid Board and for all those involved in the administration of justice to understand better both the extent and the limitations of the civil legal aid scheme. The Courts Service should highlight the work of Legal Aid Board in all of the documents they publish in order to reach a wider audience. A greater understanding should be developed between the Legal Aid Board and Courts Service so that they are more aware of each other's work. This knowledge can then be shared with the service users of each body.

5. Financial eligibility to qualify for civil legal aid

Rather than be assessed on a client's need to access legal services (as is the position for criminal legal aid), Ireland's civil legal aid scheme is more bureaucratic and sets three tests to be passed in order for a person to be deemed eligible to be granted civil legal aid by the Legal Aid Board. The client must pass an overarching principle test,²³ a merits test²⁴ and a means test (the figures for which are prescribed by the Minister for Justice, Equality and Law Reform with the consent of the Minister for Finance).²⁵

The financial test is significant first because it regulates whether a person is eligible for legal aid at all and secondly because it determines the amount that the person will pay as a contribution to the cost of the service they receive. For the most part, a person's eligibility to apply for civil legal aid will be decided on income but for some, there will also be capital eligibility test.

5.1 Assessment of income

Under the current eligibility limits for the means test which were set in 2006²⁶ a person will be eligible for civil legal aid if his or her annual disposable income is under €18,000.²⁷ The Civil Legal Aid Regulations provide that the resources of applicant's spouse or partner may be treated as those of the applicant for the purpose of the application for legal aid in certain circumstances. The current maximum disposable income is an increase of €5,000 (38%) on the previous amount established under the 2002 regulations; this was hopelessly outdated given the rise in the cost of living standards in the intervening period. Certain expenses, in the form of allowances, are excluded from the calculation of gross income; when these are deducted, the remainder constitutes disposable income. A number of the maximum figures for allowances were increased under the 2006 regulation as outlined in the table overleaf.

5. Financial eligibility to qualify for civil legal aid

Box 3

Sample of allowances 1996-2006

Category of Allowance	Maximum Amount 1996 ²⁸	Maximum Amount 2002	Maximum Amount 2006 (current)
Spouse	€1,686.56	€1,900	€3,500
Each dependent	€848.36	€1,100	€1,600
Childcare per child	n/a	€1,100	€6,000 ²⁹
Accommodation	€3,779.52	€4,900	€8,000
Income Tax	Full	Full	Full
PRSI	Full	Full	Full
Ex gratia	n/a	n/a	€1,040
Loan interest payments	€764.54	n/a	n/a
Hire purchase payments	€375.92	n/a	n/a
Work travel expenses	€375.92	n/a	n/a
Medical health insurance	€952.58	n/a	n/a

These increases were long overdue and while welcome are still inadequate. For example, while the accommodation allowance increased by approximately €258 per month under the 2006 regulations, this allows €666 to be deducted per month for the means test calculation. This remains far below the average monthly accommodation costs whether for private rented accommodation or a mortgage property. The childcare cost allowance increased substantially by €4,900 which represents an improvement but unfortunately does not go far enough to cover actual childcare costs in Ireland which in 2005 was up to €10,000.³⁰ Child dependent allowance is reduced in accordance with maintenance received per child from the other parent. The increase in consumer debt in Ireland, as well as the high levels at which this stands, is not reflected in allowances, with loan interest payments and hire purchase interest payments being removed from the list of allowances in 2002. The removal of other

routine costs such as work travel expenses and medical health insurance allowances, is also disappointing.³¹

5.2 Assessment of capital

As stated previously, as well as being assessed on disposable income, an applicant for civil legal aid must also submit to a capital assessment. If an applicant's disposable capital is in excess of €320,000, they will not qualify for legal aid. FLAC welcomes the development in 2006 that the value of the applicant's family home is no longer considered part of a person's capital for the purposes of qualifying for legal aid.³² Nor will the value of an applicant's general household goods continue to be taken into consideration as capital. It is also the case that previous specific rules in relation to the assessment of capital of farmland no longer apply; it will be treated as any other capital resource which can include property, investments and cars. It is possible that the payment of a capital contribution may result in effectively excluding those on very low incomes but who possess land such as farmers.³³ This is because a farmer's land will be considered capital for the purposes of calculating a contribution, meaning that the farmer may have to pay a high contribution in spite of a relatively low disposable income.



A person with a disposable income of €13,000 is liable to pay the maximum contribution of €150 for a consultation with a solicitor.

5.3 Contributions

While everyone who requires criminal legal aid is entitled to it free of charge and based on a personal means test by the adjudicating judge, civil legal aid in Ireland is not free and except in cases of undue hardship, all Legal Aid Board clients are expected to pay a contribution. This is based on the calculation of their income and assets in the means test. Thus a discrepancy arises between the access

5. Financial eligibility to qualify for civil legal aid

to justice available to a person who is tried for a criminal offence and for those who need to use the law for non-criminal matters even where there may be very serious consequences. For instance, a person with a civil legal issue who cannot afford legal advice or representation could face a range of serious consequences such as denial of access to one's children, losing his or her home and a range of other related negative outcomes, including on occasion imprisonment for debt.

A recent FLAC survey shows that of those who had successfully applied to the Legal Aid Board for civil legal aid since 2006, 50% were not aware that they would have to make payments towards legal aid. Contributions are to be paid in advance of receiving the service.

A 2008 amendment to the Civil Legal Aid Act means that whilst previously the Legal Aid Board could provide legal aid or advice without reference to an applicant's financial resources, or that they could waive any contribution payable or accept a lower contribution, they can now only do so if a failure to do so would cause "undue hardship" to the applicant.³⁴ It is for the Legal Aid Board to interpret "undue" hardship. It is worth noting that subject to limited exceptions, the Legal Aid Board is entitled to charge the full fees it has incurred in the course of the provision of legal services from monies or property recovered as a result of the legal services.

Under the Civil Legal Aid Regulations 2006, the minimum income contribution for legal advice was increased from €6 to €10 and the maximum contribution from €100 to €150. For legal aid, minimum payments rose from €35 to €50 and the maximum income contribution to €1,675.

Regarding capital contributions to be made, no capital contribution is payable "in respect of that portion of the applicant's disposable capital which is less than €4,000."³⁵ Capital contributions are required in respect of legal aid only,³⁶ not in the case of legal advice. If an applicant has a disposable capital of €35,000, he or she will pay a capital contribution of €775. If their disposable capital is €100,000, his or her capital contribution will be €4,700.

In order to vindicate the right of a person to representation where that is needed for a fair hearing, civil legal aid should be available on the same basis as criminal legal aid. It should be free where necessary. At a minimum, FLAC has previously called for the financial eligibility criteria to be measured *annually* against national poverty proofing standards and for the publication of the underlying analysis by the Department of Justice, Equality and Law Reform.³⁷ There are no provisions to index link the allowance or income criteria or to provide for increases in the cost of living or in the cost of legal services. Indeed, the new threshold and allowance figures for means test qualification are now three years old.

Box 4

Case study: Contributions (autumn/winter 2005)

A man who had been living on his disability allowance and disability pension since 1996 was referred to FLAC for assistance relating to the contribution he had been instructed to pay by the Legal Aid Board. He had sought civil legal aid in order to resolve domestic matters relating to the estrangement of his wife, which involved him and his two teenage children moving from the family home to alternative accommodation.

He was entirely financially responsible for the rent and maintenance of both homes. In spite of his situation, the LAB had deemed his disposable income to amount to €11,118.28. He was thereby required to pay a contribution of €739. On the advice of FLAC, he requested and was refused a review of the contribution and subsequently appealed that decision. FLAC also advised him to request that his contribution be waived under s. 37 of the Civil Legal Aid Act 1995 which allows legal aid to be granted without reference to the financial resources or which provides for the acceptance of a lower contribution. He was also advised to note that while the Board may only waive or accept a lower contribution in the case of an applicant whose income contribution is assessed at €35 under regulation 21(9) that regulation does not specifically exclude the waiver or reduction of contributions of a greater sum than the minimum of €35.

The Legal Aid Board refunded him all but €35 of the €739 he had paid to them.

6. Funding of the Legal Aid Board

On the occasion of the launch of the Civil Legal Aid Regulations 2006, the then Minister for Justice, Equality and Law Reform, Mr. Michael McDowell claimed that the revised regulations were “further evidence of [his] commitment to the delivery of an accessible and fair civil legal aid system”. He said that he had “increased funding for the scheme significantly in recent years”.³⁸ This contributed, at the time, to the reduction in waiting times to see a solicitor as noted above. The increase in the income threshold for qualification for civil legal aid has resulted in a corresponding increase in the number of people who apply for the service. From 2007 to 2008, there was an increase of 17% in applicants.

“If the right to legal aid is to be respected, a civil legal aid scheme must address unmet legal need.”

FLAC, Access to Justice: A right or a privilege?

In 2007, the Board received almost €1.8 million from clients.³⁹ It received €659,520 in contributions from legally aided persons and €1,128,820 in costs recovered.⁴⁰ As a response to the financial crisis of 2008, the government made a range of cuts to the funding of public services in its budget of 2009. There was no increase in the funding of the Legal Aid Board but funding was reduced by 1%.⁴¹ Given the increased costs involved in running the service, FLAC estimates that the actual cut faced by the Legal Aid Board was 3-4%. This results in concern about the capacity of the Legal Aid Board to provide an adequate service for the increased number of applicants who will now qualify for legal aid under the revised means test and as a result of the economic downturn.

7 Access to Justice and unmet legal aid

Access to justice means more than access to civil legal aid and an appointment with a lawyer. It is about meeting equally the legal needs of every community in Ireland. It is about access to the courts and lawmakers, to service providers and basic information on legal rights and entitlements.

This section provides a snapshot of a community in the north east inner city Dublin. The area has a population of over 35,000 and witnessed a population increase of almost 40% from 1996-2006. In 2006, almost 35% of the area's population comprised non-Irish nationals and 55% of all households with children in the area were headed by a lone parent. 2,587 of the population lived in local authority housing and 14.5% were unemployed at the time these figures were recorded.⁴² In order to gauge the climate regarding access to justice and legal need, in late 2007 and early 2008, FLAC approached 67 organisations providing services in the area with a view to carrying out a study on unmet legal need. 40 of these organisations agreed to take part. The study⁴³ yielded a number of interesting results in terms of identifying the ongoing failure of the State and the legal system for those who have neither adequate knowledge of, nor access to, their legal rights and entitlements.

When asked whether their organisation provides information on legal rights and entitlements, 67.5% (27/40) stated that they do so with 37.5% (15/40) stating that their organisation provides legal advice to clients. 75% (30/40) of organisations responded that they would like more support in their work with legal elements. The areas of law for which they would like more support include immigration and asylum, housing, debt, employment.

7. Access to justice and unmet legal aid

Box 5

Most common legal problems dealt with by organisations surveyed as part of FLAC's unmet legal need project		
Local authority housing	31/40	77.5%
Social welfare entitlements	31	77.5%
Domestic violence	29	72.5%

The civil legal aid scheme only offers assistance in one of the top three areas which the organisations most commonly deal with in terms of legal problems. Domestic violence is covered by both the civil legal aid scheme and the criminal legal aid scheme.

The major barriers to obtaining legal information in north inner city Dublin, according to these organisations are a lack of awareness that a legal issue exists (70%) and costs (70%). Perceived complexities (52.5%), a belief that the person would not be successful (50%) and literacy (47.5%) were the next most frequent barriers. Many organisations need to refer those whom they support further.

Box 6

Type of information available to clients at organisations surveyed as part of FLAC's unmet legal need project		
Referral	36/40	90%
To FLAC	26	65%
Private Solicitor	22	55%
To Legal Aid Board	21	52.5%
Information	32	80%
Advice	24	60%
Counselling	14	35%
Other	16	40%

While 65% of the organisations referred their clients to FLAC's services, only 52.5% refer to the Legal Aid Board and 55% to a private solicitor. 62.5% of organisations would describe the level of awareness among their clients of their legal rights and entitlements as "not

good” with only 2.5% reporting a “good” awareness and none reporting a “very good” awareness.

Concerning knowledge of the services of the Legal Aid Board, there was a general propensity to confuse the Legal Aid Board with FLAC. 37.5% of the organisations were not aware that the Legal Aid Board Law Centres are mandated to provide legal services in all areas of law other than criminal law and some areas of civil law which are excluded by law.⁴⁴ For those who had experience of the services of the Legal Aid Board, 20% had found the experience to be “not very good”, 15% were happy with their experience and 12.5% reported a “mediocre” experience. While the area of law for which the organisations referred clients to FLAC’s evening clinics most frequently was family issues (47.5%), this was followed by immigration (35%) and property/housing (32.5%).

37.5% of organisations asked were not aware of the remit of the Legal Aid Board Law Centres that is, that the Law Centres are mandated to provide legal services in all areas of law other than criminal law and many areas of civil law.

It is clear from the study that accessing justice remains a problem for the people of the north inner city in Dublin. Substantial unmet legal need continues to exist. The knowledge and experience of the organisations and their clients with the Legal Aid Board is less than satisfactory and issues remain outstanding regarding familiarity with the state-funded civil legal aid scheme.

A fundamental flaw in the current legal aid system is the exclusion of certain areas of law from its remit. The most prevalent legal problems affecting people who present themselves at these organisations are not addressed by the legal aid scheme. This is reflected in FLAC’s data, which is discussed in the next section. While the community organisations provide other vital services, they do not, and nor is it

their role, to provide the legal services omitted by the civil legal aid scheme.

7.1 Awareness of the Legal Aid Board

The Legal Aid Board is under a statutory obligation to disseminate information in relation to its services and the availability of those services “for the benefit of those for whom its services are made available”.⁴⁵ The Legal Aid Board has published a small number of advertisements in the format of leaflets and posters over a short period of a few weeks in national buses and elsewhere. There is no information to be found in the public spaces in court buildings. There appears to be a mixed level of awareness among judges as to the work of the Legal Aid Board and inconsistency exists in the judiciary as to whether a judge feels it necessary to refer a person before him to the Legal Aid Board.

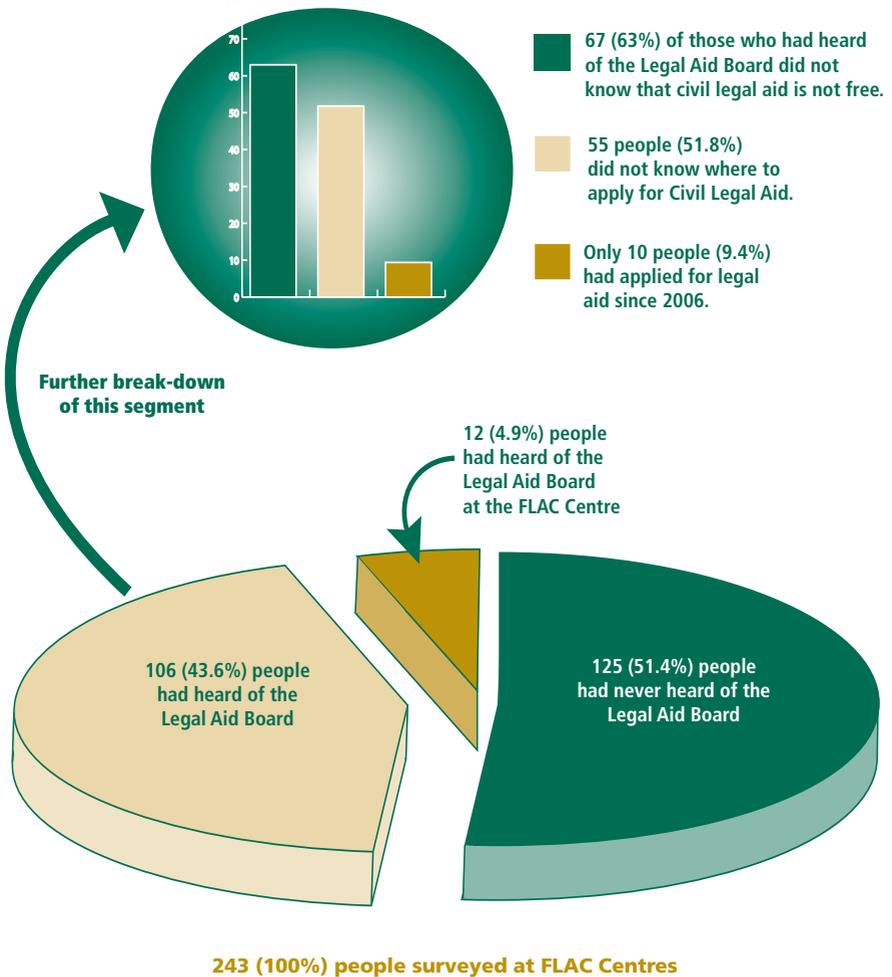
FLAC surveyed 243 people in FLAC centres throughout the country over the period of October to December 2008. For results, see Box 6. Of the 51 who answered that they did know where to apply for civil legal aid, their answers included that they would apply:

- ▶ **the post office;**
- ▶ **at FLAC;**
- ▶ **at the Department of Heritage;**
- ▶ **at their solicitor’s office;**
- ▶ **their Citizens Information Centre.**

For those who did not apply for civil legal aid since 2006, reasons for this included, a lack of knowledge, they were under the impression that the Legal Aid Board was a family law service only, they were put off by the waiting times, they needed legal advice quickly or they thought the Legal Aid Board covered criminal matters only.

Box 7

Awareness of Legal Aid Board, FLAC Survey October to December 2008



7. Access to justice and unmet legal aid

The current legal aid system does not meet the standards established by the European Court of Human Rights in the *Airey* case;⁴⁶ that is that the right of access to the courts⁴⁷ be “practical and effective”. The supports given by the state to accomplish the vindication of this right are inadequate. In 2007, the Legal Aid Board had just 109 solicitors on staff in 33 full-time law centres and 12 part-time centres⁴⁸ around the country for a population of over 4 million people.⁴⁹ In spite of a steep population increase over the past nine years, only three new centres have been established by the Legal Aid Board since 2000.⁵⁰ One of the general law centres of the Board has recently been closed. All of the new centres were refugee legal centres. The Legal Aid Board must be in a position to deliver a service to all who are entitled to receive it which at a minimum means many of those on social welfare and with low incomes. Until such time as adequate capacity is given to the Legal Aid Board to provide the service to those entitled to it, these rights will remain “theoretical and illusory”.⁵¹

7.2 FLAC services

FLAC supports almost 70 Advice Centres nationwide, many of them in conjunction with Citizen Information Centres. The FLAC centres are staffed by fully qualified solicitors and barristers who volunteer to provide private consultations to members of the community. Although people who present themselves at the centres are not means tested, the service is intended for those who cannot afford to engage a private solicitor. In many cases, legal advice is required without delay and FLAC centres often fill this need for people who cannot wait for the advice or for an appointment with a solicitor at a Legal Aid Board Law Centre.

Box 8

WHO ACCESSES FLAC'S SERVICES?⁵²

Sex:	
Male:	50.6%
Female:	49.4%

Where are the clients from?	
Ireland:	65.4%
Pakistan:	3.3%
Poland:	2.5%
USA:	2.1%
Nigeria:	2.1%
Bangladesh:	1.6%

Age:	
20-29 yrs:	22%
30-39 yrs:	32.9%
40-49 yrs:	21.8%
50-64 yrs:	17.7%
Over 65 yrs:	4.1%

Source of income	
Employment:	56.4%
Social welfare/income support:	25.5%
State/private pension:	6.2%
Maintenance:	2.05%
Other:	8.2%

Marital status:	
Single:	44.4%
Married:	33.3%
Separated/divorced:	14.4%
Cohabiting:	3.7%
Widow/er:	3.3%

Dependent children:	
No children:	56.8%
1 child:	18.1%
2 children:	13.1%
3 children:	6.6%
Over 4 children:	4.5%
Other dependents:	4.9%

Labour force status:	
Full-time employee:	32.9%
Part-time employee:	17.3%
Self-employed:	4.9%
Community education scheme:	0.8%
Unemployed:	22%
Retired/pension:	4.9%
Student:	5.4%

Over the years, the pattern of areas of law on which people request advice and information at FLAC Centres is consistent and remains similar to those outlined below for 2008 (except for gradual increases in employment and credit and debt-related issues). Queries received

7. Access to justice and unmet legal aid

over FLAC telephone information lines support this. While family law features prominently in the areas of law discussed at FLAC centres in 2008, other areas such as property, housing and credit and debt also feature highly. Areas which often affect the less well-off such as employment and social welfare law also appear on the list yet the current legal aid scheme does not provide representation at tribunals such as the Employment Appeals Tribunal or the Social Welfare Tribunal.

Box 9

Areas of law discussed at FLAC centres 2008 ⁵³		2008		
		Count	%	
Civil Law	Family	2438	31.5	
	Non-Family	Employment Law	1094	14.1
		Succession / Probate	275	3.6
		Property	439	5.7
		Housing / Landlord	521	6.7
		Consumer Law	505	6.5
		Credit and Debt	259	3.4
		Neighbour Dispute	157	2.0
		Immigration / Refugee law	258	3.3
		Negligence / Personal Injury	413	5.3
		Wills/Power of Attorney	268	3.5
		Client-Solicitor Relations	89	1.2
		Social Welfare Law	139	1.8
		Other civil matters	446	5.8
		Total non-family	4863	62.7
Criminal Law	432	5.6		
Total legal queries	7,733	100		

It is important to remember that FLAC Centres were never intended to be more than a stop-gap means of access to legal information and advice for those who cannot otherwise afford it. It is not meant to be a substitute for a comprehensive state civil legal aid scheme.

8. Conclusions and recommendations

As FLAC celebrates the fortieth year of its work, the organisation is calling on the government to prioritise the needs of those who require aid and assistance in order to access legal services and the courts. Even with a fully functioning legal aid system, this alone will not provide universal access to justice. Access to justice requires a community-orientated approach encompassing the needs of marginalised groups often left without a platform to voice their needs. This should involve at a minimum legal education within the community. FLAC believes that the following recommendations would be a crucial in order to enhance today's civil legal aid scheme:

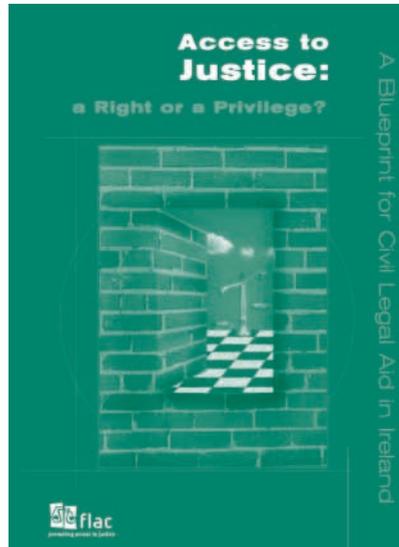
- ▶ Reconsider the "designated areas" or exclusions under the 1995 Act;
- ▶ Increase the visibility and awareness of civil legal aid scheme;
- ▶ Establish a better understanding between Legal Aid Board and the Courts Service so that they are aware of each other's work;
- ▶ The Courts Service should highlight the work of the Legal Aid Board in all of the documents they publish;
- ▶ There should be further cooperation, referral and awareness of the remit and work between Legal Aid Board law centres, Citizens Information Centres and the Money, Advice and Budgeting Service;
- ▶ An out-of-hours Legal Aid Board service should be established.

8. Conclusions and recommendations

FLAC's *A Blueprint for Civil Legal Aid in Ireland* which forms part of the 2005 report *Access to Justice: A Right or a Privilege?* details how a comprehensive, fair and equitable civil legal aid scheme might be achieved.

Though much has been done to improve the scheme, the provisions of the Blueprint are not yet a reality. While this report is to be issued at a time of limited national resources, the economic downturn cannot be used as a justification to limit the protection of the rights of the individual. Nor can it be used as a reason to fail to vindicate those rights.

FLAC remains committed to the achievement of real access to justice for everyone and will continue to work towards the realisation of a comprehensive civil legal aid scheme in Ireland.



Endnotes

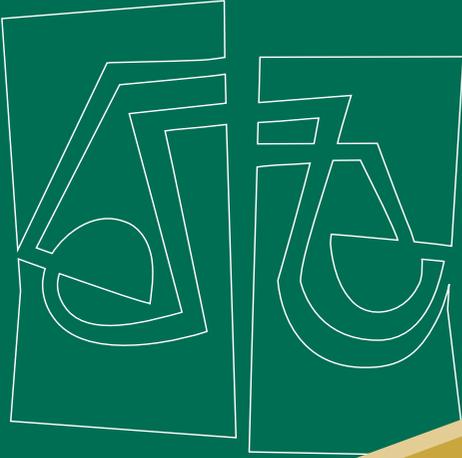
- 1 As per Kelly J in *O'Donoghue v. The Legal Aid Board, the Minister for Justice, Equality and Law Reform, Ireland & the Attorney General* [2004] IEHC 413
- 2 The state-funded civil legal aid scheme was established in Ireland in 1979 and is currently based on the provisions of the Civil Legal Aid Act 1995. The system operates through the Legal Aid Board which is appointed by the Minister for Justice, Equality and Law Reform. The Minister also decides the conditions under which civil legal aid and advice are available.
- 3 For a detailed discussion, see *Access to Justice: A right or a privilege? A Blueprint for Civil Legal Aid in Ireland*, FLAC, 2005, chapter 1.
- 4 This document consciously does not address the work carried out by the Refugee Legal Service, a body which provides legal services for asylum seekers in Ireland.
- 5 Section 27(1) Civil Legal Aid Act 1995
- 6 Section 35(2) Sex Offenders Act 2001
- 7 Section 7 Civil Legal Aid Act 1995
- 8 See section 28(9)(a) of the Civil Legal Aid Act 1995
- 9 It was held in *Corcoran v. Minister for Social Welfare* [1992] ILRM 133 that a constitutional right to legal aid to persons appearing before administrative tribunals does not exist.
- 10 Civil Legal Aid (Refugee Appeals Tribunal) Order 2005
- 11 Section 17, Mental Health Act 2001
- 12 The Attorney General's Scheme provides payment for legal representation in certain types of legal cases that are not covered by the civil legal aid or the criminal legal aid schemes, see www.attorneygeneral.ie/ac/agscheme.html for more information.
- 13 The Coroners Court Legal Aid Scheme allows a person to apply to the Department of Justice, Equality and Law Reform for legal aid to meet the costs of legal representation at inquests into deaths that occur in state care such as Garda stations. This scheme currently operates on a discretionary basis. Legislation has been proposed to place the scheme on a statutory footing but there has been no movement on it since it concluded the second stage of the legislative process in October 2007.
- 14 *Airey v. Ireland*, 6289/73 [1979] 2 EHRR 305 (9 October 1979), [1981] ECHR1 (6 February 1981): "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".
- 15 Legal Aid Board Annual Report 2007, p. 12-13. Just over two-thirds of the cases where legal advice was given by the Board related to family law in 2007. 87% of legal aid cases over the same period related to family law.
- 16 The Citizens Information Services Survey Report 2008 shows that two-thirds of their clients asked about social welfare issues, followed by employment rights at 15%,

- housing related queries accounted for 12% of overall queries as did health services and 11% related to HSE payments.
- 17 Legal advice constitutes oral and/or written advice given by a barrister or solicitor. Legal aid refers to representation by a barrister or solicitor in court proceedings.
- 18 Regulation 12, Civil Legal Aid Regulation 1996
- 19 *O'Donoghue v. The Legal Aid Board, the Minister for Justice, Equality and Law Reform, Ireland & the Attorney General* [2004] IEHC 413. In this case, while O'Donoghue succeeded against the State, the Legal Aid Board was found not to have been in breach of its statutory duty. The High Court found that the delay in providing legal aid to O'Donoghue was the sole result of the lack of resources made available to the Board by the State. The delay in granting the civil legal aid certificate to O'Donoghue amounted to a breach of her constitutional right of access to the courts and fair procedures.
- 20 These were the Law Centres in Kildare, Westmeath, Clondalkin in Dublin and Pope's Quay in Cork.
- 21 FLAC appreciates that some Law Centres operate successful and effective work practices in terms of timing and the processing of applications for legal aid. FLAC is in a position that it is more likely to hear about difficulties people face when they approach the Legal Aid Board rather than the good practices which exist in the Law Centres.
- 22 The overarching principle test is that a person will only be granted legal aid where a reasonably prudent person who is not eligible for legal aid would be likely to take the case by funding it themselves. It must be clear to the Legal Aid Board that a solicitor or barrister would reasonably be likely to advise a client to take a case in the same circumstances.
- 23 In terms of the merits test, Section 28(2) Civil Legal Aid Act 1995 lays out the criteria to be considered by the Legal Aid Board in determining eligibility for the merits test for legal aid. They are that there must be:
- (a) reasonable grounds as a matter of law for instituting or defending proceedings;
 - (b) reasonable grounds of success in the proceedings;
 - (c) reasonableness in granting legal aid having regard to all the circumstances of the case such as probable cost to the Board; and
 - (d) a lack of a more appropriate method than court proceedings for dealing with the problem.
- 24 Law Society of Ireland, Legal Aid Taskforce, *Civil Legal Aid in Ireland: Information for the Profession*, 2008, pg. 18-26
- 25 Regulation 3(d) Civil Legal Aid Regulations 2006
- 26 This document quotes figures which are subject to change by Ministerial Regulation at any time and aim to be correct as of January 2009.
- 27 All figures have been converted from punt to euro for purposes of comparison.
- 28 As stated in the box title, all figures here represent the maximum amount available.

- With regard to childcare per child and accommodation, the allowance available is a maximum of €6,000 with respect to childcare and €8,000 with respect to accommodation; a person is only entitled to an allowance of the expenses they actually incurred.
- 29 Consumer Association, *Childcare costs*, 2005 pg. 376
- 30 Regulation 16(g) Civil Legal Aid Act Regulations 1996
- 31 Regulation 3(f) Civil Legal Aid Regulations 2006, this amends the anomaly whereby a low-income applicant who owned their home or had substantial equity therein, could not qualify for legal aid or had to pay a large contribution for it because of property price inflation. Previously it had been the case that the value of an applicant's family home would only be disregarded in a capital assessment in the case of a married couple if it was the subject of a dispute, usually in family law proceedings.
- 32 National Farm Survey 2006 (most recent available) shows that the average income of a farming family was €16,680, a decrease of 25.7% on 2005 when the average income was €22,459.
- 33 Under Section 6 of the Enforcement of Court Orders Act 1940 (amending Section 18 of the Enforcement of Court Orders Act 1926)
- 34 Section 80 Civil Law (Miscellaneous Provisions) Act 2008
- 35 Civil Legal Aid Regulations 2006, regulation 3(h). These figures had previously been set at €79,400
- 36 It should be noted that contribution costs are restricted to the actual cost to the Legal Aid Board of providing the service, with reference to the chargeable solicitor hours on the case together with any other expenses. A further limit is imposed by the amount that the Legal Aid Board pays for the services of a private practitioner.
- 37 FLAC, *Access to Justice: a Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland*, 2005, pg. 64
- 38 Press Release of the Department of Justice Equality and Law Reform, *Minister McDowell introduces new regulations to improve access to civil legal aid*, 31 August 2006
- 39 Legal Aid Board, *Annual Report 2007*, p. 36
- 40 *Ibid*, p. 36. In addition, the Legal Aid Board would be entitled to fees in cases that it wins where it has challenged government practice. However, the convention in asylum judicial review cases is not to claim these fees because it would simply be transferring money from one government function to another.
- 41 The Legal Aid Board budget of €26,998,000 was marginally reduced to €26,618,000 in 2008, a cut of 1%.
- 42 Figures are from Dublin Inner City Partnership, Census 2006 Data. In 2006, the north east inner city area had a population of 35,159. The percentage population change from 1996-2006 was 39.98%.
- 43 The study involved a detailed questionnaire completed by 40 different organisations in the north inner city area of Dublin who responded as to their experience and that of those who access their services.

- 44 Section 28(9)(a) Civil Legal Aid Act 1995
- 45 Section 5(2) Civil Legal Aid Act 1995
- 46 *Airey v. Ireland*, 6289/73 [1979] 2 EHRR 305 (9 October 1979), [1981] ECHR1 (6 February 1981): “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.
- 47 Article 6(1) European Convention on Human Rights 1950
- 48 See n-39, pp. 7 and 34
- 49 Central Statistics Office, *Principal CSO Statistics: Population by age*.
- 50 Legal Aid Board Annual Reports 2000 – 2007 Sections on Capacity of the Board to meet demand for services, structure and service provision.
- 51 *Ibid* at n-46
- 52 FLAC, Civil Legal Aid Survey 2008
- 53 47 FLAC centres participate in the Data Collection programme from which this information is compiled.





"In the determination of his civil rights...
everyone is entitled to a fair and public hearing
within a reasonable time..."
Article 6(1), European Convention
on Human Rights



FLAC - 13 Lower Dorset Street, Dublin 1

LoCall: 1890 350 250
E-mail: info@flac.ie
Tel: 01-874 5690
Web: www.flac.ie