

FLAC PRESENTATION TO JOINT OIREACHTAS COMMITTEE ON JUSTICE, EQUALITY, DEFENCE AND WOMENS' RIGHTS

We would like to thank the Chairperson and the members of the Committee for the invitation to come and address you this morning.

Introduction

We would like to begin by explaining a little about the history of FLAC as an organisation and the kind of work we are involved in.

FLAC (Free Legal Advice Centres Ltd) was founded by law students in 1969 to campaign for the introduction of civil legal aid in Ireland. Following the report of the Pringle Committee in 1977 and the successful case brought by Josie Airey to the European Court of Human Rights, a non-statutory scheme of civil legal aid was set up in 1979. FLAC continued to campaign through the 1980s and early 1990s for a statutory scheme and ultimately the Civil Legal Aid Act 1995 was passed. During this time, we moved from being an organisation run solely by law students to one with paid staff and today FLAC has a full time office with a staff of eight together with a number of interns employed under a FAS scheme.

The provision of a civil legal aid service that provides for broad and effective access to justice for those of insufficient means continues to be a major priority for our organisation and there are many aspects of the current service about which we have serious concerns. This has culminated in the publication of our recent report 'Access to Justice: A Right or a Privilege?' published in July of this year. We will return to this report in due course.

FLAC has always run voluntary legal advice centres and, prior to the introduction of civil legal aid, these centres took on many cases as well. Even after the introduction of civil legal aid, our centres have continued to operate, and in recent years we have expanded these centres countrywide, in close co-operation with Comhairle and the Citizens Information Centres network. Ongoing collection of data on callers to the centres reveals a widespread demand for advice in a wide range of civil law areas. These centres are serviced by volunteers from both branches of the legal profession and we feel it is important to acknowledge the goodwill and strong spirit of voluntarism shown by the professions to FLAC. These centres provide immediate and free access to legal advice but not to legal representation. Thus, FLAC advice centres should not be confused with the State's law centres run by the Legal Aid Board. These provide legal representation on a waiting list basis and charge for that service.

In addition to the watching brief that FLAC has always kept on legal aid and the provision of legal advice through free centres, the 1990's saw an expansion of our work in the area of socio-economic rights. The areas of debt and credit law, social welfare appeals and employment appeals have received particular attention. In 2003, we published a critical analysis of how the Irish legal system treats cases of uncontested debt, *An End based on Means?* and followed this up with a conference and conference report in 2004. These reports call for a comprehensive overhaul of what is an antiquated system that does not take account of an ever expanding and increasingly diverse consumer credit market and a huge rise in consumer indebtedness. Our work in this area has also involved co-operation with state agencies such as the Financial Regulator and a close working relationship with the Money Advice and Budgeting Service (MABS), with whom FLAC made a presentation to the Oireachtas Committee on Social and Family Affairs last November on reform of the laws in relation to debt.

The treatment of refugees and asylum seekers has also been the subject of a recent report by FLAC. In 2003 we published *Direct Discrimination?*, a critical evaluation of the State's direct provision dispersal policy in relation to applicants for asylum.

Finally, FLAC has always been actively interested in the potential for law reform that individual cases may present and the broader and related issue of the use of law in the public interest. To this end we recently held a conference on the future of Public Interest Law and Litigation (PILL) in Ireland. A number of distinguished international speakers provided details of various developments across jurisdictions and domestic speakers discussed the potential for progress in Ireland. The proceedings from that Conference are due to be published shortly and will propose a way forward in this very important area.

Civil Legal Aid services in Ireland

This committee has a role in considering matters of government policy, particularly those administered by the Minister for Justice, Equality and Law Reform. The delivery of civil legal aid is a matter, therefore, comes within your remit. In any examination of how civil legal aid is delivered we would propose that the following questions be examined:

- What is the purpose of the civil legal aid scheme?
- Does the current scheme fulfil its purpose?
- Is the current scheme the only way in which the overall aim can be achieved?
- If not, what steps should be taken to make the scheme an effective one which fulfils its purpose?

FLAC has looked at these questions in its review of the current civil legal aid scheme, published as *Access to Justice: A Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland*.

1. Purpose of the Scheme

The overall purpose of a civil legal aid scheme must be to address unmet legal need, to vindicate the right to civil legal aid, and to advance social inclusion and assist in eradicating poverty.

The title to the Civil Legal Aid Act 1995 (the Act) states that its purpose is to "make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases". To that end, the Act makes arrangements for a Legal Aid Board, and provides, in Section 5, that:

- (1) "The principal function of the Board shall be to provide, within the Board's resources, and subject to other provisions of the Act, legal aid and advice in civil cases to persons who satisfy the requirements of the Act
- (2) "The Board shall, to such extent and in such manner as it consider appropriate, disseminate, for the benefit of those for whom its services are made available, information in relation to those services and their availability"

Looking beyond the statutory remit of the Legal Aid Board, FLAC has examined fundamental rights and obligations around civil legal aid. In our report, we have analysed the case law of the Irish courts and the European Court of Human Rights. The inescapable conclusion is that a State is obliged to establish and to fund a civil legal aid scheme because people should not be denied access to justice only because of a lack of resources.

Access to justice is a fundamental human right and a basic tenet of every democratic society. Providing theoretical access to the courts is not sufficient to vindicate a person's rights. In its 1979

judgment in the case of *Airey v Ireland*, the European Court of Human Rights found that the right to a fair hearing included the right to state-funded legal aid. In the course of that judgment, the Court said that “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.

Similarly, in the recent Irish High Court judgment in the case of *O'Donoghue v The Legal Aid Board and others*, the Court found that Ms. O'Donoghue's constitutional right to legal aid had been infringed by an excessive delay. That court too spoke of the need to ensure a practical implementation of the fundamental human right to access justice. Judge Kelly said “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” Quoting another previous High Court case, he said that the legal aid scheme must be “implemented fairly to all persons and in a manner which fulfils its declared purposes”.

Even before the civil legal aid scheme was introduced in 1977, Judge Pringle said that the committee was not required to demonstrate the need for a comprehensive scheme of legal aid and advice since “the then Minister for Justice...said that the need for such a scheme was already well recognised”. The provision of a civil legal aid service is consistent with stated government policy over the entire period of the current scheme. For example, a more recent pronouncement from the Minister's successor, Minister McDowell has recently said that “nobody should be debarred from seeking justice for want of finances”.¹

In addition to the accepted legal right of access justice, there is also a strong socio-economic argument in its favour. As our report suggests,² the European Union has situated the right of access to justice as a key element of social inclusion and the eradication of poverty. The 2002 Joint Report on Social Inclusion prepared by the EU Commission states that:

Access to law and justice is a fundamental right. Where necessary citizens must be able to obtain the expert legal assistance they require in order to obtain their rights. The law is thus a critical means of enforcing people's fundamental rights. For some vulnerable groups, access to the law can be particularly important but also problematic. Groups identified in the NAPs/incl include ethnic minorities, immigrants, asylum seekers, victims of domestic violence, ex-offenders, prostitutes and low income people living in rented housing.

In summary, the purpose of a civil legal aid scheme is to assist in vindicating the right of access to justice of those who are on low incomes and for those who are particularly vulnerable. Therefore a civil legal aid scheme is necessary and is valuable to the fabric of society and of democracy.

2. Does the current scheme fulfil its purpose?

The title to the Civil Legal Aid Act 1995 (the Act) states that its purpose is to “make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases”. In response to a recent parliamentary question on legal aid, the Minister for Justice, Equality and Law Reform stated that the Legal Aid Board's “services are available to persons of modest means and at little cost”.³

Means test

¹ “Free Legal Aid for victims of sex abuse examined”, Report of the speech of Minister Michael McDowell TD in Irish Times 29 October 2005.

² See the beginning of Chapter 4.

³ Parliamentary Question 31046/05 from Aengus O'Snodaigh T.D, 26 October 2005 and Parliamentary Question 29753/05 from Eamon Gilmore TD 20. October 2005.

To demonstrate just how modest a person's means have to be to qualify, it is necessary to provide the committee with some detail of the means test used by the Board to assess applicants.

To qualify, an applicant must have a disposable income of less than €13,000 per annum, equivalent to €250 weekly. Income includes income from any source, including social welfare payments but excluding child benefit. To arrive at disposable income, the following allowances are discounted:

- Income tax and PRSI payments,
- An accommodation allowance of up to €4900 annually (equivalent to less than €100 per week),
- Childcare expenses of up to €1100 per child annually
- An allowance for a dependant spouse of €1900
- An allowance of €1100 each for other dependants (including children).

The means test introduced with the Scheme in 1996 acknowledged the reality of other expenses such as hire purchase instalments, interest on other credit agreements, private health insurance costs and work expenses. The test has been revised only once, in 2002, when it was pared back to the allowances outlined above. For example, the accommodation allowance bears no comparison to the cost of an average mortgage or rented property, except local authority tenancies. The childcare allowance is also outdated and the failure to allow any discount for credit agreements makes a mockery of the notion of 'disposable' income.

There is also an inbuilt bias in the means test favouring family law cases in that a couple who are separating or who have opposing interests are entitled to a full set of allowances each for the purpose of their application, whereas if either partner is applying for civil legal aid in connection with another legal matter, the income of the family is aggregated and only one set of allowances is permitted. Thus, in practical terms, it becomes even more difficult to pass the means test in these circumstances, given the number of households where both partners are working outside the home.

It is clear that the means test is drastically in need of revision. It must be linked to the cost of living and the cost of legal services.

Costs to the applicant

In responding to the parliamentary question, the Minister also offered the view that the service was provided at very little cost to those availing of it. The Board's Director of Legal Services, speaking at a recent conference on Family Law at Trinity College stated that 'clients have to pay a contribution - in the vast majority of cases this amounts to a maximum of €35 for representation in court'.⁴

The Board's annual reports provide no detail that might help gauge the accuracy of this statement. However, the rules in relation to calculating the applicant's contribution as a result of their income cast some doubt over this sweeping statement. In summary, for legal representation the minimum contribution is €35 and a person must have a disposable income of €8,300 or less in order to pay the minimum contribution. Where the disposable income is between €8,300 and the maximum income limit of €13,000, the person must pay:

⁴ Recent Developments in Family Law, Trinity College, 8 October 2005

In the case of legal representation, one quarter of the difference between €8,300 and maximum threshold, plus the minimum charge of €35.

Therefore, depending on how close the applicant is to the disposable income threshold, the potential contribution for representation may be quite sizeable. For example, a person with a disposable income of €12,300 may pay up to €1035 for legal representation, €1000 being the difference between €8300 and disposable income at €12300, plus the minimum contribution of €35.

It is difficult to draw any firm conclusions in the absence of statistical evidence from the Board. However, looking at the statement above, either the contributions paid by applicants for legal aid is being underestimated or the vast majority of legal aid applicants are either on extremely low incomes or are social welfare recipients, i.e. with a disposable income of less than €8,300.

Scope of the scheme

The Civil Legal Aid Act 1995 precludes the Board from dealing with certain areas of law including as follows:

- Defamation
- Disputes concerning rights and interests in or over land
- Small claims
- Licensing
- Conveyancing
- A test case taken by an applicant on behalf of a group
- Actions taken by a person as part of a group with the same complaint i.e. class actions

Recent case law developments in the U.K. and under the European Convention on Human Rights and Fundamental Freedoms⁵ (now incorporated into Irish domestic law by the European Convention on Human Rights Act 2003) cast doubt over the notion of the validity of blanket exclusions, especially where the denial of legal aid prevents a person from presenting their case effectively to a court. By focusing on the subject matter of the proceedings, the core objectives of meeting unmet legal need and facilitating access to justice are sacrificed.

Quite apart from specific exclusions, a disturbing trend in the Board's annual reports is the decreasing number of non-family law cases it handles (leaving out the unique case of the Refugee Legal Service). For instance, this ran to 171 cases in 2002 decreasing to 84 cases in 2003⁶ and to a very low 49 cases in 2004.⁷

In practice, the Board provides an almost exclusively family law service to the detriment of other areas of civil law that it is not specifically excluded from dealing with. There may have been some justification for this focus on family law when the law centres waiting lists were extremely long, but the reduction of these lists to more manageable proportions of two to four months weakens this argument. FLAC's own data shows that the range of civil legal aid services needed is far wider.

Merits test

The legislation also contains a merits test and this assessment poses a series of obstacles that may be very hard to overcome for an applicant. This also may go some way to explaining why less than 2% of the Board's casework in both 2003 and 2004 was outside of the family law area.

⁵ See, for example, *Steel and Morris V The United Kingdom*, February 2005

⁶ Annual Report of Legal Aid Board, 2003 – Page 53 – Legal Aid analysis of proceedings by court in 2003

⁷ Annual Report of Legal Aid Board, 2004 – Page 55 – Legal Aid analysis of proceedings by court in 2004

In order to meet the requirements of the merits test, the Board must be satisfied:

- That 'a reasonably prudent' person would be likely to seek such services in the circumstances at his or her own expense
- That a legal professional 'acting reasonably' would be likely to advise them to do so

The Board must further be satisfied that:

- The applicant has as a matter of law 'reasonable grounds' for instituting or defending the proceedings the subject matter of the application
- The applicant is 'reasonably likely' to be successful in the proceedings, based on their current version of events being proved before a court
- That legal proceedings are the most satisfactory means of achieving the result sought by the applicant
- That having regard to all the circumstances, it is 'reasonable' to grant it.

The Board's annual reports provide no detail as to how many applicants for legal aid fail the merits test and this figure would be especially interesting in relation to applications outside the family law area.

In summary, under the criterion imposed by the Act and reiterated by the Minister, it is clear that the present service does not achieve its stated aim. Legal Aid (as opposed to legal advice) is available only in narrow subject areas of civil law, principally family law. An applicant's means must be extremely modest by the standards of 2005 to qualify. Those who qualify at the upper end of the means limit will face a substantial contribution for a service that is perceived to be free. All others, many of whom are below the average industrial wage, must pay for the full cost of legal services.

3. Is the current scheme the only way in which the State's overall aim can be achieved?

In preparing the report *Access to Justice: A Right or a Privilege?*, we in FLAC were struck by a certain lack of connection which sometimes exists between the legal aid service which is delivered, and the needs of those that the scheme is intended to serve. This is demonstrated quite acutely in the preponderance of family law cases in the statistics of the Legal Aid Board. It is also the inevitable result of a scheme designed by central government and administered by a central bureaucracy, where the communities to be served are not driving the service. Indeed, the communities to be served are not even directly represented on the board of the Legal Aid Board. The chances are that the vast majority of those who are involved in making policy for legal aid delivery and in administering it are not from the communities that actually avail of civil legal aid services. The delivery of the State's civil legal aid service has not been re-assessed in its twenty-five years of existence.

In other jurisdictions with similar common law foundations, there has been substantial development in delivering civil legal aid through mechanisms which are situated in the communities that they are meant to serve, particularly for marginalised or vulnerable communities. Such community law centres, as they are called in the UK (called law clinics or legal centres elsewhere), have community boards or management. Their mandates are set by the communities in which they are situated. They deal with the legal issues of most significance to those communities; and they deal with them within the community, in a way that the community accepts and trusts. Over 30 years ago, FLAC was involved in the establishment of Ireland's first independent community law centre, now the Northside Community Law Centre. That community law centre, now managed by the community and dealing with community issues, is still serving

the people of Coolock and surrounds. Since then, another independent Community Law Centre has been set up in Ballymun and specialist sectoral legal units have been established to serve the unmet legal need of travellers in the Irish Traveller Movement, of immigrants in the Immigrant Council of Ireland and, until recently when funds expired, to deal with the special issues of those living with disability in the Disability Legal Resource. In spite of the clear value and the civil legal aid that they give to their communities, these resources are not part of the civil legal aid scheme or budget. To a greater or lesser extent, all of these community based legal resources struggle to survive financially. They have to be supported by the voluntary sector, with certain grant aid, but not out of the civil legal aid budget.

FLAC's report urges a greater state recognition of the value to the State in delivering civil legal aid through the community. To our knowledge, no state assessment has been carried out to assess the significant value that such community law centres add to their respective communities. In particular, we are not aware of any assessment of the important role that they play in meeting the essential aims of the civil legal aid scheme, namely the vindication of fundamental human rights, the provision of legal services to those of insufficient means, the advancement of social inclusion and the eradication of poverty. Such a study is likely to show that community law centres are in fact a good way of meeting the purposes of a civil legal aid scheme and are an asset that should be fostered.

As part of this approach, FLAC's report highlights the possibility of a rich partnership and a complementary provision of services between such community law centres and the existing Legal Aid Board Law Centres to increase the range and quality of legal advice available to those of modest means who cannot access justice without legal aid.

And finally, in response to the last question that we posed at the outset:

4. If the existing scheme does not fulfil its purposes, what steps should be taken to make the scheme an effective one?

FLAC answered that question in its review of the scheme, by extracting the main policies and principles which govern legal aid, and by drawing conclusions from them. We propose a Blueprint which would deliver civil legal aid in a manner which was consistent with fundamental human rights, with the aims of the Civil Legal Aid Act 1995, and with government aims towards social inclusion and the eradication of poverty.

The Blueprint is annexed to this document and sets out recommendations, which, if implemented, will produce the kind of civil legal aid scheme required by government policy, Irish legislation, the Irish Constitution and international Human Rights law.

A Blueprint for Civil Legal Aid in Ireland

1. **Equal access to justice is a fundamental human right. The State and all of its organs should incorporate the recognition of this right into all aspects of its law, policy and practice.**
 - Given that there is no express protection in the Irish constitution of the right of access to the courts and to legal aid, the Oireachtas should enact legislation codifying those rights.
 - The State should ensure that there is sufficient provision for legal aid and advice to persons of insufficient means in civil cases.
 - The Legal Aid Board should be subject to the scrutiny of the Office of the Ombudsman.
 - The State should specifically include the objective of protecting and promoting the right of access to justice in its National Action Plans for Social Inclusion, commencing with the new National Action Plan being prepared in 2005.
 - All relevant government Departments should commission independent audits and impact assessment studies to ensure that all legislation, regulations, procedures and policies comply with the State's human rights obligations and the requirements of constitutional and international human rights law.
2. **Those who have rights must have a meaningful method of enforcing them.**
 - The Legal Aid Board should review the current operation of Law Centres as primarily a family law service. It should endeavour to ensure that its staff is fully conversant with the full statutory scope of the Board's services and it should publicise the extent of those services.
 - Sufficient funds should be provided to allow the Board to employ sufficient staff to deliver effective civil legal aid and legal advice to persons of insufficient means
 - The State should provide resources to communities to establish community and specialist law centres which aim to promote the rights of the socially and economically excluded and to facilitate equal access to justice for all.
 - The State and the Legal Aid Board should promote partnership between Community Law Centres (CLCs) and the Board, using as a template the existing partnership arrangement at Ballymun, Dublin CLC. The State should encourage and facilitate new and innovative approaches to stable partnerships in the delivery of high quality legal services which meet the needs of the clients served.
 - Section 28(9)(a) of the Civil Legal Aid Act 1995 which prohibits civil legal aid for designated areas of law should be repealed.
3. **While in a society with competing demands on resources legal aid will be a benefit based on need, the eligibility criteria must reflect the actual cost of living and the cost of legal services.**
 - Pending a thorough review of the means test, the disposable income and capital limits and the amounts of all allowances should be immediately adjusted to realistic levels to take account of increases in the cost of living.
 - Eligibility criteria should be reviewed annually.
 - Allowances provided for in the Civil Legal Aid Regulations 1996 but removed in the Civil Legal Aid Regulations 2002 for Hire Purchase, loan interest payments, health insurance, life assurance and for travel to and from work should be reinstated at realistic levels. The cost of common household utilities should be recognised and an appropriate allowance should be made.
 - The Civil Legal Aid Regulations 1996 and 2002 should be amended immediately so that the value of the family home is excluded from any calculation relating to the contribution that the applicant has to pay; and no contribution or costs should be deducted from the proceeds of sale of the family home towards the cost of delivering legal aid services.

- Every person should be assessed on his or her own income and assets only and in particular, the income and assets of spouses or co-habiting partners should not be aggregated in assessing the financial eligibility of one of them.
 - The criteria for financial eligibility should be measured annually against national poverty proofing standards and the Department of Justice, Equality and Law Reform should publish the underlying analysis.
 - The State should implement EU Directive 2003/8/EC to improve access to justice in cross-border disputes.
 - Decisions to refuse or revoke legal aid should be in writing, with reasons furnished. There should be an independent appeals mechanism. The decisions of the Legal Aid Board should be subject to the scrutiny of the Office of the Ombudsman
 - The State should extend the list of cases that will automatically merit legal aid from the existing limited list of certain child custody cases and certain categories of rape complainant to include all of the family law work that the Board currently undertakes. No merits test should be required for such work.
 - The State should enact amending legislation to ensure that legal aid is always available where required to vindicate human rights. There should be a system for assessing complex cases outside of normal financial and merit limits. This assessment should aim to vindicate rights, rather than just to alleviate hardship.
 - The Legal Aid Board should publish detailed information, such as will allow an analysis of the underlying trends, on sums it receives by way of contributions from clients from litigation costs and from damages.
 - The Legal Aid Board should make its calculation of costs public and available to all clients.
 - The Legal Aid Board should publish the guidelines that it uses to assess hardship cases, or cases where conditions or contributions are waived
4. **The requirement of access to justice is wider than access to the courts. In pursuance of protecting this right, and its duty to promote knowledge of rights, the State should commit resources to a programme of public and community legal education.**
- The Legal Aid Board should establish a dedicated service to assess how the law impacts on the communities that it serves. The information and analysis should be available to the Board, to inform it in its policies and to the Board's staff for use in its work. The analysis should be made available to the public.
 - The State should provide resources to allow interested groups to provide public and community legal education to improve knowledge of legal rights and entitlements.
 - The State should provide resources to communities to encourage legislative and policy advocacy and community group representation.
 - The Legal Aid Board should disseminate widely information about the Board's services.
5. **Access to legal aid must be effective. To this end, the Legal Aid Board and the State must ensure that the system of legal aid actually delivers a meaningful service.**
- The scandal of waiting lists that rendered the scheme virtually meaningless many times in the past must not occur again. Waiting times should never exceed the Board's own goal of two to four months and the Board should take steps to ensure the normal waiting period is as short as possible.
 - The State must ensure that there is a secure source of funding available to the Legal Aid Board to carry out its mandate of delivering civil legal aid to persons of inadequate means.
 - The Legal Aid Board should monitor the management of waiting lists to ensure that at all times, the Board delivers a high quality, efficient service to the client.
 - The Legal Aid Board should ensure that its staff and agents are alert to any potential deficiencies or breaches of the constitutional or human right to access the courts and justice.

- The Board should have procedures in place and train its staff to recognise and report such deficiencies and to notify such deficiencies to the appropriate State departments.
- The Legal Aid Board should provide information about its services effectively and consistently.
- The Board should provide an emergency, out-of-hours service.
- The Board should publish and disseminate widely a comprehensive statement on the circumstances and terms on which cross border legal aid is available.
- The Board should encourage the direct participation of its clients and of groups acting for marginalised or disadvantaged communities in the preparation of its plans and procedures and delivery of its services. The State should make statutory provision for participation by clients of the legal aid service, and of the communities most dependent on such legal services. Pending statutory amendment, the State should appoint representatives of communities which are heavily dependent on legal aid as members of the Legal Aid Board.
- The Board should make use of modern communications methods and technology to provide a more efficient and user friendly service. This should include use of the internet to allow an applicant to qualify on financial grounds on line.