

Access To Justice 2021 Conference

An overview of unmet legal needs

by Eilis Barry
Chief Executive of FLAC

Before I begin I just want to add my voice to the chorus of tributes being paid to the Chief Justice, a great friend to FLAC. He has consistently highlighted the need for broader and better legal aid at every opportunity, since the statement for the new legal year in 2017 where he committed to making access to justice a central focus of his tenure. It was also featured in the launches of the annual reports of FLAC, Mercy Law Centre and CLM, in the opening address at FLAC's Access to Justice Conference in 2019 and the 40th anniversary of the Legal Aid Board . FLAC is really proud to be part of his Access to Justice Committee.

I also want to pay tribute to Judge McMenamin , a driving force on this committee, whose signature I recently noticed, is on the articles and memo of FLAC. FLAC has been campaigning for over 50 years for access to justice so it is really encouraging to have two Supreme Court judges with such an interest and commitment to access to justice.

I also want to echo the thanks and acknowledge the huge work that my colleagues on the committee have been engaged in, Attracta O'Regan from the Law Society with her colleague Ann Tuite and Joseph O'Sullivan from the Bar Council of Ireland. Both bodies have always been very supportive of FLAC's work in terms of funding, volunteering in FLAC clinics and their endorsement and support of the pro bono pledge which was launched last year.

I am sad to hear that access to justice is losing a champion in that Philip O'Leary will shortly be stepping down as chair of the Legal Aid Board. I know he cares passionately about access to justice. He suggested having Mark Benton at this conference and has pointed us in the direction of Canada which offers the way forward to unmet legal needs in a number of critical respects. FLAC's Managing Solicitor recently emailed me that 'Canadians are cool', which pretty much sums up what I want to say this morning.

I also want to thank the incredibly efficient and effective Sarahrose Murphy and Patrick Conboy from the Chief Justice's staff, who made it all extremely pleasant and fun. It was really nice to see them all in person yesterday for the first time.

I was very struck by the amount of people wanting to speak and contribute to today's events. Normally we have to strongarm people into speaking, but rather we were turning

away a number of people wanting to contribute as panellists. I believe this is indicative of that desire for change that was so evidently clear from yesterday’s contributors.

Change in Progress

Change is in the air. A number of the issues highlighted at the FLAC’s Access To Justice Conference in 2019, and those which will be examined in some of the breakout sessions this morning, have been reflected in some of the changes that are happening.

FLAC has highlighted and campaigned for a review of the civil legal aid system for quite some time. We are delighted that that is to happen and noted Minister Humphrey’s mention of it at yesterday’s event. I would love to have heard more detail, particularly about the scope and nature of the review.

A number of FLAC staff have been engaged in consultations in relation to the Courts Services Modernisation Programme that Angela Denning spoke about. There seems to be a really welcome cultural change within the Court Services, a real openness, which is very striking. We look forward to ongoing consultation, especially in relation to issues like lay litigants, reform of rules and procedures and online hearings, and so would be delighted to be part of the coalition of reformers that Angela referred to yesterday. Professor McKeever’s research on litigants in person is a really important contribution to the modernisation programme and am delighted that she is contributing to workshop D.

We also welcome the long overdue reform of the family justice system, albeit with concerns that some of the hard won legal rights and protections may be lost sight of in the embrace of mediation as the almost only solution to family law issues. I practiced family law before the current legislative architecture of protections for mainly dependent women and children was introduced, and it was grim. It is vital that legal advice be readily available as to what people’s rights are, and what would the likely outcomes be in a court situation before mediation starts. Especially in relation to issues like the implication of pension adjustment orders, transfer of family home and the implications of settlements on social welfare rights. I am uneasy at the notion of people in domestic violence situations, instances where there is huge disparity in power and resources or where coercive control may be present, being unduly pressurised into mediation, where it is not the job of the mediator to ensure and enforce the protection of the rights of vulnerable/dependent adults and children. We look forward to more consultation in that regard.

We contributed to the Review of the Administration of Justice and welcome a number of its recommendations. However, we have sought consultation in relation to the implementation of its recommendations. Civil society was not strongly represented on the review group. I was especially dismayed to hear from the Minister that legislation is planned in relation to judicial review as we have particular concerns about those recommendations being implemented.

We very much welcome the proposed long overdue reform of rules and procedures but have some concerns that review recommendations if implemented will put too much onus on a unrepresented litigant to identify with clarity their claim. It is vital that these reforms are equality, human rights and poverty proofed as is required by Section 42 of the IHREC Act.

Public Sector Duty

There is a growing understanding of the implication of this public sector equality and human rights duty for statutory bodies like the Courts Services. FLAC will shortly publish a report on the implications of the Public Sector Duty (PSD) for the Courts Services, the WRC and the Legal Aid Board, which draws on learning from the UK especially in relation to the equal treatment bench book. We are really lucky to have Judge Tamara Lewis who was heavily involved in the revised Equal Treatment bench book with us today along with IHREC Chief Commissioner, Sinead Gibney at Workshop F. We were very pleased to hear that the WRC is providing their adjudicators with the section of the UK equal treatment bench book on catering for lay litigants.

Pro Bono

Another significant development has been embedding of pro bono in Ireland with the launch of the Pro Bono Pledge in 2020 which asks the legal profession to commit to provide a minimum aspirational target of 20 pro bono hours per lawyer per year. The Pledge was developed by an independent grouping of law firms, barristers and in-house legal teams and is coordinated by FLAC's public interest law project, PILA and so far 2,500 legal practitioners have signed up to it.

In addition to Ireland's two Pro Bono Associate's, Eithne Lynch and Carol Ann Minnock, for the first time a Pro Bono Partner has been appointed and so I want to congratulate Niamh Counihan from Mathesons. I am also so delighted that Eamon Conlon who really got pro bono off the ground in Ireland is speaking today at workshop D.

Targeted Legal Services

We are also pleased with the establishment of a dedicated legal service for Travellers albeit with only one solicitor, within FLAC. FLAC also enjoys a partnership with the Traveller Equality and Justice project in UCC and both Dr Fiona Donson and Mark Willers QC who serves on its advisory board of the partnership are with us here today.

The centre for environmental justice established by CLM, is a significant welcome development as Judge O'Leary pointed out yesterday. The Aarhus convention requirements are the gold standard in terms of access to justice and we are delighted to welcome Áine Ryall as moderator for workshop B.

Cost of Access to Justice

Yesterday we heard the moral, legal, social and economic imperatives for access to justice.

A strong civil justice scheme is an important part of the foundation of civil society, the platform on which we build everything else. It is obviously important for the individual, and has a wider societal impact. It increases social inclusion, foundational to democracy and the rule of law, and is a vital tool in holding the state and other powerful bodies to account as Judge O’Leary illustrated quoting the UK Supreme Court. Recent research shows that improved access to justice also results in positive health outcomes.

It was fantastic to hear from Professor Farrow about the research which shows that for every dollar invested in access to justice there is a return of \$9-\$15. The Cost of Justice project of the Canadian forum on civil justice illustrates the enormous social cost we are incurring because we do not have a sufficiently effective justice system.

The reality here is that we have no way of measuring the enormous social cost in not having a sufficiently effective system. Although FLAC witnesses that social cost every day on our Telephone Information Line, in the Traveller Legal Service, the Roma clinics and in our advocacy and research work on debt.

The ‘Implementation Gap’

We would like to see access to justice being made a central focus for all of the reform that is happening and to borrow further from Professor Farrow’s research, where he talks about the gap between ideas and implementation – the implementation gap. Change won’t happen just because people want it to.

One important factor contributing to the implementation gap is a lack of public interest and support for access to justice. We know in Ireland that the attitude of some members of the public and civil servants is to equate access to justice with money for lawyers. Professor Farrow’s research highlighting the economic and social benefits will hopefully result in a seismic change in attitude in this regard.

In our current legal aid campaign FLAC has been engaging with NGOs about their experience of legal aid and it was striking how interested they became in it and seen how relevant it is in their work.

Another reason suggested by Professor Farrow for the implementation gap is that some of the problems we face are intricate, systemic issues and the leadership of our civil justice system is diffuse. It is difficult to say that there is one civil justice system, but more accurate to say there are several systems and parts of systems with important elements. The various

elements of current system have a large measure of independence from the other elements, so you have the Judges as independent decisions makers, other quasi-judicial bodies like the WRC, lawyers as independent advocates with their professional bodies and more recently the LRSA's new functions, the Courts services, the Office for public works, the Legal Aid Board, the Department of Justice and DPER. FLAC would also include relevant bodies like the Citizens Information Board, the Law Reform Commission and FLAC with the Independent law centres network as elements.

There is no one group in charge of or with the power capacity and resources to cure systemic problems and to me that is why, for FLAC, the Chief Justice's Access To Justice Committee is so important. It brings some of the key players together and am really happy that such a broad range of the key actors are attending this conference

Civil Justice Movement

We need to do more than just to talk about an effective civil justice system. We need a civil justice movement, which engages the public and all of the key players in the justice system. We need a broad based access to justice campaign akin to the government led campaign for Ireland to become the EU's dispute resolution forum of choice following Brexit, it was very striking how key players were then able to come together to promote that initiative including the Attorney General.

The Canadian Action Committee on Access to Civil and Family matters, brings people from all corners of Canada's justice system together to propose and examine approaches on this critical issue. It adopted Justice Development Goals. Progress on the goals are published annually. Its Action Committee coordinates national metrics on justice and connects people to share innovations throughout the year and at its annual summit.

I hope that one legacy of this conference would be that the Chief Justice's Access To Justice committee could be developed into a more formal broad based committee involving all of the key players from Ireland's Justice system who have been at this conference along the lines of the Canadian model with action plans, goals and indicators.

Unmet Legal Needs

In talking about unmet legal needs, the nature and level of unmet legal need in Ireland is neither well understood or comprehensively researched. We have empirically little data about legal need, the social and financial impact of unmet need referred to by professor Farrow. We have no idea of the actual volume of legal need and no idea of the volume of unmet legal need and the extent of the social and financial consequences. Historically legal services and the legal education sectors have placed very little emphasis on the importance of evidence based approaches to the design and delivery of services.

The Chief Justice pointed out the similarities between family and commercial law, but there is something deeply uncomfortable about having a state of the art commercial court in comparative luxury compared to the state of the completely overstretched family law district courts across the river. Research is vital to help us understand where legal need is greatest and to prioritise resources accordingly.

I would like to highlight two different aspects of unmet needs which our legal system including our legal aid system is particularly ill equipped to deal with.

- Clustered Injustice

Luke Clement from the Legal action group in the UK has written about what he calls clustered injustice - that people who live with disadvantage experience clusters of associated legal problems either at the same time or consecutively. Commonly experienced legal problems can coalesce into clusters, the experience of one problem can lead to another in snowballing effect. Solving one problem does not mean the end of legal issues. For many people living in disadvantage their legal problems are multiple, interconnected and messy. People living with disadvantage are constantly involved with the law in its most intrusive form.

I felt like he must have been writing his book sitting in the FLAC office. We see what he describes so vividly in the Traveller legal service, with the daily lives of Travellers constantly banging up against sharp legal things like summary evictions, discrimination and the criminalisation of their way of life.

Clements says that people most likely to experience multiple legal problems include, and the list is long, lone parents, people in local authority housing, adults with longstanding illnesses or disabilities, and adults on means tested payments people with significant debt problems. FLAC would add to that list; homeless people, children with disabilities, people living in direct provisions, people who fall foul of the immigration system and ethnic minorities, and people who have difficulty meeting the habitual residence test.

- Collective Rights

The second area of unmet legal needs that our legal system is ill equipped to deal with are what the academics call diffuse or collective rights - rights that are shared by many but far too onerous for one individual to enforce – such as in relation to environment, privacy, systemic or discrimination.

In looking at unmet legal needs, FLAC maintains that access to justice is a continuum of issues. It includes information, legal advice, advocacy, access to the courts, access to an effective remedy and fair and just laws. Unmet legal needs arise at each of these points. Viewing unmet need as a continuum and committing to address needs earlier could have a tremendous implication for costs.

Access to Information

Broadening accessibility to legal information advice should be the number one priority.

What the FLAC Telephone Information Line tells us about people who know they may have a legal issue, is that there is a huge unmet need for legal information and advice, especially in the areas of family law and employment, which is not otherwise available. The phone line is only reaching the tip of the ice berg in this regard. Unfortunately for many who contact us, FLAC may be the first and last port of call due to inadequacies in the legal aid system.

At the end of May 2020, employment law topped the area of queries, for the first time in FLAC's recorded history. What is most worrying is that due to the inadequate legal aid scheme there is nowhere to send them for further advice and representation. There may be a possibility of getting legal aid in family law cases but we are seeing lots of people who are outside the very strict means test and have no hope of being able to pay for a solicitor. There is no legal aid in employment law cases, so there is nowhere to refer the almost 2000 who got through on the phone line with often complex employment law issues.

We also know from our work as a law centre, the acute needs of people who live in disadvantage for information, advice and advocacy in circumstances where they may have no idea of what the legal issues are or how the law can help.

In Canada, the BC legal aid system has a requirement to be flexible and innovative and they have multiple ways of getting information across both to people who know they have legal issues and those who don't. This includes legal information outreach workers, aboriginal community legal workers, and their system actively supports community partners and community workers, a vastly different model to our own legal aid system.

Recent Academic research on the best ways to provide access to justice to people living in disadvantage recommends that it should be provided by small local independent services. People who know most about housing, social welfare, debt and discrimination are those best placed to provide practical early advice to support those whose problems are messy and multiple.

To me that is what the Pringle Report recommended 40 years ago - a network of community law centres. When you hear small local and independent I immediately think of Dave Ellis in Coolock Community Law Centre, who was determined not to do traditional litigation but focussed on welfare rights, community education and training. A network of community law centres would also be a comparatively cheap and highly effective way of meeting unmet need for people living in disadvantage.

Also the possibility strikes me that the Citizens Information Board with their network of Citizens Information Services are very well placed to have community legal workers and

outreach legal workers, these could have the relevant expertise and could be supported by a reformed Legal Aid Board, and I welcome Michael Owens, of the Citizens Information Board here today.

Legal aid

The problems with the legal aid system are well documented. There remains very serious and significant gaps in our legal aid system, both in terms of the limited coverage of that system, defined by extensive exclusions and strict requirements of financial eligibility. There is a perception that legal aid is not available in one of the biggest issues of the day – homelessness. There is no legal aid for employment or discrimination claims, no matter how complex the issue or how vulnerable the claimant may be. Our legal aid system is particularly unsuited to deal with people with multiple legal issues and collective rights as its focus is predominately on family law. It make no sense that it is not proactively involved in the provision of legal information at an early stage. It makes no sense that it cannot represent its family law clients in their related social welfare appeal, their WRC claim or represent them in repossession hearings where their homes are being repossessed.

FLAC together with 48 NGOS have campaigned that the proposed review of legal aid be a root and branch review, that will scope and map unmet legal need. The review should explore the functions of the Legal Aid Board, including functions such as the provision of information, advocacy, education and research; the eligibility criteria for legal aid, including the means test, and financial contributions, the areas of law covered, and the methods of service delivery, such as community law centres or targeted/specialised legal services for disadvantaged groups and individuals.

We also called for it to be an independent review chaired by a person of status, such as a judge with an interest in access to justice, such as the original Pringle Committee. And to have at its centre the voices of those who experience unmet legal need and involve key stakeholders.

It also needs to measure the civil legal aid system against international standards and compliance with the State’s obligations under national and international human rights laws, as so comprehensively identified by Judge O’Leary yesterday.

The Continuum of Access to Justice

Part of the continuum of Access to Justice is access to the courts and effective remedies. I have mentioned the need accessible rules and procedures and the need to provide for lay litigants.

It is for another day to examine which rights get adjudicated upon and in which fora. It is to be regretted that the Review of the administration of Justice did not deal with the

urgently needed reform of the vast array of quasi-judicial bodies, as these are where for the most part the rights of disadvantaged people are adjudicated on. Such a review is even more urgently in need of reform in the light of the Zalewski judgment. I know this is one of the issues the Law Reform Commission is looking at.

Even if you are lucky enough to get legal representation, there is no real equality of arms beyond a strict procedural equality of arms. This is especially true if you are up against the state with its ample pockets, local authorities or large corporate entities like social media giants.

The procedural rules on standing, costs, delays, class actions and multi-party actions may restrict the ability of people living in disadvantage in making or defending claims. Especially where rights are held collectively like the regarding the environment or privacy. Some practice directions in relation to immigration have also been particularly problematic.

FLAC has previously expressed concern about the use of very strict confidentiality clauses, usually by a state department, which binds the claimants and their legal representative to absolute confidentiality and allows the state to continue with the alleged illegal behaviour. This practice is also a terrible use of court time. There should be some better procedure for public interest matters to be adjudicated upon even if settled.

The last part of the access to justice continuum are fair and just laws. We currently have laws that criminalise the way of life of Travellers and some laws governing eviction can result in summary evictions without any meaningful opportunity for access to legal advice let alone access to legal aid. These laws have been condemned by international human rights bodies, and remain unamended.

Conclusion

We need research to measure the volume and type of legal need and in particular the unmet legal need, particularly for people living in disadvantage, so that we utilise evidence led approaches to the design and delivery of legal services.

Need a reformed flexible legal aid system that can provide small local independent services and which prioritise advice and information services in accessible ways for people who know and don't yet know that they may have legal issues. This would include a network of community law centres and people with expertise in housing, social welfare, debt and discrimination.

We need a more formal broad based forum for dealing with access to justice which brings together people from all corners of the justice system, many of whom are here today and have expressed a desire for change.

We undervalue access to justice if we don't move from ideas to implementation. Let us form a coalition of reformers to implement the great ideas we are going to hear at this Access To Justice 2021 Conference.

Thank You