



Submission of the Free Legal Advice Centres Criminal Justice System Strategy Consultation

August 2020

About FLAC

Free Legal Advice Centres (FLAC) is a non-governmental, voluntary organisation which exists to promote the fundamental human right of access to justice. FLAC focuses on the use of law as a tool for social change and on the protection of economic, social and cultural rights. FLAC is an affiliate member of FIDH.

In our work, we identify and make policy proposals on the law that impacts on marginalised and disadvantaged people and groups. We advance the use of law in the public interest and we co-ordinate and support the delivery of basic legal information and advice to the public for free. FLAC was a partner of the JUSTROM programme and recently launched a dedicated legal service for the Traveller community. It also operates a legal clinic for the Roma Community.

It made a submission to the Department of Justice and Equality's consultation on a new National Traveller and Roma Inclusion Strategy, 2017-2020 and to the Commission on the Future of Policing in 2018. It also made a submission to the UN Committee on the Elimination of Racial Discrimination for the examination of Ireland's combined fifth, sixth and seventh periodic report. These submissions are drawn on for the purpose of this submission.

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

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Introduction

FLAC welcomes the opportunity to make submissions on the Department of Justice and Equality's (DOJ) public consultation to inform the development of a joint strategy for the criminal justice system.

As an organisation with a longstanding commitment to the promotion of human rights, FLAC welcomes the DOJ's commitment to the creation of a "*joined-up criminal justice system that upholds human rights...*" and one which "*vindicates the rights of the individual*".¹ Accordingly, FLAC's submissions address equality and human rights issues that FLAC has encountered in its work and which it believes are important for the DOJ to address in the context of the creation of a sectoral strategy for criminal justice.

The recommendations within are principally drawn from FLAC's experience as a partner in the JUSTROM programme, the purpose of which was the promotion of access to justice for members of the Roma and Traveller community. FLAC's participation in JUSTROM has been followed by the creation of a dedicated Traveller legal service, which launched in July 2020. FLAC also continues to run a legal advice clinic for the Roma community, funded by the DOJ.

FLAC has previously participated in public consultations relating to the Department of Justice and Equality's National Traveller and Roma Inclusion Strategy, 2017-2020 and also to the Commission on the Future of Policing in 2018.

¹ "Background Document on a Criminal Justice Sectoral Strategy – Public Consultations 2020"
[http://www.justice.ie/en/JELR/About the Criminal Justice Sectoral Strategy.pdf/Files/About the Criminal Justice Sectoral Strategy.pdf](http://www.justice.ie/en/JELR/About%20the%20Criminal%20Justice%20Sectoral%20Strategy.pdf/Files/About%20the%20Criminal%20Justice%20Sectoral%20Strategy.pdf)
(accessed 5 August 2020)

Recommendations

- The Public Sector Duty should be a core consideration in the process of developing, implementing and monitoring the Department's strategy
- Implement the recommendations of the UN CERD Committee on racial profiling to
 - a) Introduce legislation prohibiting racial profiling;
 - b) Put in place an independent complaints mechanism to handle racial profiling;
 - c) Review, in collaboration with communities mostly affected by racial profiling, policy, practices and training of An Garda Síochána;
 - d) Incorporate racial profiling issues into the training curriculum of police officers;

In addition any proposed legislative measures should allow individuals or groups representing their interests, to make complaints in relation to racial profiling

- Implement the recommendations of the UN CERD Committee by explicitly including the functions of public authorities within the definition of "services" in Section 5 of the Equal Status Acts. This will ensure that the functions of An Garda Síochána come within the remit of the prohibition on discrimination, harassment and victimisation and the obligation to provide reasonable accommodation for people with disabilities and will enable individuals seek redress if they consider that they have been discriminated against by An Garda Síochána;
- Prioritise the review of the effectiveness of Prohibition on Incitement to Hatred Act 1989 and implement such reforms as are considered necessary for the introduction of an effective legislative prohibition on hate speech;
- Implement a review of the circumstances in which s.15 of the Housing (Miscellaneous Provisions) Act 1997 has been invoked by An Garda Síochána;
- Conduct a review of the compatibility of s.15 of the Housing (Miscellaneous Provisions) Act 1997 with the General Data Protection Regulation; and
- The creation of regulations to clarify, *inter alia*, the circumstances in which s.15 of the Housing (Miscellaneous Provisions) Act 1997 may be used; the types of information that should be shared and the meaning of concepts such as "good estate management".

Public Sector Duty

The Public Sector Duty (PSD) was introduced pursuant to section 42 of the Irish Human Rights and Equality Act 2014. It provides an important legislative mechanism

for mainstreaming racial and ethnic equality and protecting the human rights of ethnic minorities.

In fulfilling their duties under the 2014 legislation, public bodies - including those involved in the administration of the criminal justice system - must consider the human rights and equality impact of their policies, services, budgets, procedures and practices. The PSD requires public bodies to take a proactive approach to tackling institutional discrimination and promote the mainstreaming of an equality perspective in all their functions.

The commitment of the DOJ to upholding and vindicating human and individual rights as a core element of its criminal justice sectoral strategy is welcomed as a means of the DOJ meeting its obligations pursuant to the PSD.

FLAC's recommendations and submissions to this consultation include measures which if adopted would constitute significant and substantive improvement to human rights and equality outcomes in the criminal justice system.

In addition to the implementation of the further substantive recommendations detailed below, FLAC recommends to the DOJ that:

- The Public Sector Duty should be a core consideration in the process of developing, implementing and monitoring the Department's strategy

Interaction with Gardaí: profiling and adequate remedies

Through its participation in JUSTROM, FLAC became aware of significant concern among the Traveller and Roma communities regarding their experience with the criminal justice system. This manifested most frequently through interaction with An Garda Síochána (AGS).

This has been an issue for a considerable length of time. In 2011, the Committee on the Elimination of Racial Discrimination (CERD), the body responsible for monitoring the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), a United Nations convention, noted in its concluding observations the lack of legislation proscribing racial profiling by AGS and other law enforcement officers and further noted that many non-Irish people are subjected to police stops and the requirement to produce identity cards. The CERD further recommended the adoption of legislation preventing racial profiling and requested the State strengthen its efforts to promote the humane treatment of migrants and people of non-Irish origin by AGS in accordance with international human rights law.

More recently in 2019 CERD recommended that the State party:

- (a) Introduce legislation prohibiting racial profiling;

- (b) Put in place an independent complaints mechanism to handle racial profiling;
- (c) Review, in collaboration with communities mostly affected by racial profiling, policy, practices and training of An Garda Síochána;
- (d) Incorporate racial profiling issues into the training curriculum of police officers.

Although FLAC notes the AGS position that it does not, as an institution, engage in discriminatory profiling, a high profile instance of such profiling was revealed in the report of the Ombudsman for Children into the removal of two Roma Children from their families by AGS in 2013. Furthermore, the experience of the JUSTROM programme revealed that many Roma and Travellers perceive that their communities are disproportionately targeted by AGS.

FLAC submits that at a minimum to ensure that AGS does not engage in discriminatory profiling, it is necessary for specific training to be provided to each member of AGS in relation to profiling; to have monitoring mechanisms in place that will highlight when discriminatory profiling may be occurring, and where it does occur it should be addressed and individuals should have access to a remedy in respect of same.

Specifically, while the Equal Status Acts 2000 to 2018 (ESA) prohibit discrimination in the provision of goods and services, the provision of accommodation and access to education, on nine grounds including the ground of race and membership of the Traveller community, the scope of the ESA is not comprehensive. The definition of “services” in section 2 of the ESA includes public services, but has been interpreted as not extending to the performance of all functions of a public body particularly the controlling or regulatory functions of the State. Therefore, the prohibition on discrimination on the ground of race and membership of the Traveller community ground may not always apply to public authorities such as the AGS in performing functions which are not considered to be “services” for the purpose of the ESA.

The UN CERD Committee in its most recent report recommended that the functions of public authorities should be explicitly included within the definition of the “services” in Section 5 of the Equal Status Acts. This will ensure that the functions of An Garda Síochána come within the remit of the prohibition on discrimination, harassment and victimisation and the obligation to provide reasonable accommodation for people with disabilities and will enable individuals seek redress if they consider that they have been discriminated against by An Garda Síochána.

Finally, the Policing Authority Code of Ethics for AGS (the Code), published in 2017, includes a section on respect and equality, however, the Code is not on a statutory footing, and a breach alone cannot form the basis of a complaint to GSOC, even where non-compliance is at a systemic level. This is also a significant weakness in the accountability of AGS, and it is submitted that putting the Code on a statutory footing, subject to any necessary amendments is a modest extension to accountability circumstances where the Code has been widely consulted on and should now in any event be part of the operational requirements of AGS.

FLAC recommends that the DOJ, in the context of its creation of a sectoral strategy with a stated commitment to individual and human rights, and in light of the obligations on it and other public bodies pursuant to the PSD, consider the following:

- Implement the recommendations of the UN CERD committee by
 - a) Introducing legislation prohibiting racial profiling;
 - b) Put in place an independent complaints mechanism to handle racial profiling;
 - c) Review, in collaboration with communities mostly affected by racial profiling, policy, practices and training of An Garda Síochána;
 - d) Incorporate racial profiling issues into the training curriculum of police officers.
- In addition, any proposed legislative measures should allow individuals or groups representing their interests, to make complaints in relation to racial profiling.
- Implement the recommendations of the UN CERD Committee by explicitly including the functions of public authorities within the definition of the “services” in Section 5 of the Equal Status Acts to ensure that the functions of An Garda Síochána come within the remit of the prohibition on discrimination, harassment and victimisation and the obligation to provide reasonable accommodation for people with disabilities and to enable individuals to seek redress if they consider that they have been discriminated against by An Garda Síochána;

Information sharing under Housing (Miscellaneous Provisions) Act 1997

Sections 14 and 14A of the Housing (Miscellaneous Provisions) Act 1997 (the 1997 Act) grant housing authorities the power to refuse to allocate to a household, or defer the allocation of, a dwelling or space in a halting site where they form the opinion that a member of the household is or has been engaged in anti-social behaviour or that an allocation to the household would not be in the interests of good estate management.

Section 15 of the 1997 Act provides that housing authorities may request information about any person from a member of AGS or the Criminal Assets Bureau, among others, whom they consider may be or may have been engaged in anti-social behaviour.

Clear individual rights issues, in the spheres of privacy, reputation and housing, arise when these provisions are invoked.

In its casework, FLAC has encountered instances of these provisions being relied upon to justify the sharing of inaccurate and unverified information.² A potential consequence of information sharing is the refusal of social housing, often in circumstances where the applicant would otherwise be homeless. Consequences of this severity require that the provisions are used with the utmost care.

FLAC notes that there are no extant guidelines or regulations to demarcate how information should occur; the types of information that may be shared and what should be considered relevant from the perspective of “good estate management”. Furthermore, it is not clear that these provisions have been reconciled with the requirements of the General Data Protection Regulation which postdates their creation.

Accordingly, FLAC recommends the following:

- a review of the circumstances in which s.15 of the 1997 Act has been invoked by AGS;
- a review of the compatibility of s.15 of the 1997 Act with the General Data Protection Regulation; and
- the creation of regulations to clarify, *inter alia*, the circumstances in which s.15 of the 1997 Act may be used; the types of information that should be shared and the meaning of concepts such as “good estate management”.

Hate Crime Legislation

As a signatory and ratifying state of ICERD, Ireland has committed to criminalising “*ideas based on racial superiority or hatred [and] incitement to racial discrimination*”. Similarly, pursuant to Council Framework Decision 2008/913/JHA of 28 November 2008, Ireland was required to take measures to ensure that racism and xenophobia were criminalised.

Council Framework Decision 2008/913/JHA correctly identifies racism and xenophobia as direct violations of, *inter alia*, respect for human rights.

While there exists a legislative prohibition on hate speech in Ireland in the form of the Prohibition on Incitement to Hatred Act 1989 (the 1989 Act), its effectiveness has been called into question. In 2017, it was reported that there had been 5 convictions under the 1989 Act since 2000.³ We are aware that the Department of Justice and Equality held a consultation in the second half of 2019 which was aimed at ensuring that Ireland’s legislation on hate speech was fit for purpose. However, we also note that

² FLAC, Annual Report (2018), pp.24-25

https://www.flac.ie/assets/files/pdf/flac_annual_report_2018_final.pdf?issuusl=ignore

³ <https://www.irishtimes.com/news/crime-and-law/courts-service-reveals-five-convictions-for-hate-crime-since-1989-1.3124352> (accessed 5 August 2020)

questions over the effectiveness of the 1989 Act have existed for some time and that reviews have been announced in the past.⁴

Accordingly, in view of Ireland's obligations under ICERD and as an EU member state, in recognition of hate speech as offensive to human rights and in light of the DOJ's commitment to the vindication of such rights in the context of the present strategy, FLAC recommends that:

- the DOJ prioritise the review of the effectiveness of 1989 Act and implement such reforms as are considered necessary for the introduction of an effective legislative prohibition on hate speech.

⁴ <https://www.irishtimes.com/news/review-of-incitement-to-hatred-law-announced-1.1099640> (accessed 5 August 2020)