Review of the Administration of Civil Justice

FLAC, February 2018

Review of the Administration of Civil Justice:

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

FLAC produces policy papers on relevant issues to ensure that Government, decision-makers and other NGOs are aware of developments that may affect the lives of people in Ireland. These developments may be legislative, Government policy-related or purely practice-oriented. FLAC may make recommendations to a variety of bodies including international human rights bodies, drawing on its legal expertise and providing a social inclusion perspective.

You can download/read FLAC's policy papers at

https://www.flac.ie/publications/

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Summary of Recommendations

- ***FLAC recommends making the Public Sector Duty a core consideration in the Review of the Administration of Justice.***
- ***FLAC suggests that the Review Group recommend that the provision of civil legal aid which is a fundamental part of the administration of justice be adequately resourced. It further requests the Review Group recommend, as a matter of urgency, a root and branch review of the scheme of Civil legal aid and advice including eligibility criteria, means tests, contribution requirements and exclusion of areas of law.***
- ***It further recommends that the Courts Services and the Legal Aid Board would work together to ensure that there is clear, concise and accessible information detailing both the Civil Legal Aid Scheme and the Criminal Legal Aid Scheme available from the Courts Services and staff and that the Legal Aid Board would be provided with an office in the Four Courts to provide information about its services and process applications.***
- ***FLAC recommends that the Courts Service establish a widely drawn working group to examine access to justice for litigants in person which would draw up a report and action plan***
- ***FLAC further recommends that any reforms of the Administration of Civil Justice would factor in that many litigants will not be represented by lawyers***
- ***FLAC recommends all forms and procedures should be accessible, accurate certain precise, clear and reader- friendly in plain English***

- ***FLAC proposes that the Courts Services should provide guides to administrative aspect of the Courts, such as the listing system, call overs, hearing dates. This should also include more accessible formats than just print. Short videos on aspects of Court procedure would be helpful for those who find written material difficult to access or understand including those with literacy issues or certain disabilities.***
- ***FLAC recommends that a liaison person should be available at Court sittings to provide practical information to assist lay litigants***
- ***FLAC recommends simplifying the procedures in the District Court***
- ***FLAC suggests the accessibility and content of existing website material could be improved by***
    - ***Preparing and publishing a "Nutshell" guide for lay litigants.***
    - ***Publishing accessible printable guides on how to represent yourself in court including using video.***
    - ***Publishing accessible guides on the areas of law where there are the most lay litigants, with direct links to printable and downloadable versions of the various forms as well as basic instructions on how they should be filled out.***
    - ***Introducing a guide and code of conduct for McKenzie friends explaining the Practice Directions of the High Court and the Court of Appeal.***
    - ***Publishing guidance for court staff when dealing with lay litigants.***
    - ***Providing accessible summaries of the judgements of the Superior Courts.***

- ***FLAC recommends that there should be an automatic exemption from stamp duty for those on means tested social welfare payments or holding a medical card.***
- ***FLAC recommends that a dedicated court/ tribunal which can deal with problem mortgage arrears on a case-by-case basis with a view to proposing resolutions is required as a matter of urgency and given the complexity involved, work needs to begin on this as a priority.***
- ***FLAC recommends that the courts should be specifically authorised to take into account the public interest nature of a case and that rules on costs be extended to expressly include the granting of Protective Costs Orders in public interest law cases.***
- ***FLAC recommends that the Law Reform Commission's recommendations on multi-party actions be given due consideration with a view to the introduction of a new litigation procedure to provide for class actions. It also recommends that the membership of the Superior Court Rules Committee be expanded to include members for example from the Legal Aid Board, FLAC and members of the Independent Law Centre Network, the Citizens Information Board.***
- ***FLAC further recommends that the Review group would examine the following issues which may increase access to justice for disadvantaged groups and individuals;***
    - ***developing the laws on standing to allow NGOS bringing actions on behalf of their members,***
    - ***allowing a greater use of the amicus curiae application***

- ***increasing the discretion of a judge to award costs to an unsuccessful litigant***
- ***modifying the doctrine of mootness so that courts can deal with issues which may be moot for the immediate parties but which may continue to affect many others***
- ***devising more effective methods of extending the benefits of judicial decisions to those who are not directly party to the litigation***
- ***examining the rules of funding of litigation.***

- ***FLAC recommends that the current system of first and second-tier quasi-judicial decision making be reviewed for the purposes of establishing a more streamlined system with common procedures, where the focus of the dispute would be on the substantive rights.***

Introduction

FLAC welcomes the opportunity to make a submission to this Review and in particular welcomes that one of review aims resonates with the aims of FLAC and the Chief Justice who has committed to making access to justice a central focus of his tenure. This submission will focus on the review aims which are most relevant to FLAC's work, namely improving access to justice and "identifying steps to achieve more effective outcomes for court users with particular emphasis on vulnerable court users including children and young persons, impecunious litigants who are ineligible for civil legal aid and wards of Court."

We agree with the comments of the Chief Justice that there is little point in having a good court system if a great many people find it difficult or even impossible to access that system for practical reasons.[1]

FLAC recognises the need for a modern, fit for purpose, accessible court services and is fully supportive of and eager to be involved in any endeavors to make the court services more accessible and effective.

FLAC is happy to meet with the Review body to expand on any of the issues contained in this submission.

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

About FLAC

FLAC operates a telephone legal information and referral line and runs a network of legal advice clinics where volunteer lawyers provide basic free legal advice. FLAC also provides specialist legal advice to advisers in MABS and Citizens Information Services. FLAC has recently worked to improve access to justice in particular for Roma and Traveller women as part of the JUSTROM (Joint Programme on Access of Roma and Traveller Women to Justice) programme, a Council of Europe initiative. Within JUSTROM, FLAC supported the running of specialised legal clinics for Travellers[2] and Roma.[3]

More than 25,700 people received free legal information or advice from FLAC in 2016 from the telephone information line and the network of legal advice clinics at 67 locations around the country. It also operates PILA the Public Interest Law Alliance which operates a Pro Bono Referral Scheme for NGOs, community groups and independent law centres. The focus on these services as a way of enabling individuals

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

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

and groups to assert their rights is a fundamental aspect of FLAC's work in promoting access to justice.

Public sector duty

We note that the review is with reference to the commitments in the Programme for Government which include "A modern legal system must be able to respond to the changing values of our society, resolve issues and promote equality". In FLAC's submission on the Court Services Statement of Strategy 2018-2020, it was noted that the Courts Service is a public body for the purposes of section 42 of the Irish Human Rights and Equality Act 2014 which requires a broad range of public and statutory bodies including the Court Services to have regard, in carrying out their functions, to the need to eliminate discrimination, promote equality of opportunity and treatment for staff and service users, and protect the human rights of staff and service users.

- ***FLAC recommends making the Public Sector Duty a core consideration in the Review of the Administration of Justice.***

Legal Aid

The provision of legal aid is a critical matter for access to justice and is central to the administration of justice and the rule of law.[4] The right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights, guaranteeing the right to a fair trial, to an

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

effective remedy and legal aid for those who lack sufficient resources in order to to ensure effective access to justice. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteed.

The current system of civil legal aid provided by the Legal Aid Board under the provisions of the Civil Legal Aid Act 1995 is limited. The applicant's disposable income must be below €18,000 and the disposable capital threshold is €100,000. Applicants must also pay a financial contribution which in some instances may be quite significant. There are lengthy waiting times in many law centres. Core areas of law such as housing are in large part excluded from its remit. For instance the operation of the merits and means test means that many people facing family home repossessions are not entitled to legal representation.

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

The Minister has recently indicated that the Department may be in favour of reviewing the eligibility criteria for legal aid. This is to be welcomed.

- ***FLAC suggests that the Review Group recommend the provision of civil legal aid which is a fundamental part of the administration of justice, needs to be adequately resourced and requests the Review Group recommend, as a matter of urgency, a root and branch review of the scheme of Civil legal aid and advice including eligibility criteria, means tests, contribution requirements and exclusion of areas of law.***
- ***It further recommends that the Courts Services and the Legal Aid Board would work together to ensure that there is clear, concise and accessible information detailing both the Civil Legal Aid Scheme and the Criminal Legal Aid Scheme available from the Courts Services and staff and that the Legal Aid Board would be provided with an office in the Four Courts to provide information about its services and process applications.***

Lay Litigants

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

In the UK the Civil Justice Council constituted a Working Group to examine access to justice for "litigants in person". The report of the Group entitled "Access to Justice for Litigants in Person" contains useful recommendations for immediate, medium and long-term focus. The immediate actions sought to identify practical recommendations that can be introduced without requiring additional financial resources.

- ***FLAC recommends that the Courts Service establish a widely drawn working group to examine access to justice for litigants in person which would draw up a report and action plan***
- ***FLAC further recommends that any reforms of the Administration of Civil Justice would factor in that many litigants will not be represented by lawyers***

Accessibility and content of Court forms and procedures and website

The rules and procedures were developed for lawyers by lawyers and need to be reconsidered in light of the number of lay litigants now using the Courts, many of whom come from diverse backgrounds and may have language and literacy issues. Many of the forms on the courts website are complex and difficult for lay litigants to fill out without the aid of a legal professional.

Often lay litigants may find it difficult to follow the court's procedures. For example, whether they should let the Court know they are there, how to find out why the case is not being dealt with or when it will be called over, how and when to address the court and whether they are expected to remain present in court until the case is called or whether or when they can excuse themselves.

The Courts website would benefit from a simpler more user friendly home page, with each section (guides, news, court fees etc.) set out in a larger font, with drop-down boxes with links directing users to more specific sections of the website (e.g. Guides »» Family Law »» Access) and a search mechanism where a user could enter their location and find their closest Circuit / District Court Office. The Guides should also be

in large writing, using clear and simple language, with direct links to downloadable versions of court forms.

Contrary to what a lay litigant might expect, the procedures that apply at District Court level are more complex and cumbersome than those that apply at Circuit or High Court level. In the High Court, to commence civil proceedings, it is only necessary to have the relevant papers stamped, and filed and served in the appropriate manner on the respondent. Only one visit to the Central Office is involved at the initial stage. Whereas in the District Court for most civil matters, it is necessary to first issue the relevant summons/ notice, then effect service, then prepare a statutory declaration in relation to service, before returning to the Court office to lodge the summons and declaration, and it is only at that point that the matter is listed. All this must be done while observing the various time frames that apply to such services and preparation of the relevant lodging papers. Even then the return date might not be the hearing date, although this may not be clear to the parties concerned. This procedure is unnecessarily cumbersome and the relevant rules and forms are not set out in a form that is accessible or easy to understand.

UK Model

The Gov.uk website[5] provides a simple way to access legal information on navigating the courts. When you access the "represent yourself" section of the Gov.Uk website it gives a concise overview on how to represent yourself, including links to applying for legal aid, and guides on how to conduct yourself before the court.

[5] (https://www.gov.uk/represent-yourself-in-court)

It gives advice on what a "McKenzie friend" is, and what they can do with a link to a guide book providing more information. The home page also has printable guides on family law, debt law, and personal injuries.

In these guides, the procedures are outlined in simple language with direct links to printable versions of the forms that need to be filed with the courts, as well as basic instructions on how they should be completed.

This website, its simple language, and accessible formatting are useful for assisting lay litigants become familiar with how the courts operate.

Finding judgements can be difficult when using courts.ie as the primary database. Written judgements can often be complex, and while an excellent resource for members of the legal profession, they often prove inaccessible to members of the public. Both the Court Service in the UK and Northern Ireland provide case summaries of judgements from their respective Superior Courts.

- ***FLAC recommends all forms and procedures should be accessible, accurate certain precise, clear and reader- friendly in plain English***
- ***FLAC proposes The Courts Services should provide guides to administrative aspect of the Courts, such as the listing system, call overs, hearing dates. This should also include more accessible formats than just print. Short videos on aspects of Court procedure would be helpful for those who find written material difficult to access or understand including those with literacy issues or certain disabilities.***
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Stamp duty

Limitations or preconditions applied to the rights of access to the Courts may undermine the very core of that right. The European Court of Human Rights takes a broad view of what constitutes legal aid and views the provision of legal aid as not being confined to the provision of legal representation and advice but it may cover both assistance by a lawyer and dispensation from payment of the costs of proceedings.

One of the biggest barriers to access to justice may be the court fees that have to be paid. At the moment there is no exemption In relation to stamp duty fees, irrespective of the means or lack thereof of the litigant. There may be an issue here of equality of arms where the State does not pay such fees.

- ***FLAC recommends that there should be an automatic exemption from stamp duty for those on means tested social welfare payments or holding a medical card.***

Efficiency and Collation of Data and Statistics.

The Programme for a Partnership Government under the heading 'Courts and Law Reform' contains a commitment to the commissioning of an annual study on court efficiency and sitting times, benchmarked against international standards, to provide accurate measurements for improving access to justice. Comprehensive data is required in relation to lay litigants and persons in receipt of legal aid, persons facing repossession of their family homes or evictions in order to be able to devise accurate and effective measures for improving access to justice.

- ***FLAC recommends that the Court Services collect comprehensive data including data on the number of people who are legally aided and the number of litigants who are representing themselves, the number of people facing home repossessions or evictions***

Personal debt crisis

For the past ten years FLAC has consistently campaigned for the need to resolve our personal debt crisis. FLAC recently made a submission to the Department of Justice Submission on analysing current developments in the resolution of mortgage arrears & related issues, and the review of the Personal Insolvency Act 2012.28,917 new repossession cases have been brought in the last four years. A number of its recommendations are relevant to the Court Services. The submission can be accessed here. The recommendations include: that the state would gather critical information on repossession activity in the courts in order to identify current trends and respond accordingly. The programme for government contains a commitment to establish a dedicated new court to sensitively and expeditiously handle mortgage arrears cases.

- ***FLAC recommends that a dedicated court/ tribunal which can deal with problem mortgage arrears on a case-by-case basis with a view to proposing resolutions is required as a matter of urgency and given the complexity involved, work needs to begin on this as a priority.***

Public Interest Law issues

Protective Costs Orders

Part 11 of the Legal Services Regulation Act 2015, Legal Costs in Civil Proceedings,[6] sets out when a court may order someone involved in proceedings to pay the costs of a case, including the costs of another party. Section 169 provides that a party who is entirely successful in civil proceedings is entitled to an award of costs against the

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

unsuccessful party. However, a court may choose not to make this order in certain instances which are outlined in the same section. These do not include cases which seek to clarify the law in the public interest.

In the experience of FLAC, the costs incurred by litigants in vindicating their rights is one of the biggest barriers to accessing justice.[7] Not only do applicants incur their own legal fees, they also run the risk of incurring those of their opponent.

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

FLAC would like to see the exceptions to the rule that costs 'follow the event' expanded to include Protective Costs Orders (PCO) for litigants taking cases that are in the public interest. This would provide certainty as to costs at the outset of litigation. Such an order could provide that there will be no order as to costs, that the plaintiff's liability for

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

costs will be capped at a certain amount, or that the defendant will pay costs, even if the plaintiff is unsuccessful.

In practice, while the Irish courts have occasionally departed from the usual costs rules in public interest cases, they have not developed specific rules for public interest litigation comparable to other common law jurisdictions. FLAC is concerned that the availability of PCOs is not specifically recognised in legislation.

- ***FLAC recommends that the courts should be specifically authorised to take into account the public interest nature of a case and that rules on costs be extended to expressly include the granting of Protective Costs Orders in public interest law cases.***

Multi-party actions

Another barrier for litigants whose cases advance the public interest is the absence of a multi-party actions. Multi-party actions (MPAs) can be an important vehicle for enhancing access to legally enforceable remedies, particularly for vulnerable groups. By taking proceedings as a group, litigants have greater combined resources that may enable them to deal with the challenges of legal action collectively and allow them gain strength in numbers. MPAs equally allow groups to pursue litigation where the individual compensation might be nominal e.g. restoration of a small social welfare

benefit or refund of the cost of goods or services purchased. MPAs are also seen to increase the efficiency of the courts and to reduce the costs of legal proceedings for all parties by enabling common issues to be dealt with in one action.

Ireland currently has no formal rules for MPAs, save for procedures around representative actions and test cases. As these procedures are not specifically designed to operate as class actions, their use is not as common or popular as class actions in jurisdictions that have dedicated procedures. Both representative actions and test cases are subject to certain limitations that deter their use.

The Law Reform Commission produced a report[8] in 2005 on multi-party litigation which concluded that *ad hoc* arrangements have been used to deal with multi-party litigation and that a more structured approach should be available based on principles of procedural fairness, efficiency and access to justice. The Superior Court Rules Committee[9] has the power of making and changing the rules of the superior courts but has not as yet implemented the LRC proposal.

- ***FLAC recommends that the Law Reform Commission's recommendations on multi-party actions be given due consideration with a view to the introduction of a new litigation procedure to provide for class actions. It also recommends that the membership of the Superior Court Rules Committee be expanded to include members for example from the Legal Aid Board, FLAC and member of the Independent Law Centre Network, the Citizens Information Board.***

[8] Law Reform Commission *Report on Multi-Party Litigation* (LRC 76-2005)
http://www.lawreform.ie/_fileupload/Reports/Report%20Multi-party%20litigation.pdf
[9] Section 67 of the Courts of Justice Act 1936 and, under section 68 of that Act

- ***FLAC further recommends that the Review group would examine the following issues which may increase access to justice for disadvantaged groups and individuals;***
  - ***developing the laws on standing to allow NGOS bringing actions on behalf of their members,***
  - ***allowing a greater use of the amicus curiae application***
  - ***increasing the discretion of a judge to award costs to an unsuccessful litigant***
  - ***modifying the doctrine of mootness so that courts can deal with issues which may be moot for the immediate parties but which may continue to affect many others***
  - ***devising more effective methods of extending the benefits of judicial decisions to those who are not directly party to the litigation***
  - ***examining the rules of funding of litigation.***[10]

Better first and second tier decision making.

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

Among this wide range of adjudicating bodies are WRC officers, deciding officers in the Department of Social Protection, the Social Welfare Appeal Office, the Residential Tenancies Board, the International Protection Office, International Protection Appeals Tribunal, Labour Court and An Bord Pleanála, to name a few – all having differing

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

forms, time limits, procedures, as well as the different forms of appeal from such bodies. Where appeal on points of law are concerned, there are differing approaches with some allowing appeal to the courts on a point of law, either to the Circuit Court or High Court.

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

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

- ***FLAC recommends that the current system of first and second-tier quasi-judicial decision making be reviewed for the purposes of establishing a more streamlined system with common procedures, where the focus of the dispute would be on the substantive rights.***