Submission to the Courts Service on their Strategic Plan 2024-2027

March 2024

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About FLAC

FLAC (Free Legal Advice Centres) is an independent human rights and equality organisation, which works in various ways to promote access to justice:

- We operate a telephone information and referral line where approximately 12,000 people receive basic legal information each year, and phone advice clinics (from which 3,318 people received basic legal advice in 2023).
- As an Independent Law Centre, FLAC takes on a number of cases in the public interest each year. We also operate a Traveller Legal Service, Roma Legal Clinic and LGBTQI Legal Clinic.
- FLAC makes policy and law reform recommendations informed by our experience of providing legal assistance. This includes policy reports and submissions to national and international bodies in areas such as housing law, social welfare law, equality and anti-discrimination law, human rights, and access to justice.
- FLAC is a member of the Chief Justice's Access to Justice Committee and the Review Group for the Department of Justice's current Review of the Civil Legal Aid Scheme.

FLAC is highly supportive of the Courts Service Modernisation programme. We have engaged with the Courts Service's consultations (through the 'Civic Society Forum') on their ongoing work in relation to the courts website, information provision and forms.

Introduction

FLAC welcomes the opportunity to make a submission to the Courts Service on their next Strategic Plan which will cover the period from 2024 to 2027 (and which is currently being prepared in accordance with the Courts Service Act 1998).

FLAC's views have been sought in relation to:

- "Any strategic objectives which you feel should be reflected in the strategy", and
- "Particular areas of scope for further interaction and engagement between the Courts Service and your organisation".

As we noted in our submission to the current review of the Civil Legal Aid scheme, FLAC views the Courts Service as one of a number of public bodies/services with the potential to play a key role in the promotion of access to justice.[1] Our understanding of access to justice (and what it requires in practice) is multifaceted and includes access to legal information, access to the courts, fair procedures, effective remedies and just laws.

FLAC has also previously emphasised the significance of the Courts Service's obligations under section 42 of the Irish Human Rights and Equality Commission Act 2014[2] (the Public Sector Equality and Human Rights Duty).[3] The Courts Service acts as an important gateway, and indeed gatekeeper, for people who wish to exercise their rights and access justice, including under human rights and equality law. If it fails to give effect to the duty, this could serve as a barrier to individuals seeking to access justice in order to defend and vindicate their rights. Correspondingly, if it gives full effect to the duty, it could reduce barriers to justice and promote human rights and equality.

We would be pleased to engage with the Courts Service further in relation to this submission and its recommendations, as well as in relation to the preparation and implementation of their new strategic plan more generally.

[1] FLAC (2023), *Stakeholder Submission to the Civil Legal Aid Review*, section 1.5.1.
[2] The 'public sector duty' imposes a positive obligation on a broad range of statutory and public bodies to have regard, in the performance of their functions, to the need to eliminate discrimination, promote equality of opportunity and protect the human rights of its members, staff and persons to whom it provides services. In fulfilling their duties under the 2014 legislation, public bodies must consider the human rights and equality impact of their policies, delivery of services, budgets, procedures and practices.
[3] FLAC (2021), *Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland*, section 3.

Recommendations

Legal Information: In its next strategic plan, the Courts Service should retain the strategic objective of providing a "user-centric" service. This should include an enhanced focus on the provision of legal information and a commitment to the introduction of legal information offices in the courts (including an office to advise lay litigants on practice and procedure). FLAC has considerable experience in providing legal information, including to lay litigants, and would be happy to engage and work with the Courts Service in relation to this recommendation.

Reform and Simplification of Court Rules, Procedures & Forms: Under its strategic objective to provide a user-centric service, the Courts Service should commit to a structured and participatory process for the reform and simplification of court rules, forms and procedures which involves relevant civil society organisations. FLAC would be happy to engage in such a process. We also hope that the Courts Service will, in its engagement with the Minister for Justice and her Department, advocate for the diversification of the Court Rules Committees to include relevant civil society organisations.

Equal Treatment Bench Book: The Courts Service should commit to the development of an Equal Treatment Bench Book. It should seek to collaborate with the Irish Human Rights and Equality Commission (IHREC) in carrying out this project, and should also seek the input of relevant civil society organisations. There may also be a significant role for the Judicial Council and the Chief Justice's Access to Justice Committee. FLAC would be happy to participate in the development of an Irish Equal Treatment Bench Book.

Data Collection & Publication

The Courts Service should aim to enhance its data collection and publication systems and regularly publish data on proceedings and their outcomes in an accessible format.

The Courts Service should engage with the IHREC and relevant civil society organisations to identify areas where more granular and disaggregated data should be collected and published (including equality data). This should include accessible data on the outcomes in judicial review cases and in District Court discrimination cases (under the Intoxicating Liquor Act 2003). Judicial review data should also include the number of cases where the leave application is heard on notice.

The Courts Service should commission an access to justice and equality-centric scoping study of its data infrastructure modelled on similar recent initiatives in the UK.

Measuring Legal Need: The Courts Services should recommend that the Department of Justice undertakes regular legal needs surveys

Remote Hearings: The Courts Service should carry out a review of the use of remote hearings since the pandemic which seeks to identify their impact on the participation of lay litigants and groups protected by the equality legislation in court proceedings.

The Courts Service should develop and publish policies around the use of remote hearings, and put in place appropriate monitoring mechanisms to oversee the impact of remote hearings on access to and confidence in the courts.

High Court Judicial Review Practice & Procedure: The Courts Service should commit to an inclusive, transparent and participatory review of judicial review practice and procedures (including an examination of the relevant fees) with the involvement of relevant civil society organisations and stakeholders

Consumer Debt Issues

Consideration should be given to the setting up of a Mortgage Arrears Review Office as a 'clearing house' to attempt to resolve mortgage arrears cases, outside the courts, using the criteria in Section 2A of the 2019 Act as a template.

A Debt Enforcement Office should be established. This should would allow a respondent in a debt case to acknowledge liability and to make an offer of instalment payments that are affordable relative to his/her budget, and thus avoid the cost and stress of further enforcement proceedings.

The Law Reform Commission's cogent and sensible recommendation (from December 2010) intended to minimise the intrusion of enforcement and to improve its effectiveness should be implemented: 'that the choice of enforcement method should be allocated to the Debt Enforcement Office and that an enforcement officer should include his or her opinion as to the appropriate method of enforcement' and that 'when deciding on the appropriate method of enforcement, regard should be had to the principle of proportionality and the need to ensure that the enforcement method chosen is the mechanism that is least restrictive of the debtor's rights in the given case'.

The treatment in terms of access to a remedy between those who are insolvent, including family home mortgage debt, and those who are insolvent, but do not have mortgage debt, must be reviewed and addressed.

The Courts Services should recommend the completion of the long awaited statutory review of the Personal Insolvency Act 2012.

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1. Legal Information

Research undertaken by Ipsos-MORI and the Law Society of England and Wales found that knowledge of legal rights was a critical factor in determining how quickly a legal issue was resolved. That research was based on a statistical analysis of the results of a legal needs survey in which over 8000 participants described their experience of legal issues (over 16,000 legal issues were reported on in total), including cases concerning welfare rights, homelessness, evictions, home repossessions, family law, domestic violence, discrimination, employment and debt:

> "Knowledge of legal rights was the third most important factor affecting the likelihood of resolution, with participants who had little knowledge of their legal rights being 33% less likely to resolve their problems."[4]

FLAC's submission to the current review of the Civil Legal Aid scheme highlighted that access to legal information is a crucial "preventative justice" measure (i.e. a service which may prevent legal problems from arising or escalating).[5] However, there are significant gaps in the availability of legal information, particularly for lay litigants navigating the courts system without legal representation. As a result, FLAC recommended the introduction of "legal information officers in the Courts Services".

We would emphasise that the statutory functions of the Courts Services include "[the provision of] information on the courts system to the public" and "[the provision of] facilities for users of the courts".[6] The establishment of legal information offices within the courts would be consistent with these functions. It would also be consistent with the Courts Service's long-term strategic objective to provide a "user-centric [service] with an enhanced experience for court users".[7]

Recommendation

In its next strategic plan, the Courts Service should retain the strategic objective of providing a "user-centric" service. This should include an enhanced focus on the provision of legal information and a commitment to the introduction of legal information offices in the courts (including an office to advise lay litigants on practice and procedure).

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[4] Ipsos MORI & The Law Society (2017), *Analysis of the potential effects of early legal advice/intervention*, p.6.
[5] FLAC (2023), *Stakeholder Submission to the Civil Legal Aid Review*, section 9.1.1.
[6] Section 5 of the Courts Service Act 1998.
[7] Courts Service (2019), *Supporting Access to Justice in a modern, digital Ireland: A long-term strategic vision, 2030*, p.6.

FLAC has considerable experience in providing legal information, including to lay litigants, and would be happy to engage and work with the Courts Service in relation to this recommendation.

2. Reform and Simplification of Court Rules, Procedures & Forms

The need to simplify and standardise court rules, procedures and forms has been highlighted by a number of major recent reports and initiatives, including:

- The Law Reform Commission's Report on *Consolidation and Reform of the Courts Acts*[8],
- The *Review of the Administration of Civil Justice*[9] (the 'Kelly Review') and the plan to implement[10] the reforms proposed by the Review Group, and
- The Courts Service's long-term Strategic Vision report[11] and the Courts Service Modernisation Programme.

The Kelly Review made far-reaching recommendations in relation the simplification of court rules and procedures. The Review Group endorsed[12] the Bill published by the Law Reform Commission in 2010 for consolidating all existing Courts Acts and which expressly provided that Rules of Court should: "use plain language, and differences among the procedures and terms used in different Courts for similar matters should be avoided if possible" [13].

The Review Group made a number of specific recommendations in relation to the simplification of Court procedures and for "(a) the harmonisation of the forms and proofs necessary for the commencement of proceedings across the first instance jurisdictions and (b) the standardising and simplification of terms and language used in civil procedure". In relation to the "simplification of terms and language", it stated that "a specific programme of simplification should be undertaken by the court rules committees in stages, with priority being assigned to those procedures, and their associated forms, which most frequently impact on potentially vulnerable individuals".

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[8] Law Reform Commission (2010), *Consolidation and Reform of the Courts Acts*, para. 2.102.
[9] Department of Justice (2020), *Review of the Administration of Civil Justice*, chapters 5 & 10.
[10] Department of Justice (2022), *Implementation Plan on Civil Justice Efficiencies and Reform Measures*.
[11] Courts Service (2019), *Supporting Access to Justice in a modern, digital Ireland: A long-term strategic vision, 2030*.
[12] "The Review Group is of the view that early consideration should be given to incorporating in legislation those provisions of the draft Bill not already legislated". See: Department of Justice (2020), *Review of the Administration of Civil Justice*, p.135.
[13] Law Reform Commission (2010), *Consolidation and Reform of the Courts Acts*, p.215.

The Review Group also called for the establishment of a "Steering Group… which should include the Courts Service, the Legal Aid Board, Citizens Information, FLAC, MABS/Abhaile, the Law Society and the Bar Council" to, *inter alia*, "provide input to the court rules committees on opportunities for simplification of procedures and language in rules and forms".

With work on the simplification of court rules, forms and procedures is now ramping up[14], FLAC would emphasise that this vital body of work should proceed in a manner which accords with the Kelly Review's recommendations for a structured and participatory process which involves civil society.

Such a process is particularly necessary in light of the limited stakeholder participation in the Kelly Review itself. Unlike other major reviews, the membership of the Review the Administration of Civil Justice did not include any external stakeholders. We would also highlight that - while the Review Group's high-level recommendations in relation to the simplification and standardisation of rules, forms procedures are welcome – a number of specific recommendations require re-examination and further consultation with stakeholders. For example, the report's suggestion to increase the level of detail required in an 'originating document' may prejudice plaintiffs who are lay litigants.[15] There is a clear need to ensure that all proposed reforms are equality, human rights and poverty-proofed in the context of the current implementation process. In this regard, we would highlight the Courts Service's obligations under the Public Sector Equality and Human Rights Duty.

We would also highlight that the process of reforming rules, forms and procedures since the publication of the Kelly Review has, to date, proceeded in an *ad hoc* manner. While the rules, forms and procedures introduced on foot of the commencement of the new capacity legislation are straightforward, accessible and written in clear and plain language – this approach has not been taken in all areas.

However, when the Superior Court Rules on Default of Appearance were updated in 2021 (after the publication of the Kelly Review)[16], provisions such as the following were retained:

> "Where an originating summons is indorsed with a claim on any bond, covenant, or agreement within the Common Law Procedure Amendment Act (Ireland) 1853, section 145, and the defendant fails to appear thereto, no statement of claim shall be delivered and the plaintiff may, without any suggestion of breaches, apply by motion to the Court

[14] At the 2023 event to mark the beginning of the new legal year, the Chief Executive of the Courts Service stated that the process of implementing court rules, forms and procedures is now underway.
[15] Separately, the report also recommends raising the threshold for obtaining leave to seek judicial review, and the introduction of extensive new procedural rules and requirements applicable to parties seeking judicial review. These are matters of serious concern for FLAC.
[16] Rules of the Superior Courts (Procedure on Default) 2021 (S.I. No. 490/2021).

> for leave to enter judgment for such sum as may seem just, and on such application the Court may order judgment to be entered accordingly or may direct such inquiry, or trial of issues, as may appear to be necessary for the ascertainment of the plaintiff's demand, and if the sum ascertained to be due does not amount to the sum mentioned in such bond, covenant, or agreement, the plaintiff, his executors or administrators, may in the event of any subsequent breach, from time to time, apply to the Court, and the Court may thereupon so far as the sum mentioned in such bond, covenant, or agreement, or the remainder thereof, will reach, make such further order or direct such further inquiry or trial to the effect aforesaid, as may be just."

This rule (Order 13, Rule 14 RSC) contains no fewer than 187 words, 25 commas and just one full stop. If a litigant – for example, an unrepresented defendant to a debt claim taken by a multi-national financial institution – wanted to know whether it applies in a given set of proceedings, they would be required to refer to section 145 of the Common Law Procedure Amendment Act (Ireland) 1853. Presuming they can locate that 170-year-old legislation, identifying section 145 requires fluency in roman numerals. Section "CXLV" of the 1853 Act is then equally opaque: "In any Action on any Bond, Covenant, or Agreement for Payment of any penal Sum for Nonperformance of any Covenant or Agreement contained in any Deed or Writing, and whether accompanied by Warrant of Attorney or not, the Plaintiff may assign One or more than One Breach of such Covenant or Agreement in his Summons and Plaint".

We believe that the above illustrates the need for a robust, inclusive and transparent process for reforming and simplifying court, rules, forms and procedures.

Beyond stakeholder participation in the current reform and implementation process, there is a need to diversify the Court Rules Committees beyond members of the judiciary, legal practitioners and civil servants. This is a matter which FLAC highlighted in our initial submission to the Kelly Review[17] and in our recent submission to the Department of Justice on the development of their new Strategy Statement. In the UK, for example, the Civil Procedure Rule Committee includes several "Lay Advice/Consumer Affairs" members.[18] Legislative reform would be needed to bring this about (as the membership of the Rules Committees are currently strictly prescribed by legislation).

[17] "[FLAC] 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." See: FLAC (February 2018), *Submission to the Review of the Administration of Civil Justice*.

[18] Ministry of Justice (2023), *Civil Procedure Rule Committee Annual Report 2022-23*.

The Courts Service's current strategic plan states that it is a "priority" to "standardise and simplify appropriate court procedures".[19] We would note the statutory power of the Courts Service to "make proposals to the Minister in relation to the distribution of jurisdiction and business among the courts and matters of procedure".[20]

Recommendation

Under its strategic objective to provide a user-centric service, the Courts Service should commit to a structured and participatory process for the reform and simplification of court rules, forms and procedures which involves relevant civil society organisations.

FLAC would be happy to engage in such a process. We also hope that the Courts Service will, in its engagement with the Minister for Justice and her Department, advocate for the diversification of the Court Rules Committees to include relevant civil society organisations.

3. Equal Treatment Bench Book

FLAC has previously called for the introduction of an Equal Treatment Bench Book for use in Irish courts.[21] In the UK, the Equal Treatment Bench Book provides detailed guidance on equal treatment in the courts.[22] It covers a wide range of topics including equal treatment for litigants in person (i.e. lay litigants) and those facing social exclusion and poverty. It also discusses litigants who fall within the scope of protected grounds under equality legislation such as, for example, persons with a physical or mental disability and those covered by the race and religion grounds (including specific sections on anti-Semitism, Islamophobia and multicultural communication). The Bench Book is intended for use by the judiciary but it is also an important reference point for the legal profession and members of the public alike.

There is now a significant opportunity for the development of an Irish Equal Treatment Bench Book in tandem with ongoing reform and modernisation processes. This would ensure that rules and procedures (old and new) are applied in a manner which has regard to the equality rights and specific needs of people and communities who experience disadvantage and discrimination. The introduction of an Equal Treatment Bench Book would also be a proactive

[19] Courts Service (2021), *Corporate Strategic Plan 2021-2023*, Goal 1: Take a user-centric approach.
[20] Section 6(2)(f) of the Courts Service Act 1998.
[21] FLAC (2021), *Submission to the Independent Anti-Racism Committee's Public Consultation: Towards a National Action Plan against Racism in Ireland*, section 3.
[22] Judicial College (April 2023), *Equal Treatment Bench Book*.

and practical means for the Courts Service to implement the Public Sector Equality and Human Rights Duty.

Recommendation

The Courts Service should commit to the development of an Equal Treatment Bench Book. It should seek to collaborate with the Irish Human Rights and Equality Commission (IHREC) in carrying out this project, and should also seek the input of relevant civil society organisations. There may also be a significant role for the Judicial Council and the Chief Justice's Access to Justice Committee.

FLAC would be happy to participate in the development of an Irish Equal Treatment Bench Book.

4. Data Collection & Publication

In the UK, it has been acknowledged that the use of data to inform policy development and evaluation in the justice sphere "lags far behind other areas of social policy – including health, welfare and education – despite the fact that issues in the justice system have serious knock-on effects across all these areas":

> "Most administrative systems used by justice system agencies are structured around cases, not people, making it difficult to understand who uses justice systems and services, their journeys and outcomes. This undermines the ability of policymakers to understand what works, for who and under what circumstances...
>
> One consequence of this lack of data is that the justice system, particularly in areas of civil and administrative law, fails to benefit from the broad networks of think-tanks, researchers and evidence intermediaries that promote effective decision making and service design in other areas of social policy. For example, the justice sector has no equivalent to the National Institute for Health and Care Excellence, who play a vital role in ensuring that initiatives proposed in healthcare meet rigorous evidence standards and uphold patient safety. "[23]

FLAC believes that this is equally true in the Irish context. We have previously highlighted the need for State bodies to collect data which is 'disaggregated' by reference to the protected grounds under the equality legislation, noting that such data assists "in the implementation and enforcement of the Public Sector Equality and Human Rights Duty".[24] In relation to the

[23] JUSTICE (8 March 2024), *Building the infrastructure for a fair, accessible justice system*.
[24] FLAC (2021), *Submission to the Department of Children, Equality, Disability, Integration and Youth's Consultation on the Review of the Equality Acts*, section 9: Equality Data.

justice sector specifically, we are concerned that research and analysis regarding the Irish courts system and access to justice in this jurisdiction is hindered by the absence of sufficient data.

The deficits in this area are detrimental to policy development around practice and procedures in the Courts. A key example of this is the recommendations of the Kelly Review to introduce "a new [higher] threshold that has to be achieved by an applicant in order to obtain leave to apply for judicial review".[25] The implicit rationale for that recommendation appears to be a perceived increase in frivolous and vexatious judicial reviews. FLAC would respectfully submit that this conclusion is based, in part, on a misappraisal of the limited available data in relation to judicial reviews - which shows an increase in the number of JR cases struck out with no order. Those figures are somewhat misleading, as they do not capture the high numbers of JR cases which are resolved on the basis of settlement agreements. Such settlements are frequently subject to strict confidentiality agreements at the insistence of the State. Therefore, cases recorded as "struck out no order" may be counted as a loss in circumstances where the proceedings have, in reality, been compromised on the basis of a settlement which is advantageous to the applicant for judicial review (where they are securing agreement to all or part of their original argument).

There would be a significant value in the publication of more granular data around judicial review cases more generally. For example, more accessible data on which State bodies are subject to judicial proceedings and the outcomes of those cases. This would allow trends to be identified including, for example, areas where there are systemic issues in the administration of public services and in the quality of decision-making by public bodies. There is also a lack of data around the number of judicial review cases where the respondent is put on notice of the application for leave to pursue the case.

Separately, in their statutory review of section 19 of the Intoxicating Liquor Act 2003 (which provides that certain discrimination cases against licenced premises should be heard by the District Court), IHREC highlighted issues with the available data:

> "The data provided by the Courts Service also reflects that a vast majority of the proceedings instituted in the District Court under the ILA 2003 were either struck out or withdrawn. An extremely small number of cases resulted in an Order for compensation – 11 in total during the period of 2017-2019, with no closure orders being made, thus demonstrating that the District Court rarely, if ever, uses this power. It is not possible to draw conclusions from the data as to whether the cases which were struck out or adjourned generally actually came on for hearing before a judge of the District Court.

[25] Department of Justice (2020), *Review of the Administration of Civil Justice*, Chapter 7: Judicial Review.

> Thus, it is unclear whether these cases were struck out or adjourned following a hearing by a judge, as a result of settlement agreements having been reached between the parties prior to a hearing (therefore negating the need for a court order) or for some other reason."[26]

This echoes the issues with the data on the outcomes in judicial review cases highlighted above.

Under its current strategic objective to "adopt a digital first approach", the Courts Service commits to the development of "an ICT and data strategy to define the application, infrastructure and data architecture to support a modern and digitally enabled Courts Service". The aim of this goal is to create a "robust, secure and transparent data ecosystem supporting the functioning of the Courts, effective decision making, and collaboration with justice agencies and government in line with GDPR".[27]

In its next strategic plan, the Courts Service should redouble its efforts to improve its data collection and publication systems. We would highlight a recent initiative launched by JUSTICE (a UK NGO) "to explore options for harnessing data and evidence to improve justice policy and practice" by undertaking a scoping study to begin the process of "[putting] in place the data and evidence infrastructure to support a fair, accessible justice system". JUSTICE acknowledges that: "Robust, proportionate and evidence-based regulation, alongside parity of access to data is vital to support innovation and ensure that technology delivers on its promise to increase access to justice for all".[28]

Recommendations

The Courts Service should aim to enhance its data collection and publication systems and regularly publish data on proceedings and their outcomes in an accessible format.

The Courts Service should engage with the IHREC and relevant civil society organisations to identify areas where more granular and disaggregated data should be collected and published (including equality data). This should include accessible data on the outcomes in judicial review cases and in District Court discrimination cases (under the Intoxicating Liquor Act 2003). Judicial review data should also include the number of cases where the leave application is heard on notice.

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[26] IHREC (February 2022), *Report of a review of section 19 of the Intoxicating Liquor Act 2003 carried out pursuant to section 30 of the Irish Human Rights and Equality Commission Act 2014*, p.48.
[27] Courts Service (2021), *Corporate Strategic Plan 2021-2023*, Goal 3: Digital First.
[28] JUSTICE (8 March 2024), *Building the infrastructure for a fair, accessible justice system*.

The Courts Service should commission an access to justice and equality-centric scoping study of its data infrastructure modelled on similar recent initiatives in the UK.

5. Measuring Legal Need

The lack of knowledge in relation to unmet legal need is a significant obstacle to creating a user-centred justice system. There is no definitive knowledge of the extent of unmet legal need in Ireland. Ireland is an outlier in that regard. Legal problems are not randomly distributed across populations but disproportionately affect disadvantaged groups and individuals and can create and exacerbate disadvantage.

Legal needs surveys provide an empirical basis for understanding how peoples' justice issues arise and are experienced. Legal needs surveys investigate the experience of legal problems from the perspective of those who face them (a 'bottom-up' perspective) rather than from that of legal professionals, courts etc. ('a top-down' perspective). They seek to identify and explore the full range of responses to problems and, within this, all the sources of help and institutions that are utilised in pursuing problem resolution.

In our submission to the current review of the Civil Legal Aid scheme, FLAC noted that "meaningful understanding of legal needs and legal capability is crucial for the development of effective public legal assistance models and financing":

> "Systemic research on unmet legal need is an essential component of improving the quality and availability of public legal assistance. Research is vital to help us understand where legal need is greatest and to prioritise accordingly." [29]

Meaningful data on legal needs should also be central to planning and resourcing in the Courts Service.

Recommendation

The Courts Services should recommend that the Department of Justice undertakes regular legal needs surveys.

[29] FLAC (2023), *Stakeholder Submission to the Civil Legal Aid Review*, section 2.3.1.

6. Remote Hearings

The Covid-19 pandemic and resulting restrictions heralded in a new era of remote hearings. This can be characterised as an advance in the Courts' use of modern technology and undoubtedly it gives rise to certain efficiencies.

However, since the pandemic there has been a wealth of research into the challenges posed by the remote administration of justice. This research has found that a move to remote hearings has a disproportionately negative impact on groups who experience discrimination and disadvantage (including people with disabilities) and litigants without legal representation. It has highlighted that the so-called "digital divide" must be considered in the roll-out of remote hearings.

In 2020, the Nuffield Family Justice Observatory undertook significant empirical research into the use of remote hearings in the English and Welsh family justice system which highlighted: "…concerns chiefly related to cases where not having face-to-face contact made it difficult to read reactions and communicate in a humane and sensitive way, the difficulty of ensuring a party's full participation in a remote hearing, and issues of confidentiality and privacy. Specific concerns were commonly raised in relation to specific groups: such as parties in cases involving domestic abuse, parties with a disability or cognitive impairment or where an intermediary or interpreter is required…".[30]

Similar research undertaken by the Civil Justice Council on the use of remote hearings in civil proceedings more generally found that "the remote nature of hearings plus the difficulties of navigating unfamiliar technology alongside unfamiliar legal processes was felt to compound pre-existing practical and emotional barriers to effective participation by litigants in person".[31]

Research undertaken by the Oireachtas Library and Research Service noted that "participation in remote hearings may be hampered by the 'digital disadvantage'", and that geographic and socio-economic factors have a significant impact on ability to participate in remote hearings in Ireland:

> "According to 2019 statistics from the Central Statistics Office, there is a statistically significant number of people who lack the resources to participate in remote hearings. In the Dublin region 92% of households have access to a fixed broadband connection, compared with the Border and Midland regions, at 71% and 69% respectively. There is a notable difference in fixed broadband connection between deprivation quintiles; 25%

[30] Nuffield Family Justice Observatory (2020), *Remote hearings in the family justice system: a rapid consultation*, at p. 1.
[31] Civil Justice Society (2020), *Rapid Review: The Impact of COVID-19 on the Civil Justice System Report and Recommendations*, at p.70.

of households in the *Second quintile – disadvantaged* deprivation quintile do not have a fixed broadband connection in their home. Further, just over four in every ten (42%) respondents who did not have internet access in their homes reported 'Lack of skills' as a reason for not having household internet access." [32]

In 2021, FLAC made a number of recommendations to the Workplace Relations Commission in relation to the use of remote hearings which may be equally relevant to the Courts Service. These included recommendations for:

- The introduction and publication of policies around when a remote (as opposed to in-person) hearing should take place (in the interests of justice and fairness), and how an appellant may assert their preference for an in-person hearing.
- The introduction of measures to pro-actively identify cases where a remote hearing would not be suitable and schedule those matters for in-person hearing.
- The introduction of practical supports and safeguards to ensure meaningful access to remote hearings, including an assisted digital programme designed to help those who are 'digitally excluded' or lack digital skills to engage with remote processes.
- The introduction of an appropriate monitoring mechanisms to oversee the impact of remote hearings on access to and confidence in the tribunal, particularly amongst person with protected characteristics under equality law.

Recommendations

The Courts Service should carry out a review of the use of remote hearings since the pandemic which seeks to identify their impact on the participation of lay litigants and groups protected by the equality legislation in court proceedings.

The Courts Service should develop and publish policies around the use of remote hearings, and put in place appropriate monitoring mechanisms to oversee the impact of remote hearings on access to and confidence in the courts.

[32] Oireachtas Library and Research Service (2020), *Remote Court Hearings*, at p.17.

7. High Court Judicial Review Practice & Procedure

Judicial Review is the process by which the courts may examine the decisions of public bodies to ensure that they have acted lawfully and fairly. It is essential for the rule of law and as a check on the power by public bodies.

The State increasingly plays a role in providing public and social services in areas such as housing, health and social security. Access to such services is vital for the enjoyment of some of the most fundamental human rights. Access to judicial review provides a means through which decisions of the State, its organs and its public bodies may be challenged. In some areas, it is the only means by which individuals may challenge decisions which have a profound effect on their lives and rights. For this reason, it is important that it is as accessible as possible to people who may be seriously affected by the decisions of public bodies.

As an independent law centre, FLAC routinely takes judicial review proceedings on behalf of its clients. In recent years FLAC has regularly acted in judicial review proceedings across a range of areas such as social welfare[33], education[34,] and citizenship[35]. These cases are illustrative of the value of judicial review, particularly for marginalised groups.

Issues around housing and homelessness have dominated FLAC's casework (including its judicial review casework) in recent years. The majority of those cases arise from FLAC's Traveller Legal Service and Roma Legal Clinic. There is limited accountability for local authorities and the State in the field of housing and judicial review is often the only means to challenge decisions of local authorities in relation to housing. FLAC has acted in several housing cases on behalf of clients in dire circumstances with no recourse other than to the courts.[36]

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[33] For example: In 2017, FLAC acted on behalf of an older Roma woman whose Rent Supplement payment had been suspended in October 2016 without notice to her, pending an investigation. The woman had engaged with the Department and had provided documents they requested from her, but her payment remained suspended and she faced becoming homeless due to the rent arrears she was accruing. FLAC initiated High Court proceedings seeking an order for the Department to make a determination in relation to the investigation arguing that the inordinate delay was unlawful. Four days after proceedings were initiated, the investigation into the woman's payment was concluded. In January 2018, the woman's Rent Supplement payment was restored and arrears were paid in respect of the period of the suspension. See: FLAC (2019), FLAC Annual Report 2018, p.26.

[34] For example: In 2019, two sets of High Court judicial review proceedings (and linked Equal Status complaints on the Disability ground) concerning access to the July provision scheme against the Department of Education were settled in favour pf FLAC's clients - with the families receiving compensation. The terms of the settlement are confidential. See: FLAC (2020), FLAC Annual Report 2019, p.36.

[35] For example, in 2020, judicial review proceedings were initiated in a case concerning a prolonged delay in issuing FLAC's client's Certificate of Naturalisation after his citizenship application was approved in principle. Those proceedings were resolved in his favour. See: FLAC (2021), FLAC Annual Report 2020, p. 37.

[36] In 2018, FLAC acted for a young Traveller woman with a serious illness who, while pregnant and living on the side of the road in a caravan, was served with a 48-hour eviction notice. After correspondence from FLAC, the

As alluded to above, FLAC has profound concerns in relation to the Kelly Review recommendations around raising the threshold for obtaining leave to seek judicial review, and the introduction of extensive new procedural rules and requirements applicable to parties seeking judicial review. We have raised these concerns with the Minister for Justice and her Department on a number of occasions.

FLAC also has a number of immediate practical concerns about the accessibility of judicial review. This includes concerns around the relatively high fees (i.e. stamp duty) which must be paid to begin a judicial review case. These fees apply without exception. An applicant with a medical card who is seeking to represent themselves in a challenge to a decision refusing them access to a public service is subject to the same fees as a property developer seeking to challenge a planning decision. In effect, stamp duty on court documents is a regressive form of taxation which may act as a barrier to justice. The '*Ex Parte* Docket' which must be filed in judicial review cases seems to exist solely for the purpose of bearing stamp duty and does not act as a pleading. We note the statutory power of the Courts Service to "…on its own initiative, recommend to the Minister appropriate scales of court fees and charges".[37]

We would also highlight recent changes in court practice which have led to a significant increase in the amount of time which elapses before an applicant may seek leave to apply for judicial review. Under the new approach, only a small number of leave applications may be moved each week. This has meant that, more frequently, applicants must seek to 'open' their case to the court to 'stop the clock' (i.e. prevent their application becoming statute-barred) while they await an opportunity to apply for leave. This contributes to costs and is not a good use of court time. It also raises concerns that applications may become moot before they come to the attention of the court.

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local authority agreed not to forcibly evict her but subsequently removed her from the housing list. Judicial review proceedings in relation to the decision to remove her from the housing list without a proper examination of her full circumstances were settled on the basis of her being reassessed as homeless, being provided with emergency accommodation and the making a proposal regarding the provision of long term housing.

In 2021, FLAC acted in judicial review proceedings in the High Court against a local authority in relation to its decision not to proceed with the development of Traveller-specific accommodation. The relevant local authority conceded the proceedings and agreed to orders being made against it in the terms sought by FLAC's clients.

These are just two examples of a significant number of judicial review cases taken by FLAC in recent years on behalf of members of the Traveller community in relation to access to social housing supports, including Traveller-specific accommodation and emergency accommodation. Often these cases are the only means through which the institutional and societal discrimination experienced by members of the Traveller community in the context of housing may be challenged. Similarly, judicial review has also proven to be one of the only mechanism for challenging systemic issues faced by Travellers in the social housing system, such as inappropriate police interventions in the process of allocating social housing to Travellers.

[37] Section 6(2)(e) of the Courts Service Act 1998.

More generally, there has been a recent turn to a more rigid, appointment-based approach to the administration of justice in the courts and courts offices. For example, there are now additional requirements for lodging books in advance of judicial review hearings. In FLAC's experience, booklets of pleadings may have to be lodged multiple times before leave is granted (in circumstances where the application is adjourned by the court).

The changes described above (many of which contribute to delays) have come about despite an increase in judicial resources. Many of the changes are based on 'notices' which are frequently amended, rather than on the requirements of the Rules of Court or Practice Directions. FLAC is concerned that they may result in unnecessary delays in hearing urgent cases. Transparent policies are needed to ensure that urgent cases are heard in time and that litigants and their representatives are kept abreast of changes in practice and procedures.

While we acknowledge that allowing judges to specialise in an area may be beneficial in ensuring the efficient disposal of cases, we do not understand the disparity in the resources (financial, judicial and otherwise) afforded to the new Planning and Environmental List (which largely deals with judicial review matters) as compared to the 'standard' Judicial Review List. We would note that the latter list frequently deals with matters where fundamental human rights are engaged.

Recommendations

The Courts Service should commit to an inclusive, transparent and participatory review of judicial review practice and procedures (including an examination of the relevant fees) with the involvement of relevant civil society organisations and stakeholders.

8. Consumer Debt Issues

This aspect of our submission provides detail from the Courts Service Annual Report 2022 under five separate categories of proceedings in debt cases, which taken together, add up to a substantial amount of litigation in the Irish legal system. Following the winding down of Covid restrictions in February 2022, it might have been expected that such activity would increase, but it is not clear that this was the case across each of these categories when the 2022 and 2021 figures are compared.

Following some analysis and discussion concerning the relevant data, some suggestions are made for improvements to these mechanisms where potential issues of law reform are

proposed. These largely stem from FLAC's recent series of four papers on consumer debt issues, Pillar to Post, published between June 2021 and November 2022.[38]

8.1. Circuit Court repossession proceedings

	2022	2021
Incoming	**837**	**477**
Resolved	**548**	**435**
Orders granted	**208**	**82**
Orders not granted	**340**	**353**
Orders executed	**145**	**35**

In 2022, 548 cases were resolved by the Court, 208 (38%) resulted in a Possession Order being granted, 340 (62%) in an Order not being granted. There is no breakdown of the outcome in these 340 cases where an order was not granted – for example, how many were struck out, how many withdrawn and how many were settled.

An obvious exception is a substantial increase in new repossession cases in 2022 over 2021, with 837 Civil Bills for possession issued in 2022 compared to 477 in 2021, amounting to a substantial 75% increase in new applications. However, it is also apparent that bringing such proceedings is far from a guarantee of success, with 340 out of the 548 such cases resolved in 2022 not resulting in a Possession Order being granted, though it might be noted that it is not stated how many of these cases resulted in a voluntary surrender of the relevant family home.

In practice, it is clear that there are multiple adjournments in the significant majority of these cases, leading to considerable ongoing stress for the households in question and equally frustration for the lenders involved. In FLAC's series of papers on consumer debt issues, Pillar to Post (PtP), published between June 2021 and November 2022, we have characterised the approach taken by the State here as 'neither wishing to allow the repossession of family homes in any significant manner nor the write-down of impaired mortgages, broadly irreconcilable aspirations in the long term'[39].

The latest Central Bank of Ireland (CBI) data for the end of Quarter Four 2023 record that of the Possession cases in progress at that time:

- It was less than one year from the date of the first hearing for 2,172 accounts

[38] Available at: https://www.flac.ie/priorityareas/debt-law-reform/.
[39] See: https://www.flac.ie/publications/flac-pillar-to-post-paper-2/. Free Legal Advice Centres (2021). Ten years and counting: Conclusions from a decade of attempting to resolve family home mortgage arrears in Ireland. Dublin: Free Legal Advice Centres.

- Between one and two years from the date of the first hearing for 253 accounts
- Between two and five years from the date of the first hearing for 862 accounts
- Over five years since the first court hearing for 1,830 accounts
- The total here of 5,117 in the repossession process is a slight decrease from 5,380 accounts at the end of Q.3 2023.

These figures are very concerning, particularly the almost two thousand accounts that have been locked into a battle to remain in their family home for over five years.

In the course of our interaction with MABS advisors and MABS court mentors in 2023, we understand that there is a continuing persistent trend of low borrower attendance rates at County Registrar Possession lists and that rates of legal representation amongst defendants in repossession cases in 2023 were very low, reflecting a lack of access to civil legal aid. The fact that so many defendant borrowers appear in the Circuit Court unrepresented, facing a potentially adverse Court order with major consequences, is a marked indictment of our legal system and arguably amounts to a breach of the European Convention on Human Rights, in terms of the right to a fair hearing.

In addition, a significant number of borrowers who have availed of legal representation do not appear with their solicitor, a factor that is unlikely to help their case. There is also said to be an increasing trend of Personal Insolvency Practitioners (PIPs) appearing on behalf of borrowers, where the defendant borrower does not attend with the PIP either. Finally, there remains a significant of borrowers who have not engaged any of the core services or (the limited) legal supports available to them under the Abhaile scheme.

These trends are perhaps influenced by the fact that such hearings are in open court, that multiple cases are often dealt with by County Registrars at the one sitting and that the environment and limited time available is not, broadly speaking, conducive to arriving at a detailed understanding of the defendant borrower's personal and financial situation. In the majority of such cases, the borrower does not have a defence in law to the lender's claim and his/her incapacity to make the contractual payments under the terms of the mortgage results from events outside of his or her control.

The Land and Conveyancing Law Reform (Amendment) Act 2019 was commenced (via SI 397/2019) in August 2019. The key provision in this section was the insertion of a new Section 2A into the existing Land and Conveyancing Law Reform Act 2013, to oblige the (Circuit) Court to consider a number of 'matters' pertaining to the efforts made by lender and borrower respectively to arrive at suitable payment arrangements, the conduct of the parties in seeking to resolve the case, the circumstances of the borrower/s and whether the granting of an order would be proportionate in all the circumstances.

In principle, this legislative initiative was well framed. However no regulations whatsoever have since been passed to guide borrowers or indeed lenders on how to invoke the processes set out in that Act. For example, does the defendant borrower have to file a replying affidavit in response to the lender's grounding affidavit to challenge that lender's adherence to the standards set out in Section 2A? Does the use of the term 'the Court' in such cases refer to County Registrars as well as Circuit Court judges? Alternatively, are the powers under Section 2A exercisable by a Circuit Court judge only?

Ultimately, we have only been able to find one specific instance where the 2019 Act has been considered by the Circuit Court[40], in very cursory terms, and that was a case where counsel for the lender (rather than the borrower) raised it before the presiding judge. Recommendation;

Regulations should be made under the Land and Conveyancing Law Reform (Amendment) Act 2019 to set out the practice and procedure.

Ultimately, it is also suggested that the courts may not be the most suitable venue for proceedings that are mainly about assessing payment capacity and personal financial circumstances, rather than legal merit. In PtP Paper Four, we proposed in some detail the setting up of Mortgage Arrears Review Office as a 'clearing house' to attempt to resolve mortgage arrears cases, outside the courts[41], using the criteria in Section 2A of the 2019 Act as a template.

Recommendation

Consideration should be given to the setting up of a Mortgage Arrears Review Office as a 'clearing house' to attempt to resolve mortgage arrears cases, outside the courts[42], using the criteria in Section 2A of the 2019 Act as a template.

8.2. Liquidated sum cases

High Court: In 2022, there was a 22% decrease in incoming debt claim cases to 604, down from 773 in 2021. In the course of 2022, 16 cases resulted in judgments being marked in the relevant Court Office, with 109 being resolved by the Court itself.

Circuit Court: In 2022, there was a 9% increase in incoming debt claim cases to 1,499, up from 1,371 in 2021. In the course of 2022, 716 cases resulted in judgments being marked in the relevant Court Office, with 159 being resolved by the Court itself.

[40] See pages 129-130 : https://www.flac.ie/assets/files/pdf/from_pillar_to_post_paper_4_-_a_review_of_debt_resolution_mechanisms_and_debt_support_services_with_final_recommendations_for_reform.pdf.

[41] See also Paper Four, pages 136-141.
[42] See also Paper Four, pages 136-141.

District Court: In 2022, there was a 22% increase in incoming debt claim cases to 15,188, up from 12,405 in 2021. In the course of 2022, 6,968 cases resulted in judgments being marked in the relevant Court Office, with 1,165 resolved by the Court itself.

Two things are worthy of note here perhaps. First, there is an increase in the number of new cases in 2022 over 2021, particularly marked in the District Court where claims are for up to a threshold of €15,000. This and the more modest increase in Circuit Court activity is likely to reflect the removal of Covid restrictions in early 2022. Second, the significant majority of these claims, with the exception of the larger sum cases in the High Court, that were resolved in 2022 were marked in the relevant Court Office, indicating that liability was not contested by the respondent.

The question of how such judgments are then enforced by the applicant and the efficiency of the enforcement mechanisms is a matter discussed in more detail below.

8.3. Litigious and Non- Litigious Enforcement of judgments

Litigious Enforcement - Instalment Orders

	2022	2021
Instalment Order applications	**1,094**	**1,243**
Instalment Orders granted	**1,334**	**1,593**
Variation Orders granted	**92**	**75**
Committal Orders issued	**2**	**2**

Instalment Orders are described in the 2022 Annual Report as ‘litigious enforcement’, i.e., a District Court application must be made by the judgment creditor, a statement of means should be completed by the debtor and the debtor should attend to further have his/her means examined by a District Court judge. There were fewer such applications in 2022 than in 2021, which seems a little surprising given the direction of travel of Covid.

The Instalment Order has always been somewhat controversial from the debtor side in that the judgment debtor must fill out a statement of financial means and attend at his/her local District Court to have those means ‘examined’, again in open court, a daunting challenge for many, in principle at least, and as a result attendance can vary. This can lead to unrealistic orders being made that may then lead to a default in payment, at which point it is still open to the judgment creditor to issue a Committal Summons and seek a Committal Order to have the debtor imprisoned.

Following the *McCann* case in 2009[43], the Enforcement of Court Orders (Amendment) Act 2009 considerably reduced the possibility that a judgment debtor might be imprisoned in such circumstances but cases still arose very occasionally. In one such case, in March 2017, FLAC acted for a MABS client in successfully having him released from Mountjoy prison on foot of a habeas corpus application[44].

In late 2021, the Civil Reform Team in the Courts Service invited those with an interest in the area of debt enforcement to attend meetings to help the Service 'shape the future of Debt claims as well as inform the development of our first digital debt recovery proof of concept'. A number of promising meetings subsequently took place, but unfortunately, this project seems to have halted and to have been discontinued, at least for now. FLAC's basic ask in the course of these meetings, also expressed in PtP Paper Four[45], was that, as recommended by the Law Reform Commission in December 2010[46], a Debt Enforcement Office be set up that, amongst many other recommendations, would allow a respondent in a debt case to 'acknowledge liability and to make an offer of instalment payments that are affordable relative to his/her budget, and thus avoid the cost and stress of further enforcement proceedings'.

In our view, enforcement options involving the payment of amounts that are financially unrealistic are doomed to fail and cause distress and difficulty for all concerned.

Recommendation

A Debt Enforcement Office should be established. This should would allow a respondent in a debt case to acknowledge liability and to make an offer of instalment payments that are affordable relative to his/her budget, and thus avoid the cost and stress of further enforcement proceedings.

Non-Litigious Enforcement – Execution Orders, Judgment Mortgages, Registering judgments

Other forms of enforcement referred to in the 2022 Report, officially bracketed as non-litigious enforcement, include Execution Orders to seize goods issued following judgments being marked in the office or on foot of court orders; judgment mortgages being registered against real property owned by the judgment debtor (and thereby accruing interest at 2% simple interest per annum) and judgments registered in the Registry of Judgments potentially affecting the debtor's credit rating. Each of these forms of enforcement appear to have

[43] McCann -v- Monaghan District Court & Ors [2009] IEHC 276.
[44] See: https://www.flac.ie/news/2017/03/30/flac-man-unlawfully-jailed-for-failure-to-pay-debt/.
[45] Ibid, see Section 7, Debt claims and debt enforcement processes in the courts, pages 120-127.
[46] See https://www.lawreform.ie/2010/report-on-personal-debt-management-and-debt-enforcement.325.html.

increased in 2022 compared to the Covid years, albeit in varying proportions, in some cases returning to pre-pandemic levels.

Execution Orders that may result in the seizure and sale of personal property belonging to the judgment debtor are another controversial area, particularly when carried out by the City and County Sheriffs for Dublin and Cork respectively (four in total) and the eight Revenue Sheriffs[47], and to a lesser extent by County Registrars, officers of the Circuit Court. Occasionally, property may be seized that does not actually belong to the debtor (cars the subject of hire purchase agreements have been an example in the past) and the resale value of the items seized can sometimes yield little of value, while causing great distress and invasion of privacy.

Recommendation

The Law Reform Commission's cogent and sensible recommendation (from December 2010) intended to minimise the intrusion of enforcement and to improve its effectiveness should be implemented: 'that the choice of enforcement method should be allocated to the Debt Enforcement Office and that an enforcement officer should include his or her opinion as to the appropriate method of enforcement' and that 'when deciding on the appropriate method of enforcement, regard should be had to the principle of proportionality and the need to ensure that the enforcement method chosen is the mechanism that is least restrictive of the debtor's rights in the given case'.

8.4. Bankruptcy Proceedings

	2022	2021
Pre-Bankruptcy summonses	**32**	**34**
Bankruptcy petitions (creditors)	**17**	**21**
Bankruptcy petitions (self)	**92**	**169**

31 summonses and 12 creditor petitions were resolved in 2022. The corresponding figures for 2021 were 28 and 30.

In terms of debtors filing for their own bankruptcy ('self' petitions), 93 were approved in 2022 and 169 in 2021, thus apparently all applications were approved.

These numbers would appear to suggest that the number of debtor 'self' petitions in both 2022 and 2021 exceeded those of creditor petitions by a wide margin, particularly in 2021.

[47] A review into the effectiveness of the role by played by the country's tax-collecting sheriffs was commissioned in early 2023. See https://www.irishtimes.com/ireland/2023/01/29/role-of-debt-collecting-sheriffs-to-be-reviewed/.

Nonetheless, the numbers of debtors petitions are still relatively small, indicative perhaps of two factors.

The first is that a debtor's petition may not be presented unless the debtor 'has, prior to presenting the petition, made reasonable efforts to reach an appropriate arrangement with his creditors relating to his debts by making a proposal for a Debt Settlement Arrangement or a Personal Insolvency Arrangement to the extent that the circumstances of the debtor would permit him to enter into such an arrangement'.[48] High Court Practice Directions[49] further provide that such a petition must be accompanied by an affidavit from the debtor exhibiting a letter from a Personal Insolvency Practitioner (PIP) certifying that having regard to the debtor's financial situation, an arrangement under the personal insolvency legislation would not be an appropriate means of dealing with the debtor's financial situation. Access to a Personal Insolvency Practitioner to obtain such a letter is only free where the debtor is in family home mortgage arrears and has access to the Abhaile scheme. Petitioners with unsecured debt only must, in theory at least, pay for this PIP consultation and letter, in addition to the other costs of filing for bankruptcy.

A second factor that may be keeping numbers low are the potential long-term consequences of bankruptcy on the credit rating and future economic activity of the petitioner.

Recommendation

The treatment in terms of access to a remedy between those who are insolvent, including family home mortgage debt, and those who are insolvent, but do not have mortgage debt, must be reviewed and addressed.

8.5. Personal Insolvency Arrangement (PIA) reviews

Debtors whose applications for a PIA are rejected by their creditor/s may seek a review in the Circuit Court, pursuant to S.115A of the Personal Insolvency Act 2012 (as amended), and seek an order under S.115A (9).

	2022	2021
Incoming reviews	225	278
Approved	64	196
Refused	13	235
Appeals to High Court	58	90

[48] Section 145 of the Personal Insolvency Act 2012 amending Section 11 of the Bankruptcy Act 1988.
[49] Practice Direction HC 100, 3rd December 2020, See discussion in Pillar to Post, Paper Four, pages 83-84.

The introduction in the Personal Insolvency (Amendment) Act 2015 of a right for a debtor to seek a review in the Circuit Court where his/her application for a PIA has been rejected under the relevant voting provisions (most commonly by the mortgage lender) has made a significant difference to assisting a number of mortgage borrowers to obtain a PIA resolution and remain in their family home[50]. A critical factor in exercising this option has been potential access under the Abhaile scheme to advice and representation from insolvency practitioners and legal professionals.

According to the 2022 Annual Report, there were 431 review cases disposed of in 2021 - 196 were approved and 235 were refused. In addition, a further 278 reviews were initiated in 2021, and these figures indicate a solid demand to avail of the review mechanism to obtain a PIA arrangement.

However, it is notable that the number of incoming applications for a review decreased by 19% in 2022 from 2021 (from 278 down to 225) and, in addition, the number of reviews disposed of in 2022 was 77 (64 approved, 13 refused), a very substantial reduction from 431 in 2021.

It is conceivable that these reductions may reflect the fact that the S.115A review mechanism is open to a limited pool of borrowers in mortgage arrears with some recent decisions of the High Court, some of which we have reviewed in Pillar to Post, Paper Four[51], having ruled out (regretfully in the main) the application of this relief to 'lifetime mortgages' or 'debt for equity' swaps to which the secured creditor does not consent.

Further reforms are required to expand this option, particularly to address the situations of borrowers with restructured mortgages or mortgages in arrears facing a shortfall at the end of the restructure or the term of the mortgage, at a time of increasing age and reduced earning capacity. However, the long awaited statutory review of the Personal Insolvency Act 2012 to be completed by the Department of Justice, which would likely be the vehicle for such reforms.

Recommendation

The Courts Services should recommend the completion of the long awaited statutory review of the Personal Insolvency Act 2012.

[50] Note that a further amendment in the Personal Insolvency (Amendment) Act 2021 revised the first date of arrears criterion which expanded this option to a larger potential pool of borrowers.
[51] See pages 73-81