



# FLAC Submission to the Department of Justice

Family Justice Oversight Group Phase 1 Consultation

**February 2021**

## **About FLAC**

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.

FLAC sits on the External Consultative Panel to the Legal Aid Board. This operates to provide a forum to enable stakeholders to provide feedback to the Board on the services which they provide.

**You can download/read FLAC's policy papers at**

**<https://www.flac.ie/publications/>**

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# FLAC Submission Family Justice Oversight Group

## Phase 1 Consultation

### Introduction

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 has also provided specialist legal advice to advisers in MABS and CISOs. FLAC works to improve access to justice for marginalised and vulnerable individuals and communities.

FLAC also operates PILA, the Public Interest Law Alliance, which operates a Pro Bono Referral Scheme for NGOs, community groups and independent law centres. FLAC runs a clinic for the Roma community and a dedicated legal service for Travellers. FLAC is also an independent law centre and engages in litigation in the public interest seeking to achieve outcomes which will have benefit beyond the individual, and which may test and possibly bring about change in law and practice. The focus on these services as a way of enabling individuals and groups to assert their rights is a fundamental aspect of FLAC's work in promoting access to justice.

FLAC participates as a member of the External Consultative Panel to the Legal Aid Board, providing feedback and assistance to the Board on the Board's services from the perspective and informed position of the stakeholder.<sup>1</sup> FLAC is also a member of the newly established umbrella group of NGOs working on matters concerning one parent families, the National One Parent Family Alliance (NOPFA).

Since its establishment in 1969, FLAC has had a role in providing advice and information in family law cases in Ireland. More than 26,000 people received free legal advice or information from FLAC in 2019 through the telephone information line and the network of legal advice clinics at 72 locations around Ireland.

During 2019, FLAC provided legal information to 12,469 callers to the telephone information and referral line. Of the 12,469 calls, 24.1% of these were specifically related to family law matters. Of those calls, 41% of callers were enquiring about a divorce or separation; 25% wished to discuss custody, access or guardianship; 20% had a query about maintenance; and around 10% related to domestic violence and the family home. There was a 23% increase in calls related to domestic violence from the previous year.

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<sup>1</sup> <https://www.legalaidboard.ie/en/about-the-board/external-consultative-panel/> [accessed 17.02.21]

The FLAC telephone information line regularly receives calls from lay litigants who are endeavouring to represent 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. Lay litigants made up approximately 4% of callers to the information line in 2019. Of the lay litigants who contacted FLAC, 48% had a family law issue. It is worth noting that not all callers to the line seeking information on family law matters may disclose their status as a lay litigant.

In 2019, approximately 2,500 free legal advice clinics took place at 72 locations around the country, where volunteer lawyers provided 14,526 basic free legal advice consultations to members of the public. Of the 14,526 consultations that took place, almost 5,000 of these were family law queries (34%). Of the total family law queries, half were related to divorce or separation; 25% were about custody, access or guardianship, and 20% were about maintenance. Domestic violence queries increased by almost 11% compared with the previous year and accounted for 9% of the family law queries. FLAC's work in providing information and advice to the public means that we act as a bridge for those who cannot afford access to the law, in light of the underfunded and stretched state services providing assistance. The large numbers of individuals who turn to FLAC for guidance in family law matters is a testament to this. During Covid 19 our telephone Information line has been overwhelmed with queries on family law and employment law. Recently we have noticed an increase in people seeking advice about divorce who have no idea of their rights and entitlements and the range of legislative protections that are available.

FLAC's public interest law project PILA has facilitated the establishment of a project between Women's Aid and a major law firm which provides legal assistance on family law to victims of domestic violence who are ineligible for legal aid.

FLAC engages in policy and research on areas of law that most impact on vulnerable and marginalised groups such as social welfare, legal aid and debt. In 2017, FLAC campaigned successfully to have the financial contribution requirement for legal aid removed for victims of domestic violence. It has been campaigning for some time for a root and branch review of the system of legal aid and this was reflected by the previous Joint Committee in its report. FLAC made a detailed submission to the Joint Oireachtas Committee on Justice and Equality on the Reform of the Family Law System Report in October 2019 which is [available here](#). A number of its recommendations were taken on board by that committee such as:-

- The Committee recommends that a full review of the legal aid scheme be conducted, with particular regard to means test rates, contribution requirements and eligibility, in order to ensure that the scheme is meeting the needs of those most vulnerable in society. It believes that the current threshold for legal aid needs to be raised significantly.
- Given the delays and volume of cases facing the Legal Aid Board, and the barriers to access facing the public, the Committee strongly recommends that a thorough needs analysis and review be conducted of the funding requirements of the Legal Aid Board, with a view to reducing waiting times for consultations with a solicitor and ensuring that cases are

progressed within acceptable time frames that minimises stress on children in particular.

FLAC also made a detailed submission to the Joint Oireachtas Committee on Legal Aid and Costs which is [available here](#). It also made detailed submission on the work program of the Courts Service. FLAC also made a submission to the Oireachtas Committee on the Family Court Bill General Scheme (September 2020) which is available here. The content of that submission is reflected in the response to this consultation process.

FLAC welcomes the opportunity to make a submission to the Family Justice Oversight Group. This submission makes recommendations informed by our experience in working on access to justice issues and human rights in Ireland. FLAC is fully supportive of and eager to be involved in any aims to rectify the current difficulties within the family law system.

## **Importance of Family law: unmet legal need**

Family Law is a vitally important area of law which has a fundamental effect on how our society is organised. A centrally important theme in Family Law is the best interests of the child and the voice of the child. Family law is primarily socially protective legislation, that has been long campaigned for by civil society, which provides a range of important protections and remedies including for victims of domestic abuse and vulnerable adult dependent and child dependent family members.

FLAC has concerns at the framing and direction of some of the questions in the Phase 1 Consultation. It is noted that there is no mention of the significant rights and protections in the socially protective family law legislation, such as the recent family law legislation which recognised and provided remedies in relation to coercive control. There is also no reference to the significant imbalance in power and resources that may be at play in family breakdown situations which have given rise to some of the socially protective rights and remedies that are afforded by family law legislation.

There is also no mention of the significant extent of unmet legal need that exists in the area of family law and related areas like housing social welfare and debt, the inability of the Legal Aid Board to be able to meet this unmet need due to limited resources, functions and scope. There is also no mention of access to justice, including for lay litigants and people with disabilities and the public sector equality duty.

FLAC is also concerned at the lack of emphasis on the primary role and purpose of the Courts which is to adjudicate on and enforce rights. Within an under sourced Court system, family law has not been sufficiently prioritised to date. There is a stark contrast between the environment where commercial disputes are resolved in the Four Courts and nearby Dolphin House. Given its importance to society, it should be accorded priority resources within the Courts Services.

FLAC has participated in a multi-agency campaign, Courting Disaster, which called upon the government to allocate funding for a dedicated family law court at Hammond Lane, recognising that the current court facilities are wholly unsuitable for the purpose of hearing family law cases.<sup>2</sup>

The Legal Aid Board and the Courts Services and ancillary services are central to the administration of Justice and the rule of law and their funding and resourcing should be a central focus to this consultation.

There has been an ongoing campaign to portray Ireland as a centre of excellence for commercial dispute resolution post Brexit. It is vital that there is a similar ambition by this oversight group in relation to reform of the family justice system. Our primary recommendations are stated below and are expanded upon throughout this submission

## **Recommendations**

### **Ireland a centre of excellence for family justice**

- The ambition for the reform of the Family Justice system should be to make Ireland a centre of excellence for family justice. The Legal Aid Board and the Courts and ancillary services are key elements in the administration of Justice and the rule of law and need to be adequately resourced. Within the Courts Services and infrastructure family law needs to be prioritised accordingly.

### **Public sector duty**

- The Public Sector Duty should be a core consideration in the process of developing, implementing and monitoring reforms of the family law system including any move to online hearings.
- There needs to be an assessment of the impact on all of the proposed reform measures on those individuals with protected characteristics under the Employment Equality Acts and the Equal Status Acts. Any proposed reform of the family justice system needs to be equality, poverty and human rights proofed.

### **Access to Justice**

- Access to justice is foundational and should underpin all proposals made by the Family Justice Oversight Group.

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<sup>2</sup> The campaign included Barnardos, Children's Rights Alliance, Community Law and Mediation, Dublin Rape Crisis Centre, Family Lawyers Association, FLAC, National Women's Council Ireland, One Family, The Bar of Ireland, The Law Society and Women's Aid.

- A comprehensive, well-resourced legal aid system that would be able to provide legal information, engage in educational programs, provide legal aid and advice in family law and related areas like housing, social welfare, and debt, that would be able to proactively target and be accessible to people in poverty and extreme poverty, provide unbundled legal services for lay litigants, and which could locate offices in the new family court building, is an essential foundational service and needs to be an integral part of the new family justice system.

## **Topic one: Optimising the delivery of family justice via the use of Modern Technology**

### **Recommendation**

- Any technology developments in the provision of Family Law, need to be equality, poverty and human rights proofed to ensure that the needs of those who have little access to the technology required or those who may have literacy or accessibility issues be addressed. It is essential that marginalised members of the community are not left without access to justice in the quest to broaden access by moving services online.
- FLAC is unaware of any research being carried out into the use of online facilities in family law cases and urges that this take place as a matter of urgency. There should be specific research into the use of online facilities to assist victims of domestic violence who may have difficulties leaving home to access relevant services.
- FLAC recommends that the possibility of continuing with face-to-face hearings be explored as a matter of urgency, with appropriate measures in place to ensure to comply with Government restrictions in force.
- Parties to remote hearings, must be given support to understand the implications of the different modes of participation and provided with an opportunity to access legal advice, including free legal advice, in advance of participating in the new form of hearing.
- The use of remote hearings should be based on the consent of the parties.
- An accessible website with accessible forms and procedures should be available online.
- The Court Services need to be resourced to work with people with disabilities to develop appropriate and accessible technologies to improve access to their website.
- Websites providing legal services and information need to undergo periodic accessibility testing for persons with disabilities.

- All legal and court documents need to be available in accessible formats (including video and audio where necessary) and accompanied by information leaflets giving specific advice in relation to access to the courts for people with disabilities.
- The practical issues identified in this submission in relation to the IT platform, the conduct of remote hearings, recording of remote hearings, provision to consult with legal advisers in a confidential way, availability of IT staff for assistance and guidance, simultaneous translation and the Courts website, need to be addressed.

## **Topic one and four: The provision of facilities and supports in the family justice locations:**

### **A Family Court**

- FLAC recommends that a Family Court Strategy and Implementation Plan be published that provides details as to the level of resources that will be allocated, and the projected time frame.
- FLAC further recommends the implementation of the recommendation of the Joint Oireachtas Committee which stated that legislation must, in turn, be backed up with the necessary resources and implementation.
- There need to be a statutory obligation to provide ancillary services, which the family courts must have, to ensure meaningful access to justice.
- FLAC recommends the provision of a fit for purpose Family Law system that will not only reform the Courts - but also provide the ancillary necessary services that were recommended by the Report of the Oireachtas Committee such as legal aid and mediation services, ADR facilities as well as the courts and courts offices, all be housed under one roof. Accommodation should incorporate appropriate areas for private consultation, and negotiation, child-friendly spaces, crèche facilities, disability access and supports and guides for navigation through the process for lay-litigants. Translators should be readily available to courts to avoid lengthy delays when there are language problems.
- There also needs to be the following services, parenting information, domestic violence support and resources, anger management programmes, family therapy and addiction counselling spaces, facilities to monitor custody and access orders, There must be appropriate consultation and negotiation rooms. The courts must also have access to child and welfare assessment services, suitably qualified persons providing Section 32 and Section 47 reports on both the wishes of the children and the best interests of the children.

- Lay litigants. Research in Northern Ireland and the UK on lay litigants in person should inform the development of the new family law system. FLAC recommends introduction of a statutory obligation upon the Courts Service to ensure that lay litigant services are provided by the Courts. Information and advice services for lay litigant should be integral to the new family court system and should be provided as vital ancillary services to be accommodated within the new structures. This should include establishing liaison person roles for persons at Court sittings who could provide practical information to assist lay litigants.

## **Topic two: The Place of Mediation**

- FLAC is concerned that mediation is seen as a way to reduce the need for adequate resourcing of the Courts and legal aid system. It is not and should not be the purpose of mediation to mitigate the need for adequate court and legal aid services. Mediation should be viewed as one solution but not the solution or the dominant solution to access to the courts to enforce socially protective rights.
- FLAC recommends that any provision concerning the operation of mediation needs to be equality, poverty and human rights proofed in order to ensure that it is truly voluntary. A party should not be penalised for refusing to take part in mediation. Parties to mediation should be fully informed of their rights before they engage in mediation. Legal advice should at all stages be available to parties involved in mediation.

## **Consultation topic: THE FAMILY COURTS**

### **What issues should always be prioritised for hearing.**

While cases involving the safety and welfare of the parties involved and the best interest of the child need to be treated as urgent, there are concerns in the Courts deciding that it will prioritise some family law issues over others and establishing a hierarchy of issues. Further it is undesirable that matters such domestic violence would be prioritised but that related issues such as custody and access and maintenance would be deprioritised.

## **Consultation Topic: Reimagining the structure of civil legal aid in family justice:**

- FLAC welcomes the commitment in the action plan for the review of the legal aid system and believes that such a review should be an external root and branch review of the legal aid system by a committee composed of relevant external stakeholders chaired by an independent person of considerable status. The review should consider matters such as the functions of the Legal Aid Board, its resources, the criteria for legal aid (including the means test, and financial contributions), the areas of law covered, and the methods of service delivery. It should also examine what steps are necessary to ensure that the system is compliant with the State's obligations under the ECHR and the Charter of Fundamental Rights, as well as the public sector equality and human rights duty contained in section 42 of the Irish Human Rights and Equality Commission Act 2014. It needs to be equality, human rights and poverty proofed.
- The system of legal aid and advice should not be conflated with legal aid and advice in family law matters. There is significant unmet legal need in family matters and this needs to be provided for. However there needs to be a complete reimagining of the legal aid system so that it can be accessible to and cater for unmet legal need in areas of law that most impact on people living in poverty and related matters such as housing, homelessness, social welfare and discrimination.
- The focus on the provisions of legal aid in family law needs to be on the prioritisation of the provisions of legal aid in circumstances where mediation is not appropriate.
- However legal advice also needs to be available to parties engaged in mediation.
- FLAC recommends that the Courts Services and the Legal Aid Board should 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.
- It also recommends the Legal Aid Board would be provided with an office within the new family court to provide information about its services and process applications.

## **Consultation Topic: The voice of the child**

FLAC recommends there needs to be research done as a matter of priority as to how best the voice of the child will be heard in proceedings and mediation. Legislative provisions giving effect to Article 42A need to be reviewed and consolidated with a view to vindicating the child's right to be heard in family law proceedings. Appropriate funding should accompany any legislative changes.

## **Public Sector Duty**

Section 42 of the Irish Human Rights and Equality Act 2014, introduced the Public Sector Duty, providing one of the most important national mechanisms for mainstreaming equality and human rights. It imposes a positive obligation on a broad range of statutory and public bodies to have regard to in the performance of their functions, 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.

The reform of the family law system in Ireland and the delivery of high-level services is a key instance in which the Public Sector Duty will apply. FLAC suggests that initiatives designed to improve the family law system and deliver the reforms necessary to make improvements should be underpinned by the Public Sector Duty and be reflected in the subsequent recommendations. There needs to be an assessment of the impact of the proposed reform measures on those individuals with protected characteristics under the Employment Equality Acts and the Equal Status Acts.<sup>3</sup> In the UK the HMCTS have designed systems for capturing characteristics under the UK Equality Acts 2010 as part of their ongoing programme of court reform: see Appendix 1 below. These 13 data points that could be collected in relation to individual users of the justice system in order to identify vulnerability and assess the impact of reform, may be of assistance to the Courts Services but would need to be adapted to include all of the grounds under Irish equality law.

Any proposed reform of the family justice system needs to be equality, poverty and human rights proofed. We believe that this would go some way to improving equality in access to the courts, the experiences of service users in engaging with family law matters, and overall access to justice.<sup>4</sup>

## **Access to Justice**

Access to justice is a fundamental human right, recognised as such under a range of regional and international human rights instruments including the European Convention on Human Rights,<sup>5</sup>

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<sup>3</sup> The protected characteristics identified in the equality legislation are: gender, civil status, family status, age, disability, sexual orientation race, religion, membership of the Traveller Community and, under the equal status regime, housing assistance.

<sup>4</sup> FLAC in its recent submission to the Department of Justice on the General Scheme of the Family Court Bill recommended that the Public Sector Duty the obligations arising be reflected in the guiding principles of that legislation.

<sup>5</sup> Article 6(1) and Article 13 of the European Convention on Human Rights

the Charter of Fundamental Rights of the European Union<sup>6</sup> and the International Covenant on Civil and Political Rights.<sup>7</sup> Access to justice includes access to legal information, advice, legal aid or representation, access to the courts, access to an effective remedy and fair and just laws. It encompasses access to fair systems of redress and the states' obligations to vindicate and protect human rights. In the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision makers accountable.

Socially excluded groups within the general population are more likely to suffer justiciable problems (meaning problems for which there is a potential legal remedy within a civil and/or criminal justice framework) and the lack of effective and accessible mechanisms for resolving legal disputes prevents individuals from protecting and asserting their rights. Unless the right of access to justice, in all spheres of law, is vindicated, the risk of social and economic exclusion particularly for marginalised or vulnerable communities is greatly increased. Access to justice on a truly equal basis will be signified by equality of outcome regardless of resources. This is no less true for matters of family law.

Currently, civil litigation within a family law setting is more easily navigated by persons with the financial resources to access legal representation. Beyond this, there is a general expectation that the impecunious litigant will either manage with a low level of support through legal aid or become a lay litigant. Applicants for legal aid are often directed to the remedy which will be available in the lowest court. This is antithetical to access to justice. This submission will examine the issue of civil legal aid separately.

Equal access to justice means that everyone should have equal access to the court and legal system alternatives to court as a matter of law, and as a mechanism of social inclusion and cohesion. Access to justice means more than access to civil legal aid and an appointment with a lawyer. It is about proactively meeting equally the legal needs of marginalised communities and people living in poverty and extreme poverty in Ireland. It is about access to the courts and lawmakers, to service providers and basic information on legal rights and entitlements, and to the ancillary services required to resolve family law disputes.

Access to justice is also fundamental to democracy. If socially protective legislation is enacted and people are not able to benefit from it, this diminishes democracy. Substantial unmet legal need continues to exist in family law and in related areas such as housing, social welfare and debt and the objective of protecting and promoting the right of access to justice should be at the foundation of all reforms to the family law system.

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<sup>6</sup> Article 47 of the Charter of Fundamental Rights of the European Union

<sup>7</sup> Article 14(1) of the International Covenant on Civil and Political Rights.

## **Consultation Topic:**

### **Optimising the delivery of family justice via:**

- **The use of modern technology**
- **The provision of facilities and supports in the family justice locations**

### **The use of modern technology**

FLAC recognizes the challenges posed by the Covid-19 public health emergency for all areas of the administration of justice, including the courts. On the one hand, a shift towards alternative modes of hearing may ensure that claims are processed and adjudicated upon in circumstances where the parties would otherwise be deprived of access to justice, potentially for a lengthy period of time. On the other, such a significant change may have exclusionary effects for certain categories of litigants or materially affect the quality of justice, particularly for complex claims. This being so, it is important that careful consideration, based on research where possible, is given to these issues and that the Court Services ensures that any significant changes would not impede access to justice by creating barriers to bringing or pursuing a claim.

The rapid development and increased use of software and technology for legal services and in the courts could reduce costs and improve access to justice but deepen the digital divide and strengthen existing biases in the justice system, according to research from NUI Galway.<sup>8</sup> The report noted “However, it is not a silver bullet to solve the problem of access to justice. As Artificial Intelligence (AI) is used more by lawyers and courts, it could lead to fairer outcomes or repeat existing biases.” The research paper noted:

- Lawtech could reduce costs and provide better access to justice by making it easier for lawyers to create standard documents or allowing people to access legal information and advice online, including through automated apps.

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<sup>8</sup> Algorithms, Big Data and

- It could worsen the digital divide in society and solidify existing biases in the legal system, by preventing those without IT skills from accessing legal services or by relying on historical data which is prejudiced.
- Areas for immediate legislative intervention include expansion of the validity of digital signatures for uses such as wills or legal proceedings, and the admissibility of digital recordings in court.

Dr Kennedy’s research noted that AI software programs may also “learn” to discriminate in ways that are illegal, focusing on characteristics that are proxies for social class, race or gender such as home address or height. *“It is unlikely that AI can or will ever replace humans, but it may allow faster, cheaper, and fairer judging. However, if this software is not carefully designed, it could make prejudice even more difficult to remove from the justice system,”* he said.

Recent case law has affirmed the principle that access to formal legal processes must be “practical and effective” as opposed to “theoretical and illusory”. FLAC is unaware of any research being carried out into the use of online facilities in family law cases and its potential for example in cases of domestic violence where a party may not be physically able to access the court for emergency relief and urges that this take place as a matter of urgency.

Studies have shown that in cases where hearings are conducted remotely by video-link, parties are less likely to seek legal advice and representation.<sup>9</sup> The Court Services need to be particularly attentive to these issues in any move towards alternative forms of participation, as not all parties to a hearing may be similarly placed in terms of access to legal advice and representation.

While FLAC acknowledges the challenges posed by the restrictions in place in response to the Covid-19 crisis, FLAC submits that the Court Services should assess whether – and, if so, when – it would be possible to continue hearings safely within the Courts existing physical infrastructure.

## **Online hearings and the public sector duty**

A move to remote hearings is a key instance of strategic planning by the Court Services to which the Public Sector Duty applies. This being so, it is important that the Court Services give active consideration to the Duty in relation to online hearings. There needs to be an assessment of the impact of the proposed reform measures on those individuals with protected characteristics under the Employment Equality Acts and the Equal Status Acts. The impact of the shift in the mode of proceedings on individuals with characteristics under the equality legislation should be

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<sup>9</sup> See e.g. Eagly, I. (2015) “Remote Adjudication in Immigration” Northwestern University Law Review Vol 109, No. 4 2015 <http://escholarship.org/uc/item/5p1044zc>. This research, conducted into the impact of the introduction of remote hearings in immigration detention settings in the USA, demonstrated that remote hearings impacted negatively on the level of litigant engagement in the process- litigants perceived the process as less legitimate and therefore did not take full advantage of the legal safeguards available to them. Studies suggest that failure to seek legal advice may be linked to diminished ability to present their case effectively.

monitored (for example patterns in attrition at different and different types of outcome such as settlement or withdrawal from the system).

There is some emerging evidence indicating that individuals who are neurodiverse, have a learning disability, or who are experiencing mental ill health which impacts on their communication and comprehension skills may be particularly adversely impacted by appearance via video link.<sup>10</sup>

It is unknown what criteria will be used to determine the question of whether a claim will be decided by remote hearing (whether on the basis of the type of claim or a case-by-case assessment). In FLAC's submission, this requires a case-by-case assessment, which should take account of the capacity and vulnerability of the parties as well as the suitability of the case.

It must be acknowledged that even apparently straightforward cases may give rise to complex disputes of fact and complex issues of law. Indeed, cases which initially appear straightforward can become more complex in the course of hearings by virtue of inconsistent or unexpected evidence on the day:

*“As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.”<sup>11</sup>*

If a party has a concern about the suitability of a remote hearing of the claim, or the fairness of such a procedure, the parties should be afforded the opportunity of a face-to-face hearing in relation to the claim. Furthermore, if a serious dispute as to fact or law arises during the remote hearing, the parties should be afforded the opportunity of a face-to-face hearing in relation to these issues.

## **Right to cross-examine**

Physical presence in court can be a very important part of both effective cross-examination of witnesses and assessing veracity. Both applicants and respondents may be disadvantaged by the remote nature of the hearings if any remote witness examination is contemplated. An effective hearing requires both that individuals are able to present the information necessary to enable a decision maker to make a determination based on applying the law to the facts of the case and that the decision maker is able to comprehend this information.

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<sup>10</sup> UK Equality and Human Rights Commission Inquiry. See also: See House of Commons Justice Committee, “Court and Tribunal reforms” 31 October 2019 HC 190 31 October 2019, Second Report of Session pp24 para 67

<sup>11</sup> Per Megarry J in *John v Rees* [1970] 1 Ch 345 at 402 and quoted with approval by O’Flaherty J in *Gallagher v Revenue Commissioners* (No 2) [1995] 1 IR 55 at 82.

Demonstrating procedural fairness has been held to be important for a number of reasons. People are more willing to accept decisions when they feel that those decisions are made through decision-making procedures they view as fair. In addition, perceptions of procedural justice have been found to be linked to public trust and confidence in legal authorities and institutions, including courts<sup>12</sup>.

Further the right to be heard is a pillar principle of due process.<sup>13</sup> Cregan J in Flynn v. National Asset Loan Management<sup>16</sup> characterized the principle of audi alteram partem as follows:-

*“It is a command, a direction, to the court or tribunal: hear the other side, listen to the other side. This duty to hear gives rise to a corresponding right: the right to be heard. The right to be heard is a powerful and important right. Although it is expressed in the passive voice, it is in fact, an active right: a right to speak or a right to make representations to the court, tribunal or statutory body which seeks to make a decision which affects the person concerned. It is a right which is at the heart of our legal system. For if a person is denied a right to be heard, they are shut out of participation in the vital process which affects their interests.”*

Preserving such participative rights via online hearings presents real challenges. The Court Services in making a decision to hear a claim by remote hearing has to be satisfied that the parties are in a position to make their own case, present the information necessary and are not incapacitated by virtue of literacy, language or other incapacity.

There are also concerns that individuals who lack legal knowledge, advice and support are unlikely to be well placed to assess the legality of a given process or procedure or issue. Therefore if a legal issue arises, during the course of a written or remote procedure, parties must be given an opportunity to obtain legal advice and make submissions in relation to them.

## **PRACTICAL CONCERNS AND CONSIDERATIONS WITH REMOTE HEARINGS**

### **IT platforms**

While there are a wide range of IT platforms which may be utilised to conduct remote video hearings, whatever platform is chosen, it is likely that there will be a minimum remote device specification and broadband speed required of all parties. Older people, persons for whom English is not a first language, persons with physical or intellectual disability, homeless people and the more marginalised and disadvantaged are all less likely to have access to these facilities. There would be a very significant difficulty for the Courts Services in ensuring equal access to justice and tackling the existing digital divide in these circumstances.

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<sup>12</sup> Tyler, 2000:117 and Tyler, 2001:216

<sup>13</sup> See Further “Remote Hearings: Overview of UK Experience; Patricia Sheehy- Skeffington, the Bar of Ireland

## **Conduct of Remote/Video hearing**

Remote hearings pose challenges in the taking of evidence. It is likely that people will engage in remote hearings from their homes. There may be children in the household at the time and childcare may be an issue for the duration of the hearing. A very flexible approach may be needed regarding breaks. In addition, judges would need to be attentive to the risks such as coaching by another person or reliance on materials which cannot be seen through the video conference facilities.

## **Recording Hearings**

Platforms like Zoom have a built-in capacity to record the proceedings; it is unclear how this can be controlled in a way that is compatible with GDPR.

## **Conference with legal representatives**

Speaking in confidence with your solicitor or barrister has profound implications in the context of the adjudication of disputes. It is difficult to envisage how an applicant or respondent can properly provide instruction to their lawyers if the lawyers are in fact remote from their client, and cannot take instructions or give advice at a hearing.

While some platforms have the capacity for 'private consultations' built in, it does again require a certain level of IT proficiency to use these effectively. Given the importance of client confidentiality and the right to consult Counsel in private, significant thought would have to be given on how to guarantee this using this type of platform.

## **Available IT staff**

Dedicated IT staff must be on hand throughout any hearings in order to assist with practicalities regarding connections and access. There should be tests of the connection prior to a hearing.

## **Document availability**

Whatever operating platform is used needs to ensure that there is a facility to allow for the sharing of additional documents in real time during the hearing. This can be done using a document camera or digital screen-sharing function.

## **Simultaneous translation**

The Courts Services must ensure that simultaneous translation is made available to those in remote hearings that need an interpreter. This may require multiple audio channels so that interpretation doesn't interrupt the hearing. The platform will need to ensure that any sign language interpreter is clearly visible to those who require translation on screen.

## **Plain English**

Any technical guides setting out how a person might participate in an online hearing should be produced with the lay applicant with basic literacy in mind. Consideration should be given to producing a video guide instruction in addition. Further, participants in any hearing should be given the opportunity for a 'dry run' test connection 24 hours beforehand where possible.

## **Ground rules**

The judges should bear in mind that individuals may be anxious regarding participation in the forum in which they have not so before or are not familiar with the technology, or may have literacy issues, or find screen-based comms difficult or have language issues etc. Therefore, clear ground rules should be set out at the beginning of hearings regarding turn-taking, muting, privacy, alerting the adjudicator if any technical or sound difficulties and in particular rules around prohibitions on recording or broadcasting, which may not be immediately obvious to participants. IT staff should 'check in' regularly to ensure that participants are hearing, understanding and following the proceedings. Regular breaks are essential and must be factored into the hearing schedule.

## **Court Services Website**

It is essential that the Courts Service develop its website to improve access to persons with disabilities. It is imperative that people with visual impairments or motor impairments who are unable to access a webpage, much less submit or retrieve information are not excluded from these services because they cannot access the technology. FLAC also recognises that there are some Courts services provided online now due to Covid and are keenly aware of the impact of the digital divide in Ireland. Not everyone has access to good broadband or computer equipment that would be required to avail of some services.

Given the difficulties faced by some, FLAC believes that any technology developments in the provision of Family Law, be equality proofed to ensure that the needs of those who have little access to the technology required or those who may have literacy or accessibility issues be addressed. It is essential that marginalised members of the community are not left without access to justice in the quest to broaden access by moving services online.

## **Consultation Topic: One and Four**

### **Optimising the delivery of family justice via:**

#### **The provision of facilities and support.**

#### **What are the professional supports that most benefit the participants in the process?**

While set out separately in the consultation document it is proposed that these will be dealt with together. The FLAC telephone information line highlights an urgent need for basic information and advice about family law and related areas. It is very clear that people who contact the phone line have no idea of what rights and entitlements they may have in a family breakdown situation. A comprehensive, well-resourced legal aid system that would be able to provide legal information, engage in educational programs, provide legal aid and advice in family law and related areas like housing, social welfare, and debt which would be able to proactively target and be accessible to people in poverty and extreme poverty, provide unbundled legal services for lay litigants, and which could locate offices in the new family court building, is an essential foundational service and should be an integral part of the new family justice system.

### **Establishing a Family Court - An Access to Justice Issue**

We note and welcome the commitment in the Department of Justice's Statement of Strategy to establish a Family Court and a transformed family justice system.<sup>14</sup> FLAC is broadly supportive of establishing a Family Court as a division of the existing court structure. FLAC had previously welcomed the commitment to ensure that court facilities across the country are suitable for family law hearings so that these can be held separately from other cases.<sup>15</sup>

However, we are concerned that no budgetary information or implementation strategy has been published. Given the absence of clear plans, it is difficult to assess how a new Family Court will have a meaningful impact on the matter of waiting times, or develop effective mechanisms

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<sup>14</sup> In 2020, we welcomed the Programme for Government's Commitment to enact a Family Court Bill to create a new dedicated Family Court within the existing court structure and provide for court procedures that support a less adversarial resolution of disputes

<sup>15</sup> Programme for Government; Our Shared Future, 2020.

for hearing the voice of the child, make improvements in court facilities, access to the courts or provide the necessary ancillary services.

Previous governments had planned for a new family law and children's court complex at Hammond Lane to be completed in 2020. Some work has begun, and although the design stage is being finalised, the project has yet to go to tender.<sup>16</sup> Though the total capital budget for the Courts Service in 2020 was €66.017million, €15.380million of which will be allocated for courthouse capital works for a variety of courthouses around the country, it is not clear what separate facilities and buildings will be provided.

FLAC notes that the Courts Service has stated that improved court accommodation and facilities is a strategic priority for them.<sup>17</sup> Investment in some court buildings has improved a small number of facilities. However, significant investment is required in order to ensure that the courts infrastructure meets the needs of the public. While there are proposed courthouse developments included in the National Development Plan, these are specifically for new or refurbished courthouses in regional cities and county towns, in addition to the development of the Family Law and Children Court at Hammond Lane. There are also proposals for regional family law centres, however the allocation and timing of funding has not yet been published.

FLAC notes that the General Scheme of the Family Court Bill provides for the creation and alteration of District Family Court districts allowing the Courts Service after consultation with the Principal Judge of the District Family court and the President of the District Court to divide the circuits into convenient geographical areas. It is not clear whether these newly created family courts will be expected to slot into the already existing, and often insufficient, courts facilities and buildings. There is a need to invest substantially in appropriate physical infrastructure for new family courts.

In October 2019, the Joint Oireachtas Committee on Justice and Equality published a report on Reform of the Family Law System following extensive consultation with stakeholders. Following their deliberations, the Committee recommended a review of the physical infrastructure of the family law courts with a view to producing a blueprint for a modern and family friendly court structure. The Committee supported a model of family law courts that would operate as regional hubs with sittings set aside exclusively for family law, and more efficient case management systems that are child focused. The Committee also suggested that legislation for new family courts should provide for the development of a comprehensive set of overarching rules and practice guidelines to be applied uniformly across divisional courts to ensure a more unified and coherent approach to family law proceedings.

## **Other facilities and supports**

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<sup>16</sup> <https://www.kildarestreet.com/wrans/?id=2020-11-17a.1684&s=hammond+lane#g1685.q>

<sup>17</sup> Courts Service of Ireland Annual Report 2019, Strategic Priority 5

It is clear that a new Family Court will be established in Ireland, but if it is to be functional and not simply replicate or worsen the problems of the existing court system, then there must be a serious exploration of establishing a statutory obligation to provide ancillary services to which the family courts must have, that would ensure meaningful access to justice.

A new Family Court structure needs ancillary social services where individuals might access parenting information, domestic violence support and resources, anger management programmes, family therapy and addiction counselling spaces, facilities to monitor custody and access orders, and translation services. There must be appropriate consultation and negotiation rooms. The courts must also have access to suitably qualified persons providing Section 32 and Section 47 reports on both the wishes of the children and the best interests of the children.

## **Litigants in Person**

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 in family law cases and who are desperately in need of assistance, advice and representation which FLAC does not have the resources to provide. The General Scheme of the Family Court Bill will not alter this position.

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. There has also been significant research in Northern Ireland.<sup>18</sup>

The General Scheme proposes to amend the jurisdiction of the Court. If this is implemented, this is likely to increase the number of lay litigants seeking to access the District Court.

Research in Northern Ireland and the UK on litigants in person should inform the development of the new family law system. FLAC recommends introduction of a statutory obligation upon the Courts Service to ensure that lay litigant services are provided by the Courts. Information and advice services for lay litigant should be integral to the new family court system and should be provided as a vital ancillary services to be accommodated within the new structures. This should include establishing liaison person roles for persons at Court sittings who could provide practical information to assist lay litigants.

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<sup>18</sup> Litigants in Person in Northern Ireland

## **Consultation Topic: The place of mediation in family justice**

- **The desirability of using mediation to resolve family law issues**
- **Maximising family court users' understanding of the role mediation can have in settling family disputes**
- **Interdisciplinary training in mediation for family justice practitioners**

**Should mediation be a requisite to initiating or progressing family law proceedings with the court only being required in irresolvable cases or as the last step?**

### **Mediation should not diminish Access to Justice.**

It is noted that one of the Guiding principles in Head 5 of the Bill is *“encouraging and facilitating as far as possible the resolution of issues in dispute by means of alternative resolution methods, such as mediation, unless resolution by such means would not be appropriate due to the nature of the proceedings”*.

The Mediation Act 2017 imposes requirements on the providers of legal services to make a Statutory Declaration confirming that they have advised separating clients (Section 5 and 6 of the 1989 Act) and divorcing clients (Section 6 and 7 of the Family Law (Divorce) Act 1996) that they have discussed and advised their clients about, inter alia, reconciliation, engaging in mediation, effecting a separation by means of deed or agreement and furnishing clients with appropriate contact details.

Given the socially protective nature of family law and the often significant disparity in power and resources between parties any alternative dispute mechanism, including mediation, should not dilute the vindication of rights. However, meaningful access to justice should ensure that while mediation is available and used where appropriate; access to the courts and legal advice and representation should also be available where mediation is not going to be an appropriate mechanism to resolve a family law issue.

The literature on alternative dispute resolution models reveals that: *“the apparent informality of alternative processes can replicate existing power disparities”*. In FLAC’s experience this is particularly true for more vulnerable claimants attending mediation who may not have access to legal advice, and who may have language, literacy or mental health issues.

Some cases are wholly unsuitable for mediation, where there is abuse including coercive control or a significant power imbalance or where either party refuses to engage in mediation.

The use of mediation is desirable if it meets the needs of the parties involved in the family law disputes in suitable cases. FLAC agrees that ADR should be encouraged and facilitated in suitable cases by legal practitioners and by the Courts in the context of case management but only if it is in the best interests and choice of the parties.

While mediation may have a role to play in certain disputes, it is not appropriate in all cases, even in what might appear straightforward cases. Mediation should never be imposed on parties. It is a fundamental feature of mediation that it is a voluntary process and it is vitally important that any increased recourse to mediation is based on the informed consent of the parties. Mediation works best when it is truly voluntary, when the parties bona fide agree to come together to resolve their disputes. In order to be truly voluntary parties should be made aware of their rights and entitlements before they enter into the process in order to ensure that the consent to the mediation agreement has been fully informed. They should be advised of matters such as that one party in a mediation process is under no obligation to make full disclosure of the assets and resources. Parties should be advised on the legal consequence of matters such as a pension adjustment order or the implications of any settlement agreement on their social welfare entitlements. Parties should have legal advice available to them in relation to the proposed settlement. They should be advised on the likely outcome if the matter was to proceed to court. Parties should be informed that a mediator is not obliged to inform parties of what their legal entitlements are.

It is very striking the number of callers to the FLAC telephone information line who have no knowledge whatsoever of their rights and entitlements under family law legislation. FLAC would have grave concerns about these Parties being directed into a mediation process without legal advice and if necessary legal representation.

It is vital that the voluntary nature of mediation is absolutely evident to the parties concerned throughout the whole process and that any new procedures make it clear that the parties may refuse or withdraw from mediation at any stage without any penalty. While mediation can and should be encouraged it should not be imposed on parties who refuse to mediate.

If the mediation settlement is to be achieved by informed consent, it is vital that parties at the outset are fully informed of their rights and entitlements and the likely outcome should the parties chose to go to court instead.

it is important to bear in mind the role of the Courts in ensuring the constitutional right of access to justice. Lord Reed in the UK Supreme Court in the case of R (on the application of UNISON) [2017] UKSC 51 in a powerful judgment that attracted the concurrence of his seven fellow justices, stated that:

*“Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by parliament and the common law created by the courts themselves are applied and enforced.” (Lord Reed, per para 68)*

FLAC is concerned that the emphasis on mediation in the consultation paper should not detract from the basic function of the Courts under family law is to vindicate rights. However it is only one solution and should be easily accessible and available and one of the ancillary services available. Even with mediation you will need lawyers to be available in the background to advise on matters such as failure to financially disclose, the implications of a pension adjustment order, the implications of a settlement on social welfare entitlements and the proposed settlement.

FLAC has serious concerns that the legal aid system and the Courts system which are fundamental to the administration of Justice have been inadequately resourced to date. FLAC is concerned that mediation is seen as a way to reduce the need for adequate resourcing of the Courts and legal aid system. It is not and should not be the purpose of mediation to mitigate the need for adequate court and legal aid services. Mediation should be viewed as one solution but not the solution or the dominant solution to access to the courts to enforce protective rights.

Expanding mediation services has the potential to be a positive development, but it will not address the overall remaining problem of a lack of access to state funded civil legal aid for those who need it but fall outside of the eligibility criteria and participate as lay litigants because they cannot afford legal fees. Participation in mediation should be voluntary rather than a last resort or imposed solution for those seeking to access the courts.

## **Consultation topic: THE FAMILY COURTS**

### **What issues should always be prioritised for hearing.**

It has been stated earlier that given the importance of family law for society that the Courts Services should prioritise the allocation of resources to family law disputes.

FLAC has some concerns in relation to this question. It is the function of the courts to adjudicate on the matters that come before it. There is a constitutional right of access to the Courts. The legislature has enacted legislation which provides certain rights entitlements and protections in the area of family law. It is the function of the Courts to adjudicate on those matters. It is not the function of the Courts services to prioritise the hearing of certain issues as opposed to others. This is not to say that urgent issues should not receive priority.

However it has been FLAC's experience that the Legal Aid Board in the allocation of certs prioritises domestic violence applications. This on the face of it may be appropriate but it has ended up that applicants will have received legal aid in barring order or safety order applications but will not necessarily receive a legal aid cert for subsequent and related custody or maintenance issue and have to represent themselves in subsequent hearings. This is not appropriate or desirable and may lead to applicant forgoing their rights and entitlements rather than facing their abuser in person.

Further it is unclear as to who would make decisions as to priorities? The Court services, the Judges? Applicants who are rights holders should have the opportunity to make the case that their issues need to be dealt with by the Courts, rather than the courts services deciding without any opportunity for consultation, that their issue is not a priority.

It is to be hoped that the posing of this question does not suggest that it is envisaged that contemplation is being given to this sort of rationing of Court time. Further it would not be an efficient use of Court time to consider domestic violence issues and then to have a series of court hearings involving the same parties over extended periods of time.

## **Consultation Topic: Reimagining the structure of civil legal aid in family justice**

- **Should a greater focus of the system of civil legal aid be on the promotion and use of non-court based solutions to family issues where these are possible?**
- **In addition to mediation, is there scope within a civil legal aid system for utilising other ADR mechanisms including but not exclusively arbitration and collaborative law as a means of achieving family justice?**

### **Legal Aid in family justice - more than legal advice and representation!**

#### **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. 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 effective remedy and legal aid for those who lack sufficient resources in order 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. Access to legal aid will be a key factor in the success of any reformed Family Court structure in Ireland. FLAC welcomed the Minister for Justice's recent announcement to review the civil legal aid scheme in Q3 2021.

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 functions of the Legal Aid Board are limited. The legal aid does not have an explicit function to provide legal information to the public. It is not required to engage in research on unmet legal need or make representations on law reform to the relevant Minister, notwithstanding that it is ideally placed to do both. It has been FLAC's experience that there is a huge unmet need for basic legal information especially in matters like family law. There is a very strict means test. 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. Advice. FLAC successfully campaigned for the financial contribution to be waived in domestic violence cases. The accommodation and childcare allowances are completely out of date. If a person does not satisfy the means test there is no facility for the Legal Aid Board to provide legal aid. There are lengthy waiting times in many law centres, although domestic violence cases are prioritised .

The Legal Aid Board tends not to provide legal aid in core areas related to family law in areas such as housing and debt which are clearly within its remit. For instance the strict operation of the merits has meant that many people facing family home repossessions have not been granted legal representation even though this may have increased their capacity to negotiate a settlement or delay the repossession of the family home.

In many cases members of the public have no option but to attempt to represent themselves and this is very evident in persons representing themselves in the District Court in family law cases.

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. Family law litigation may also be connected to 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.

There has been a growing consensus of the need to reform the legal aid system. We look forward to participating in the review of civil legal aid later this year. FLAC believes that such a review should be an external root and branch review of the legal aid system by a committee composed of relevant external stakeholders chaired by an independent person of considerable status. The review should consider matters such as the functions of the Legal Aid Board, its resources, the criteria for legal aid (including the means test, and financial contributions), the areas of law covered, and the methods of service delivery. It should also examine what steps are necessary to ensure that the system is compliant with the State's obligations under the ECHR and the Charter of Fundamental Rights, as well as the public sector equality and human rights duty contained in section 42 of the Irish Human Rights and Equality Commission Act 2014.

It is understandable that those examining the operation of Family Law may not wish to pre-empt the outcome of any review of civil legal aid in Ireland. However, it is important that the civil legal aid scheme is considered by the Family Justice Oversight Group given that many of the difficulties pertaining to access to justice in family law terms are rooted in problems with accessing legal aid. Civil legal aid cannot be separated easily from any of the issues set out in this submission.

It is vital that reform of the legal aid system is integral to reform of the family law system. However, it should not be the case that any reforms undertaken simply reinforce the idea that civil legal aid is solely for family law. While the Family Justice Oversight Group is concerned with family law, it should also take into consideration that the absence of civil legal aid for social welfare appeals and housing matters can have a significant knock-on effect on family law cases and can often compound matters.

## **Should a greater focus of the system of civil legal aid be on the promotion and use of non-court based solutions to family issues where these are possible?**

FLAC is concerned about this question and believes that it fundamentally fails to have regard to access to justice, and the significant extent of unmet legal need that exists in family law areas. The primary reason that the Legal Aid Board was established was on foot of the judgement of the European Court of Human Rights which found that Ireland had failed to comply with its obligations under the ECHR in view of its failure to provide Mrs Airey with legal aid in her Family law proceedings. There is very significant unmet legal need in the area of family law. There are a significant number of parties representing themselves in domestic violence applications in the District Court.

The focus needs to be on the prioritisation of legal aid in circumstances where mediation is not appropriate and ensuring that legal advice is available to parties engaged in mediation. The Legal Aid Board provides legal aid and advice primarily through solicitors employed in the Law Centres or through its private practitioner scheme. All of the solicitors involved in the provision of legal aid and advice are officers of the Court and are under a professional ethical obligation towards their clients. While the Mediation Act 2017 requires solicitors to advise all clients engaged in litigation to consider mediation as a means of resolving their dispute, it would be wholly inappropriate for solicitors involved in the provision of legal aid and advice to be promoting the use of a particular non-court based solution to family law issue if it was inappropriate for their clients just because it was a possible solution. They should only be encouraging such a course of action where it is appropriate and meets the needs of their clients. Their focus has to be on what is in the best interests of their client. Further it must be remembered that the current family mediation service that is provided by the Legal Aid Board, parties are not provided with legal representation by the Legal Aid Board. It would be important that if a legally aided party was to engage in mediation that they would still be able to receive legal advice in relation to the mediation.

## **Consultation topic:Voice of the Child**

- **How best to incorporate the voice of the child?**
- **How can the proposed new system of family justice be made more child friendly?**

### **How can we keep children informed in the family court system?**

#### **Child's Best Interests**

Article 42A was inserted into the Constitution in 2012 enshrining the right of children to be heard in family law proceedings where the child is capable of forming views. Section 32 of the Children and Family Relationships Act 2015 gives effect to this right and requires the Courts to hear the voice of the child with due regard to their age and maturity. Under this Act, the court may appoint an expert to determine the views of the child through providing expert reports.

The volume of cases and lack of judges to manage them, can impact on the voice of the child being heard in many cases. This creates delays and increases costs for all parties when cases are required to return on the next sitting. In practice, despite the constitutional right of the child to be heard, the inadequate facilities, delays, lack of services and lengthy proceedings mean there are significant barriers to this right being realised.

The lack of resources also negatively impacts on this. While regulations fix the cost of an expert report at €250 or €300, the Law Society have emphasised that the cost of procuring an expert report is in the region of €3,000-4,000. For parties involved in proceedings who cannot pay these costs, an expert will not be appointed. For those entitled to legal aid, the Legal Aid Board will cover 50% of the cost but this will only cover a very small proportion of those involved in family law proceedings. In practice, the default position in family law proceedings is that the views of the child are not ascertained at all, or they may be ascertained by judges who are not specifically trained to do so without the assistance of an expert.

The absence of a structured framework in how these matters are approached has resulted in a lack of consistency from the Courts. There is a clear need for a legislative framework that ensures a multi-disciplinary approach to ensure that the voice, welfare and best interests of the child are front and centre of decision-making. While the General Scheme of the Family Court Bill 2020 refers to judicial training, it is not clear what form this will take. FLAC notes the Oireachtas Committee on Justice and Equality previously stated that appropriate training should be a mandatory requirement and provided examples from other jurisdictions.

FLAC has previously highlighted this in the context of noting difficulties in the inadequate provision of civil legal aid. There is a clear need for a state service, that could be provided through the Legal Aid Board, that would ensure expert reports were provided where children were concerned. Alternatively, a state Guardian ad Litem service may be appropriate.

## **Conclusion**

FLAC welcomes the opportunity to engage with the Family Justice Oversight Group.

A family justice system that meets the needs of the community and those involved in family law proceedings is long overdue. The Report of the Oireachtas Committee on Justice and Equality on Family Law Reform, the publication of the General Scheme of the Family Court Bill 2020, the establishment of the Family Justice Oversight Group and the planned review of the civil legal aid scheme in Q3 2021 indicates that there is significant appetite for reform.

However, FLAC is acutely aware that major reforms often require significant levels of funding to ensure that many of the current problems are not simply replicated or actually worsened.

A new and more accessible civil legal aid scheme, alongside new Court facilities containing ancillary services is required. A holistic approach must be taken in delivering family law reform, new Courts will not be much use to those who cannot afford to access them, and civil legal aid for a lone parent seeking a safety order will not suffice if that parent is also struggling to fight an eviction notice alone and without legal support. Expanded access to mediation services may be beneficial to some, but will be wholly unsuitable for others.

As set out above, there are many difficulties with the current Court facilities available due to chronic and consistent underfunding since they were established. Far reaching changes will mean very little to those who cannot access it without legal representation or advice, and it will mean little to the children involved in proceedings who cannot have their voice heard because of a lack of resources allocated to the task.

Radical reforms present opportunities for significant progression and improvements. However these opportunities will be lost if legislative changes are not accompanied by the significant funding.

Access to justice should not be preserved solely for those who can afford it. FLAC, as a body consistently serving the unmet legal needs of those who are not provided for by the current system, urges the Family Justice Oversight Group to take on board our concerns, as well as the

concerns of the Oireachtas Committee on Justice and Equality, and other stakeholders working in the family law sector.

## **Appendix 1**

### **VULNERABILITY AND FAIRNESS DATAPOINTS**

Individual attributes to be captured Vulnerability Digital Exclusion.

Equality Act 2010

- 1 Age
- 2 Disability
- 3 Employment status/Income
- 4 English as a foreign language
- 5 Gender reassignment
- 6 Highest level of education (proxy for literacy)
- 7 Postcode (Permanent address, to identify whether in a care home, homeless, in an area of low internet coverage etc.)
- 8 Pregnancy and maternity
- 9 Race
- 10 Religion or belief
- 11 Sex
- 12 Sexual orientation
- 13 Fear or distress connected with the case e.g. domestic violence/abuse, in detention, survivor of trafficking/trauma.