



**FLAC Submission to the  
Independent Anti-Racism  
Committee's Public  
Consultation:  
Towards a National Action  
Plan against Racism in  
Ireland**

**July 2021**

## About FLAC

FLAC (Free Legal Advice Centres) was founded in 1969 and is one of Ireland's oldest civil society organisations. It is a voluntary, independent, legal and human rights organisation which for the last fifty years has been promoting access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights.

FLAC makes policy recommendations to a variety of bodies including international human rights bodies, drawing on its legal expertise and providing a social inclusion perspective.

FLAC works in a number of ways, it:

- Operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information.
- Runs a nationwide network of legal advice clinics in 71 locations around the country where volunteer lawyers provide basic free legal advice to approximately 12,000 people per annum.
- Is an Independent Law Centre that takes cases in the public interest, mainly in the areas of homelessness, housing, equality and social welfare.
- Operates a legal clinic for members of the Roma Community.
- Has established a dedicated legal service for Travellers.
- Operates the public interest law project PILA that operates a pro bono referral scheme that facilitates social justice organisations receiving legal assistance from private practitioners acting pro bono.
- Engages in research and advocates for policy and law reform in areas of law that most affect the marginalised and disadvantaged.

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## Introduction

FLAC welcomes the opportunity to make this submission to the Independent Anti-Racism Committee's Public Consultation: "Towards a National Action Plan Against Racism in Ireland".

In making this submission, FLAC has had regard to the Independent Anti-Racism Committee's (the Committee) Interim Report to the Minister for Children, Equality, Disability, Integration and Youth<sup>1</sup> and the Committee's Consultation Document<sup>2</sup>. FLAC welcomes the recommendations made by the Committee in its Interim Report, as well as the Guiding Principles and Understandings of Racism adopted by the Committee.

FLAC has a longstanding commitment to promote human rights, equality and access to justice for all. Recent and ongoing work, which informs this submission, includes:

- In 2017, FLAC was invited to be an associate partner in the JUSTROM Programme, a joint programme of the Council of Europe and the European Commission, which aims to improve the access to justice for Roma and Traveller women. Throughout 2017 to early 2018, FLAC facilitated the operation of legal advice clinics aimed at the Traveller and Roma communities, which provided legal advice and advocacy services. In June 2018, FLAC began operating a dedicated legal clinic for the Roma community, which is supported by the Department of Children, Equality, Disability, Integration and Youth.
- The Traveller Legal Service (TLS) was launched in July 2020. It functions under the auspices of a Steering Group of Traveller organisations and its purpose is to address the unmet legal need of the Traveller community

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<sup>1</sup> Independent Anti-Racism Committee (2021) *Interim Report to the Minister for Children, Equality, Disability, Integration and Youth*. Available at: <https://www.gov.ie/pdf/?file=https://assets.gov.ie/132151/ed3f39e2-4aa1-4991-aa06-52beae8310db.pdf#page=null>

<sup>2</sup> Independent Anti-Racism Committee (2021) *Towards a National Action Plan Against Racism for Ireland: Public Consultation 2021*. Available at: <https://www.gov.ie/pdf/?file=https://assets.gov.ie/132788/85f75bfc-0154-46f7-b947-f25513e9070a.pdf#page=null>

through legal representation and the provision of legal training to Traveller advocates.

- As an Independent Law Centre, FLAC engages in litigation in the Public Interest. In 2020, the majority of this casework was undertaken on behalf of callers to the Roma Legal Clinic and Traveller Legal Service. More generally, almost one-third of casefiles related to the area of Equality/Anti-Discrimination law.<sup>3</sup>
- The Equal Access Project is a two year project of FLAC and INAR which is co-funded by the European Commission, Directorate-General for Justice and Consumers under the Rights Equality and Citizenship Programme (DG-JUST). The Project, which commenced in February 2021, seeks to build the capacity of advocates to represent claimants on the Race, Ethnicity and Traveller Community Grounds under the Employment Equality Acts (EEA) and Equal Status Acts (ESA) before the Workplace Relations Commission. It also seeks to test whether the Race Directive as implemented into Irish law is an effective remedy.
- The Traveller Equality and Justice Project is a collaboration between FLAC and the Centre for Criminal Justice and Human Rights at the UCC School of Law. It is supported by a grant from DG-JUST. The Project will establish a legal clinic which will seek to highlight the discrepancies that exist within the current equality system and the measures needed to overcome this. In its operation the Clinic will provide legal research supports for lawyers representing members of the Traveller Community in equality and discrimination cases while also providing training to lawyers and Traveller Community groups.
- As an independent human rights and equality organisation, FLAC makes policy recommendations to national and international bodies, including human rights bodies. In December 2019, in Geneva, FLAC made a detailed written submission and oral presentation to the UN Committee on

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<sup>3</sup> FLAC (2021) *Remote Justice: FLAC Annual Report 2020*. Available at:  
<https://www.flac.ie/publications/flac-annual-report-2020/>

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the Elimination of Racial Discrimination (UNCERD) for the examination of Ireland's combined fifth, sixth and seventh periodic report to that Committee.<sup>4</sup> In its concluding recommendations, UNCERD adopted several of the recommendations made by FLAC.<sup>5</sup> UNCERD adopted FLAC's recommendations to "explicitly [include] the functions of public authorities within the definition of the 'services' in Section 5 of the Equal Status Acts"; and, "[ensure] that an effective remedy is provided for discrimination that has a legislative basis". FLAC's recommendations in relation to legal aid were also adopted and UNCERD recommended that Ireland "extend the scope of the Legal Aid Board to the areas of law that are particularly relevant to Traveller and other ethnic minority groups, including by designating the Social Welfare Appeals Office and Workplace Relations Commission as prescribed tribunals under Section 27(2)(b) of the Civil Legal Aid Act 1995". Finally, UNCERD adopted FLAC's recommendations in relation to racial profiling including a recommendation to introduce "legislation prohibiting racial profiling".

Finally, FLAC welcomes the Committee's commitment to preparing a Draft National Action Plan against Racism for Ireland which is rights-based, action-oriented and comprehensive in scope. This submission will address areas which are most relevant to FLAC's work in promoting equal access to justice for all and make recommendations as to matters which should be addressed in the National Action Plan Against Racism. FLAC would be happy to meet with the Committee to discuss the matters addressed in this submission.

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<sup>4</sup> FLAC (2019) *Submission of FLAC to the UN Committee on the Elimination of Racial Discrimination for the examination of Ireland's combined fifth, sixth and seventh periodic reports*. Available at: <https://www.flac.ie/publications/flac-submission-to-icerd-1/>

<sup>5</sup> UN Committee on the Elimination of Racism (2019) *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR. Available at: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT\\_CERD\\_COC\\_IRL\\_40806\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf)

## Recommendations

### 1. Access to Justice

- The Committee should recognise Access to Justice as a cross-cutting area of public policy which may inform the National Action Plan against Racism for Ireland as a whole.
- The National Action Plan against Racism for Ireland should ensure that representative NGOs are given unambiguous legal standing in appropriate cases to initiate proceedings on behalf of those affected by racism.
- The National Action Plan against Racism for Ireland should ensure that NGOs are adequately resourced to carry out advocacy and representation for those affected by racism.
- The National Action Plan against Racism for Ireland should provide that the Department of Justice and Legal Aid Board implement the recommendations of UNCERD and UNCESCR in relation to the provision of Civil Legal Aid. This includes expanding the scope of the civil legal aid scheme to include the provision of legal aid where legal advice and representation is required in quasi-judicial tribunals such as the Workplace Relations Commission and Social Welfare Appeals Office. It also includes ensuring that civil legal aid is available in eviction cases. To achieve this, the Plan should direct the Minister for Justice:
  - to designate the Social Welfare Appeals Office and Workplace Relations Commission as “prescribed” tribunals for the purposes of Section 27(2)(b) of the Civil Legal Aid Act 1995, as recommended by UNCERD.
  - to amend the Civil Legal Aid Act 1995 by the substitution in subsection (9)(a)(ii) of ‘disputes concerning rights and interests

over land' with 'disputes concerning rights and interests over land which is not the principal private residence or family home of the applicant within the meaning of section 2(2) of the Family Home Protection Act 1976', in line with the recommendation of UNCERD.

- The National Action Plan against Racism for Ireland should provide that the planned review of the Civil Legal Aid scheme will be conducted with a view to ensuring that Ireland complies with its obligations under regional and international human rights instruments. This can only be achieved through a comprehensive, independent review of the civil legal aid system which examines the functions of the Legal Aid Board, its resources, and:
  - The criteria for eligibility for legal aid (including the means test, and financial contributions);
  - The mechanisms for applications for legal aid and appeals from decisions refusing legal aid;
  - The system of contributions and waivers;
  - The accessibility of services to persons in need of legal aid and assistance (including persons in institutional settings);
  - The areas covered by legal aid in practice and gaps in provision.
- The National Action Plan against Racism for Ireland should direct the Legal Aid Board to engage in targeted information campaigns which provide information to people from minority ethnic and migrant backgrounds as to the availability of their services in areas including family law, housing, homelessness, and discrimination claims against licenced premises.
- The National Action Plan against Racism for Ireland should direct the Citizens Information Board to engage in targeted information campaigns which provide information to people from minority ethnic

and migrant backgrounds as to their rights and entitlements in areas including equality, housing, social welfare and legal aid.

- The National Action Plan against Racism for Ireland should provide for the provision of dedicated legal services for marginalized groups, including through the provision of long-term funding for fully resourced dedicated legal services for Travellers and Roma.

## 2. Judicial Review & Access to the Courts

- The National Action Plan against Racism for Ireland should provide that High Court Practice Direction 81 is withdrawn and replaced, only if strictly necessary, with a Practice Direction that takes into account the views of the various stakeholders concerned with the asylum list, but which avoids any encroachment on the proper jurisdiction of the Superior Court Rules Committee.
- The National Action Plan against Racism for Ireland should provide that the Department of Justice conduct a comprehensive and meaningful consultation on the implementation of the Review of the Administration of Civil Justice report. Such a review must be conducted before the recommendations contained in the report are implemented. Such consultation should include statutory bodies with an important role in this field such as the Legal Aid Board, the Irish Human Rights and Equality Commission, the National Disability Authority and the Citizens Information Board. It should also include representatives from civil society or independent law centres like FLAC, Mercy Law Resource Centre, the Immigrant Council of Ireland, the Irish Refugee Council and Community Law and Mediation, that provide legal services, advice and information to thousands of individuals and families every year who otherwise would have no access to justice. In addition, it should involve groups that provide information, legal advice

and advocacy to lay litigants such as FLAC, MABS and the Citizens Information Services as well as academics with expertise on access to justice.

### **3. The Public Sector Human Rights and Equality Duty**

- The Public Sector duty should be a core consideration of the Independent Anti-Racism Committee in carrying out their work and in the recommendations and actions contained in the National Action Plan against Racism for Ireland.
- The National Action Plan against Racism for Ireland should direct all statutory and public bodies to comply with their obligations under section 42 of the Irish Human Rights and Equality Act 2014, including their obligations under section 42(2) to “assess”, “address” and “report”.
- The National Action Plan against Racism for Ireland should direct the Department of Justice to ensure that the Public Sector Duty is a core consideration of the forthcoming review of the Civil Legal Aid Scheme. The review must be conducted with a view to ensuring the system of legal aid is compatible with the public sector human rights and equality duty and the State's obligations under European and international law.
- The National Action Plan against Racism for Ireland should direct all public bodies involved in the administration of justice to have particular regard to the Public Sector Duty in performing their functions. In this regard, we ask the Committee to consider the findings and recommendations of FLAC's forthcoming research on the implementation of the duty by such bodies upon its publication.

## 4. Equality

- In light of the Committee's understanding of racism as a "dynamic, living phenomenon", the National Action Plan against Racism for Ireland should provide for periodic, independent reviews of national equality law and its operation.
- The National Action Plan against Racism for Ireland should provide that any proposed amendments to Ireland's equality legislation should ensure the legislations compliance with regional and international instruments such as the Racial Equality Directive and UNCERD. To do so, the National Action Plan against Racism for Ireland should provide that:
  - As recommended by UNCERD, the definition of services in the Equal Status Acts is amended to explicitly include the functions of the State, in order to ensure that bodies like An Garda Síochána, the Prison service and the Immigration Services are brought within the prohibition on discrimination and harassment.
  - As recommended by UNCERD, the exemptions in section 14 of the ESA need to be reviewed and amended to ensure that the State and public bodies are not exempted from the legislation and to ensure compliance with international and EU obligations.
  - The discriminatory grounds need to be reviewed and should be amended to include a disadvantaged socio-economic status ground.
  - As recommended by UNCERD, the legislation also needs to provide protection against intersectional discrimination, the multiple and combined forms of discrimination experienced by marginalized individuals and groups such as Roma women.

- In line with the recommendation of UNCERD, the provisions of the Intoxicating Liquor Act 2003, which transfer the jurisdiction for certain discrimination complaints against licensed premises to the District Court, must be repealed.
- The National Action Plan against Racism for Ireland should propose that Article 40.1 of the Constitution is amended to provide for strengthened and enforceable equality rights including economic, social and cultural rights.

## 5. Social Welfare

- The National Action Plan against Racism for Ireland should provide for an independent review of the Habitual Residence Condition which examines its compliance with human rights and equality standards, as well as EU law. The purpose of such a review should be to identify steps to eliminate the condition's discriminatory impact on access to social welfare among disadvantaged and marginalized individuals and groups such as Roma, as recommended by UNCESCR.
- The National Action Plan against Racism for Ireland should provide for the Department of Social Protection to take steps to address UNCESCR's concerns as to the quality of first-instance social welfare decision-making, including in relation to the application of the Habitual Residence Condition.
- The National Action Plan against Racism for Ireland should provide for an independent review of rules in relation to entitlement to social welfare payments during absences from the State, and the enforcement of those rules, by reference to human rights and equality standards, as well as EU law.

## 6. Housing

- The National Action Plan against Racism for Ireland should provide that the Department of Housing, Local Government and Heritage implement the recommendations set out in the Expert Review Group on Traveller Accommodation's report without delay, and within a specified timeframe, through legislation and any other measures necessary.
- The National Action Plan against Racism for Ireland should provide that the Department of Housing, Local Government and Heritage and the Department of Justice review the legislation allowing for summary evictions without judicial oversight. The Government should bring forward reforming legislation in relation to evictions that ensures that, other than in the most exceptional of circumstances, a family home can never be interfered with in the absence of a merits based determination involving a proportionality assessment by a Court accompanied with a requirement to offer alternative appropriate accommodation to homeless families.
- The National Action Plan against Racism for Ireland should provide for the repeal of Section 19C of the Criminal Justice (Public Order) Act 1994 (the so-called "criminal trespass" legislation).
- The National Action Plan against Racism for Ireland should provide for a review of the frequency of the use of the eviction procedures identified by the European Committee of Social Rights as transgressing Article 16 and the establishment of a central database to record use of the relevant provisions against Travellers.
- The National Action Plan against Racism for Ireland should provide that the Minister for Housing, Local Government and Heritage immediately review the Guidelines published in 1998 in relation to Traveller Accommodation; to update guidance in relation to the design and delivery of Traveller Accommodation standards, and; to amend the

Housing (Standards for Rented Houses) Regulations 2019 to include halting sites (including transient, temporary and permanent halting sites).

- The National Action Plan against Racism for Ireland should provide that the Minister for Housing, Local Government and Heritage withdraw the Housing Circular 41/2012 or, at the very least, amend it to ensure its compliance with EU law and to eliminate its discriminatory impact on groups such as Roma. This would accord with the recommendation of UNCERD to “improve access to social housing by...Roma.”

## 7. Racial Profiling

- The National Action Plan against Racism for Ireland should provide for the full implementation of the recommendations of UNCERD in relation to racial profiling to:
  - (a) Introduce legislation prohibiting racial profiling;
  - (b) Put in place an independent complaints mechanism to handle racial profiling;
  - (c) Review, in collaboration with communities mostly affected by racial profiling, policy, practices and training of An Garda Síochána;
  - (d) Incorporate racial profiling issues into the training curriculum of police officers;
  - (e) Fully implement the Garda Diversity and Integration Strategy 2019-2021;
  - (f) Collect disaggregated data on racial profiling and regularly publish it, and provide the data in its next periodic report.
- The National Action Plan against Racism for Ireland should provide that the Government engage in periodic reporting outlining the monitoring of

racial profiling in practice, including through the Public Sector Duty under Section 42 of the Irish Human Rights and Equality Commission Act 2014 and in relation to any proposals to address deficits in the area.

- The National Action Plan against Racism for Ireland should provide for legislative measures that would allow individuals, or groups representing their interests, to make complaints through the Workplace Relations Commission (WRC) in relation to discrimination, including discriminatory profiling, that would allow for such allegations to be investigated and remedied independently.
- The National Action Plan against Racism for Ireland should provide that section 15 of the Housing (Miscellaneous Provisions) Act 1997 is amended to clarify the exact nature of the information which may be exchanged between local authorities and An Garda Síochána, having regard to the right to privacy and proportionality. Further, the Minister for Housing should issue guidance to local authorities on the statutory vetting process for applicants for social housing, setting out the statutory limits on that process and their obligations under the GDPR. Similar guidance should also be provided to members of An Garda Síochána about their role in vetting applicants for local authority housing.

## 1. Access to Justice

Access to justice is a fundamental human right and is recognised as such under a range of regional and international instruments. The Committee has identified Access to Justice as a specific area of public policy which will be central to its work.

While it has no single precise definition, access to justice includes knowledge of and access to the legal system as well as whatever legal services are necessary to achieve a just outcome. Access to justice includes access to legal aid. It also encompasses states' obligations to vindicate and protect human rights and access to fair systems of redress, effective remedies and just outcomes.

The same international and regional instruments to which Ireland is subject and which are concerned with combatting racism, are also concerned with the right of access to justice. Article 7 of the Racial Equality Directive obliges EU Member States to ensure that judicial and administrative procedures are available to victims of racial discrimination to enforce their right to equal treatment. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the right of fair procedures and states that "all persons shall be equal before the courts and tribunals". 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 which guarantees the rights to a fair trial, to an effective remedy and to legal aid to those who lack sufficient resources, so far as this is necessary 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.

In the absence of access to justice, people are unable to exercise and vindicate their rights, have their voices heard, challenge discrimination, or hold decision-makers and executive power to account.<sup>6</sup> Unless the right of access to justice is vindicated, the risk of social and economic exclusion is greatly increased. A UN Special Rapporteur on extreme poverty and human rights has noted that groups that suffer from structural discrimination and exclusion are disproportionately represented among the poor, and

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<sup>6</sup> See United Nations Development Programme website at: <http://bit.ly/204OeWJl> and European Union Agency for Fundamental Rights and Council of Europe (2016) Handbook on European law relating to access to justice, Luxembourg: FRA and CoE, p.16

encounter additional barriers to accessing justice. Research in the area of social exclusion suggests that those who may be considered 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).<sup>7</sup>

Recent research has demonstrated the connection between legal issues and issues in accessing employment, debt, homelessness, and mental and physical health issues. In 2016, the Canadian Forum on Civil Justice's "Survey of Everyday Legal Problems and the Cost of Justice" report made stark findings on the consequences of experiencing legal problems in terms of health and employment.<sup>8</sup> The results of such surveys suggest that the cost of unresolved or prolonged legal issues to public services far outweighs the cost of investing in legal aid and access to justice which may prevent "knock-on" problems from arising.

Knowledge of legal rights, entitlements and services and access to legal information, advice and representation empowers people to enforce their rights, challenge inequalities and discrimination and combat social exclusion.

### *Access to Justice in Ireland*

Ireland's State-funded civil aid scheme is administered by the Legal Aid Board under the provisions of the Civil Legal Aid Act 1995. Its stated purpose under this legislation is "to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases".<sup>9</sup> However, significant gaps in the scheme mean that legal aid is not available for many types of cases which are particularly relevant to people from minority ethnic and migrant backgrounds, including marginalized groups such as Travellers and Roma. For example, Legal Aid is generally unavailable in

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<sup>7</sup> A Buck, NJ Balmer and P Pleasence, 'Social Exclusion and Civil Law: Experience of Civil Justice problems among Vulnerable Groups' (2005) 39 *Journal of Social Policy and Administration*, 302- 320.

<sup>8</sup> Canadian Forum on Civil Justice (2016), *Everyday Legal Problems and the Cost of Justice in Canada*. Available at: <https://www.cfcj-fcj.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>

<sup>9</sup> Civil Legal Aid Act, 1995.

discrimination cases. Further issues arise in relation to knowledge of legal rights, entitlements and services amongst marginalised groups. The important role of dedicated legal services aimed at addressing barriers to justice amongst ethnic minority and migrant groups has also been left largely unexplored.

### *The Civil Legal Aid Scheme*

Legal representation and advice under the Civil Legal Aid Scheme administered by the Legal Aid Board is not free. Following a successful campaign by FLAC, applicants no longer have to make a financial contribution in cases of domestic violence.<sup>10</sup> However, in other cases applicants must pay a financial contribution which in some instances may be quite significant.<sup>11</sup> Applicants are also subject to a very strict means test. The applicant's disposable income must be below €18,000 and the disposable capital threshold is €100,000.<sup>12</sup> If a person does not satisfy the means test there is no facility for the Legal Aid Board to provide legal aid.

Waiting times for civil legal aid is a significant issue. In January 2021, Legal Aid Board Law Centres reported waiting times of up to 44 weeks for an initial consultation with a lawyer.<sup>13</sup>

While its statutory remit is fairly broad, the vast majority of advice and representation relates to family law. In 2019, 74% of cases handled by the Legal Aid Board related to

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<sup>10</sup> FLAC Press Release (28 December 2017), *FLAC welcomes the decision of the Minister for Justice and Equality to abolish the financial contribution requirement for civil legal aid for people affected by domestic violence in the District Court*. Available at: <https://www.flac.ie/news/2017/12/28/flac-welcomes-the-decision-of-the-minister-for-jus/>

<sup>11</sup> See Legal Aid Board Information re "Paying for your civil legal aid and advice": <https://www.legalaidboard.ie/en/our-services/legal-aid-services/how-much-will-i-have-to-pay-/paying-for-your-civil-legal-aid-and-advice.html>

<sup>12</sup> See Legal Aid Board Information re "Financial Eligibility & Contributions": <https://www.legalaidboard.ie/en/our-services/legal-aid-services/do-i-qualify-/financial-eligibility-contributions.html>

<sup>13</sup> See Legal Aid Board Information re "Law centre waiting times and other statistical information": <https://www.legalaidboard.ie/en/our-services/legal-aid-services/waiting-times/>

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family law, 14% to International Protection, 4% to childcare and only 8% to "other civil matters".<sup>14</sup>

In addition to these general issues, significant gaps in the scheme mean that legal aid is not available for many types of cases which are particularly relevant to people from minority ethnic and migrant backgrounds, including marginalized groups such as Travellers and Roma.

The Legal Aid Board is precluded by law from providing representation before many quasi-judicial tribunals. This includes the Workplace Relations Commission which deals with discrimination complaints under the Equal Status Acts and Employment Equality Acts.

Employers and businesses can often afford to pay for private legal representation in equality cases before the WRC; however persons making complaints often cannot. Where a person alleging discrimination does not have such financial means and is faced with an experienced legal team on the other side, this can give rise to an inequality of arms in practice. Concerns around the absence of legal aid before tribunals such as the WRC are all the more pressing in light of the recent decision of the Supreme Court in *Zalewski v Adjudication Officer & Ors* [2021] IESC 24. In that landmark decision, the Court held that the exercise of powers by WRC Adjudication Officers, while permissible under Article 37 of the Constitution, also constitutes the administration of justice under Article 34. Notably, at paragraph 138 of his judgment, Mr Justice O'Donnell held that: "The standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34".

The Legal Aid Board is precluded by law from providing representation before the Social Welfare Appeal Office. Groups such as Roma face particular difficulty in accessing social security payments, and complex issues such as the Habitual Residence Condition (which will be discussed in further detail below) and EU Law are often dealt with at social welfare appeals.

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<sup>14</sup> Legal Aid Board (2019), *Annual Report 2019*. Available at: <https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/legal-aid-board-annual-report-2019-pdf-version.pdf>

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Legal aid is not available for “disputes concerning rights and interests in or over land”.<sup>15</sup> The Legal Aid Board takes the general view that eviction proceedings constitute “a dispute concerning rights or interests over land” and are therefore excluded from the remit of the civil legal aid scheme. While there is an extremely limited exception to this rule<sup>16</sup>, this exclusion means that Travellers who are subject to forced evictions encounter difficulties in accessing civil legal aid. (Forced evictions are discussed in greater detail in Section 5 below).

The time frames for accessing civil legal aid under the Civil Legal Aid Act 1995 create another barrier for Travellers facing eviction from accessing legal advice or representation from the Legal Aid Board. Under section 10 of the Housing (Miscellaneous Provisions) Act 1992, as amended, the owner of a “temporary dwelling” such as a caravan which is situated on public land without permission, may receive a notice giving them 24 hours to move it before a local authority may seize it, move it or impound it. Given the long waiting times which exist in most Law Centres, it is not possible for Travellers facing imminent eviction to access a consultation with a Legal Aid Board solicitor, or indeed any solicitor, within 24 hours, even if the matter is prioritised.<sup>17</sup>

In 2019, UNCERD expressed its “concern about the lack of legal aid provided for appeals concerning social welfare, housing and eviction, which has a significant adverse impact on Travellers and other ethnic minority groups to claim their rights”.<sup>18</sup>

In 2015, the UN Committee on Economic, Social and Cultural Rights (UNCESCR) expressed concern regarding the exclusion of certain areas of law from the civil legal

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<sup>15</sup> Section 28(9)(a)(ii) of the Civil Legal Aid Act 1995.

<sup>16</sup> Legal aid may be granted where a subject matter of the dispute is the applicant's home (or what would be the applicant's home but for the dispute) and the Board considers that the applicant suffers from “an infirmity of mind or body due to old age or to other circumstances”, or may have been subjected to duress, undue influence or fraud in the matter, and that a refusal to grant legal aid would cause hardship to the applicant. See: Section 28(9)(c)(iii) of the Civil Legal Aid Act 1995.

<sup>17</sup> See Legal Aid Board Information re “Law centre waiting times and other statistical information”:  
<https://www.legalaidboard.ie/en/our-services/legal-aid-services/waiting-times/>

<sup>18</sup> UN Committee on the Elimination of Racism (2019) *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR, para. 43.

aid scheme “which prevents especially disadvantaged and marginalised individuals and groups from claiming their rights and obtaining appropriate remedies, particularly in the areas of employment, housing and forced evictions, and social welfare benefits”.<sup>19</sup> Thereafter, UNCESCR recommended that the remit of the Legal Aid Board be expanded and that civil legal aid services be made available in a wider range of areas.<sup>20</sup>

An “Action Plan” published by the Department of Justice in February 2021 commits the Department to a review of the civil legal aid scheme in the third quarter of 2021 for the purpose of bringing forward “proposals for reform”.<sup>21</sup> However, precise details as to the scope of this review are yet to be released.

### *Knowledge of Legal rights, Entitlements and Services*

Each year FLAC's Telephone Information Line receives over 12,000 calls from persons seeking basic legal information. Throughout the Covid-19 pandemic, it was impossible for that service to keep up with the level of demand for basic information in relation to legal rights. It has emerged from FLAC's experience and engagement with the Steering Group of the Traveller Legal Service, that there is a lack of awareness of the Civil Legal Aid Scheme, and the services available under that scheme, amongst the Traveller community. Similar concerns arise from our experience of the Roma Legal Clinic. Similarly, our experience of both services suggests an understandable distrust of officialdom amongst both groups.

Research conducted by the Fundamental Rights Agency across the European Union has highlighted that awareness of the national legislative and procedural framework giving effect to the prohibition on discrimination appears to be low among minorities.<sup>22</sup>

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<sup>19</sup> UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.8.

<sup>20</sup> UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.8.

<sup>21</sup> Department of Justice (2021), *Justice Plan 2021*. Available at: [http://www.justice.ie/en/JELR/Department\\_of\\_Justice\\_Action\\_Plan\\_2021.pdf/Files/Department\\_of\\_Justice\\_Action\\_Plan\\_2021.pdf](http://www.justice.ie/en/JELR/Department_of_Justice_Action_Plan_2021.pdf/Files/Department_of_Justice_Action_Plan_2021.pdf)

<sup>22</sup> European Union Agency for Fundamental Rights (2012) *The Racial Equality Directive: Application and Challenges*, Luxembourg: FRA, p.25.

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This, in turn, affects the degree to which victims pursue their rights and reduces the frequency with which the prohibition of discrimination is enforced and remedies are obtained.

Insofar as the Legal Aid Board is concerned, these concerns are exacerbated by failures to provide legal services to groups such as the Traveller community, even where there is no statutory barrier to such services being provided. For example, where a person considers that they have been discriminated against on or at the point of entry to a licensed premises, they must apply to the District Court (rather than the Workplace Relations Commission) for redress (this matter will be discussed in further detail in the Equality Legislation section below). Unlike the WRC, the District Court is not free at the point of access. In theory, Civil Legal Aid is available for applications to the District Court for redress under section 19(2) of the Intoxicating Liquor Act 2003. However, all applicants for civil legal aid must still satisfy the financial eligibility criteria under the Civil Legal Aid Act and accompanying regulations. The applicant must also show that they would be reasonably likely to be successful in the proceedings. In reply to a Parliamentary Question in November 2018, the then Minister for Justice and Equality, Charlie Flanagan TD stated that legal aid had not been granted for any applications under section 19(2) of the 2003 Act in the preceding three years.

A similar matter of concern is the perception that civil legal aid is not available in cases concerning housing and homelessness against the State and local authorities. The difficulty created by the lack of legal aid in "disputes concerning rights and interests in or over land" does not arise in this context, nor does any other statutory barrier to the availability of legal aid. However, this is not reflected in the practice of the Legal Aid Board.

FLAC is currently working with the Legal Aid Board in relation to the improvement of their levels of service provision to the Traveller community. The Legal Aid Board must undertake adequate data collection measures, assessments of unmet legal need and targeted communications campaigns as part of this work in respect of the Traveller community, and should undertake similar projects in respect of other groups.

### *NGOs & Dedicated Legal Services*

The role of NGOs is particularly valuable in facilitating access to justice through the enforcement of human rights and anti-discrimination law. However, their ability to provide assistance or engage in litigation is dependent upon expertise and resources.

It is relevant to note that Article 7 of the Racial Equality Directive obliges EU Member States to ensure that associations, organisations or other legal entities may engage in judicial or administrative proceedings on behalf of, or in support of victims, with the victim's permission.<sup>23</sup> The EU's Fundamental Rights Agency has stated that one of the ways by which the existing frameworks to combat discrimination on the grounds of race and ethnic origin could be strengthened is to widen access to complaints mechanisms, including by increasing funding for voluntary organisations in a position to assist victims.<sup>24</sup> In relation to the promotion of equality and the elimination of discrimination, the European Commission has stated that "real change often requires a critical mass of cases".<sup>25</sup> The Commission's guidelines for Equality Bodies suggest that promoting the achievement of a critical mass of casework under each protected ground should be amongst such body's aims.

Many of the matters addressed in this submission are informed by FLAC's work over the previous four years in providing dedicated legal services to the Traveller and Roma communities. Access to the Traveller Legal Service functions principally on a referral basis with the majority of its cases originating with local Traveller groups or advocates. The Traveller Legal Service also provides training to Traveller advocates. The Traveller Legal Service functions under the auspices of a Steering Group of Traveller organisations. The Traveller Legal Service has extremely limited resources and is staffed by only one full-time solicitor. Accordingly, it is only able to deal with a small amount of the significant levels of unmet legal need amongst the Traveller community. The funding for the project will expire in 2023.

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<sup>23</sup> Directive 2000/43/EC.

<sup>24</sup> European Union Agency for Fundamental Rights (2012) *The Racial Equality Directive: Application and Challenges*, Luxembourg: FRA, p.25.

<sup>25</sup> European Commission DG-JUST (2015) *Know Your Rights: Protection From Discrimination*. Available at: <https://op.europa.eu/en/publication-detail/-/publication/5a511c88-b218-47b5-9f3e-4709d650e28b>

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Prior to the onset of the Covid-19 Pandemic, the Roma Legal Clinic operated on the basis of a drop-in clinic where interpretation services were provided by a member of the Roma Community, fluent in English, Romanian and Romani. FLAC sits as a member of the National Roma Network which is made up of local and national Roma organisations, as well as organisations who work with the Roma Community in Ireland. The Roma Legal Clinic is funded by the Department of Children, Equality, Disability, Integration and Youth's National Roma and Traveller Inclusion Strategy until the end of 2021.

While these services cannot be viewed as an alternative to a comprehensive system of civil legal aid, they seek to address unmet legal need to the greatest extent as their resources allow, as well as bringing strategic litigation which has the potential to benefit the Roma and Traveller communities as a whole. The services also allow for barriers to justice to be identified and for the accumulation of expertise as to how those issues may be addressed.

FLAC believes that the Traveller Legal Service provides a rights-based model which should be replicated in respect of other groups, including those from minority ethnic and migrant backgrounds. For example, FLAC believes that provision should be made for a Roma Legal Service which operates on a similar basis to the Traveller Legal Clinic after the conclusion of the current funding period for the Roma Legal Clinic. Such a model would allow FLAC to support and empower advocates, such as those who sit on the National Roma Network, and to take on strategic cases with the potential to benefit the wider Roma community in Ireland.

However, the provision of such services is contingent on funding and resources. While FLAC has secured project funding for both the Traveller Legal Service and Roma Legal Clinic, neither service has any form of long-term funding. This serves as a barrier to the growth and strategic planning of those services.

***FLAC recommends that:***

- The Committee should recognise Access to Justice as a cross-cutting area of public policy which may inform the National Action Plan against Racism for Ireland as a whole.
- The National Action Plan against Racism for Ireland should ensure that representative NGOs are given unambiguous legal standing in appropriate cases to initiate proceedings on behalf of those affected by racism.
- The National Action Plan against Racism for Ireland should ensure that NGOs are adequately resourced to carry out advocacy and representation for those affected by racism.
- The National Action Plan against Racism for Ireland should provide that the Department of Justice and Legal Aid Board implement the recommendations of UNCERD and UNCESCR in relation to the provision of Civil Legal Aid. This includes expanding the scope of the civil legal aid scheme to include the provision of legal aid where legal advice and representation is required in quasi-judicial tribunals such as the Workplace Relations Commission and Social Welfare Appeals Office. It also includes ensuring that civil legal aid is available in eviction cases. To achieve this, the Plan should direct the Minister for Justice:
  - to designate the Social Welfare Appeals Office and Workplace Relations Commission as “prescribed” tribunals for the purposes of Section 27(2)(b) of the Civil Legal Aid Act 1995, as recommended by UNCERD.
  - to amend the Civil Legal Aid Act 1995 by the substitution in subsection (9)(a)(ii) of ‘disputes concerning rights and interests over land’ with ‘disputes concerning rights and interests over land which is not the principal private residence or family home of the applicant within the meaning of section 2(2) of the Family Home

Protection Act 1976', in line with the recommendation of UNCERD.

- The National Action Plan against Racism for Ireland should provide that the planned review of the Civil Legal Aid scheme will be conducted with a view to ensuring that Ireland complies with its obligations under regional and international human rights instruments. This can only be achieved through a comprehensive, independent review of the civil legal aid system which examines the functions of the Legal Aid Board, its resources, and:
  - The criteria for eligibility for legal aid (including the means test, and financial contributions);
  - The mechanisms for applications for legal aid and appeals from decisions refusing legal aid;
  - The system of contributions and waivers;
  - The accessibility of services to persons in need of legal aid and assistance (including persons in institutional settings);
  - The areas covered by legal aid in practice and gaps in provision.
- The National Action Plan against Racism for Ireland should direct the Legal Aid Board to engage in targeted information campaigns which provide information to people from minority ethnic and migrant backgrounds as to the availability of their services in areas including family law, housing, homelessness, and discrimination claims against licenced premises.
- The National Action Plan against Racism for Ireland should direct the Citizens Information Board to engage in targeted information campaigns which provide information to people from minority ethnic and migrant backgrounds as to their rights and entitlements in areas including equality, housing, social welfare and legal aid.

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- The National Action Plan against Racism for Ireland should provide for the provision of dedicated legal services for marginalized groups, including through the provision of long-term funding for fully resourced dedicated legal services for Travellers and Roma.

## 2. Judicial Review & Access to the Courts

Access to the Courts is a vital component of the right of access to justice. Access to judicial review provides a vitally important avenue by which decisions of the State, its organs and its public bodies can be challenged. Judicial review is an accountability mechanism that encourages better administrative decision making, and provides a remedy where this is not always achieved. For this reason, it is important that it is as accessible as possible to the ordinary person who may be seriously affected by the decisions of such bodies.

In a submission to the Review of the Administration of Civil Justice, FLAC noted that there is currently a multi-tier system for judicial review in place with distinct, and more onerous, rules applicable to judicial reviews concerning asylum and immigration:

“In the areas of asylum/immigration the restrictive rules applicable, some of which are legislative in origin, others of which are laid down in rules of court/practice directions, may make access to an effective remedy considerably more onerous than in other contexts.”

The submission further stated that:

“Rules of Court should facilitate, rather than inhibit access to justice for individuals. They should be clear, accessible, foreseeable in their application. Any changes to the rules on the substantive requirements for judicial review are properly matters for primary legislation, rather than rules of court and should not provide the State and the organs of the State with an unfair advantage“.

FLAC's concerns as to the distinct rules in place for cases before the High Court's Asylum/Immigration list were exacerbated by the introduction of further, and even more onerous, procedural rules in High Court Practice Direction 81. More general, concerns in relation to access to the courts and the accessibility of judicial review have been raised by the report of the Review Group into the Administration of Civil Justice.

*The High Court Asylum, Immigration and Citizenship List & Practice Direction 81*

Practice Direction 81 was published on the Courts Service website on 17 December 2018.<sup>26</sup> The Practice Direction runs to over eighteen pages and applies to all the matters that appear on the "asylum" list.<sup>27</sup> The Practice Direction contains 22 different headings and has now been subject to an explanatory note. It is understood that this is the first time that a Practice Direction had to be followed in quick succession by the provision of an explanatory note which is in itself an indication of the scope and complexity of the Practice Direction and the level of confusion caused to practitioners in attempting to understand its application in practice.

In a submission to a review of the Practice Direction conducted by the High Court judge who then had responsibility for the asylum list, FLAC noted the absence of legal basis<sup>28</sup> for several of the requirements in the Practice Direction, and expressed particular concern at number of requirements specifically:

- Paragraph 5(1) provides that every *ex parte* application must be supported by an affidavit of each and every adult applicant who appears on the

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<sup>26</sup> Practice Direction HC81 – "Asylum, immigration and citizenship list". Available at: <https://www.courts.ie/content/asylum-immigration-and-citizenship-list>

<sup>27</sup> The "asylum list" is itself an administrative arrangement of matters that are assigned to a particular list administered by an assigned Judge established by Practice Direction, and which does not have a basis in the Rules of Court. The outcome of this arrangement is that matters touching on the status of non-Irish nationals in the State are all administered through one List in High Court, although in reality the legal issues arising may be quite disparate.

<sup>28</sup> Any practice direction can only properly be made within the scope of the Rules already prescribed by the Rules Committees. Practice Directions are subject to the Rules of Court and the law and should not prescribe requirements that are not already provided for in the Rules of Court. A practice direction is an administrative notice that cannot change the law or alter it. Crucially, Practice Directions are not the subject of any oversight and so, quite properly, are limited to matters that are incidental, supplementary and consequential to the relevant Rules of Court.

The Superior Courts Rules Committee is empowered by section 36(1) of the Courts of Justice Act 1924 to make rules but such powers are limited to making rules dealing with "pleading and practice and procedure generally". A Rules Committee is limited to making rules that regulate the manner in which a substantive power of the Court is exercised. It is not a legislative body.

Several elements of the provisions of the Practice Direction go beyond regulating the conduct of proceedings before the court. It is respectfully submitted that these elements exceed what is permitted in a Practice Direction and also go beyond what is permitted by the Rules of Court and very clearly encroach on matters of "pleading, practice and procedure generally".

proceedings. No such requirement exists in general judicial review proceedings involving multiple applicants.

- Paragraph 7(8) of the Practice Direction imposes unprecedented obligations in terms of averments of verification. It provides that these should contain averments as to *“each and every statement or representation made by or on behalf of the applicant or any other member of the applicant’s family, including by any solicitor for the applicant or any member of the applicant’s family, to any immigration or protection body, whether in the State or elsewhere, including but not limited to the Department or Minister of Justice and Equality, an international protection officer (including the chief international protection officer) and the International Protection Appeals Tribunal, or any of their predecessor entities, has been disclosed in the grounding affidavit and exhibited thereto, or if not so disclosed, particularising the extent to which it has not been so disclosed, the content of the statement or representation not so disclosed insofar as known to the applicant and the steps taken to obtain and put before the court a copy of such statement or representation”*. This requirement is extremely onerous and disproportionate: on its face it requires disclosure of each and every visa, asylum or immigration application made by or on behalf of the applicant or other members of the applicant’s family (even where those family are not the subject of the judicial review proceedings). On a practical level there are very real concerns about the ability of applicant and their legal representatives to comply with this requirement which would possibly result in thousands of pages of material being submitted to the Court, much of which may be irrelevant or only very tangentially relevant to the legal issue at question before the Court.
- Paragraph 7(8)(b) requires the applicant’s solicitor to swear an affidavit containing averments mirroring the applicant’s averments of verification in relation to a number of matters. This requirement does not exist in other judicial review proceedings.

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- The Practice Direction seeks to create a set of discrete obligations on solicitors and enforce these through references to exposure to an adverse costs order pursuant to Order 99 Rule 6 RSC. This order prescribes that, in very limited circumstances where a case cannot proceed due to the actions or omissions of a solicitor, an adverse order may be made against that solicitor. It does not contemplate a wider set of circumstances as potentially giving rise to such an order and cannot be relied upon in general terms to provide for adverse costs orders against solicitors where they have not complied with requirements that fall outside the specific scope of Order 99 Rule 6 RSC.
- Further Paragraph 7(8)(b)(iv) appears to offend against Article 9 of the ECHR on the right to freedom of religion and the right not to disclose one's religion. When swearing or affirming an Affidavit a deponent is only required to disclose their personal religious or philosophical convictions to the extent necessary to ensure that the Affidavit is sworn or affirmed in the appropriate manner, and this is normally done in the privacy of a solicitor's office. Beyond this the specifics of a deponent's religion are not inquired into. However, the Practice Direction would require a more detailed inquiry into the person's religion and that same would be averred to in an Affidavit opened to the Court. Again, this is not a requirement that exists in other judicial review proceedings. FLAC would point out that applicants in the asylum list may be fleeing religious persecution and may have a justifiable fear or anxiety related to disclosing their personal religion whether before a Court or otherwise.

FLAC also submitted that the Practice Direction – in its laying down of additional and more onerous obligations on litigants which, as a matter of course, will not be citizens of the State - is *prima facie* discriminatory:

The Practice Direction imposes extensive obligations on legal representatives acting for applicants, without any equivalent obligations being placed on the legal representatives for the respondent. This is of particular concern because the

obligations – in the context of the duty of disclosure, the costs of litigation, including the use of wasted costs orders – are at variance with those applicable in ordinary judicial review proceedings. This raises a fundamental issue about equality of arms. The fact that only one area is subject to the extensive range of obligations set out in the Practice Direction is of further serious concern. As is the lack of clarity as to why the area of asylum and immigration was singled out in this way. The majority of cases that come within the Practice Direction are subject to section 5 of the Illegal Immigrants (Trafficking) Act, 2000 (as amended), which imposes a 28 day time limit in relation to bringing a judicial review. Practitioners and clients already face onerous time limits in having to collate all necessary documents on time for a leave application to be brought within 28 days of the making of the decision being challenged, and the additional requirements of the Practice Direction fail to have regard to the reality and challenge of putting before the Court the extensive material required to be placed on Affidavit within those strict time limits.

Finally, FLAC expressed its concern that the Practice Direction constitutes a disproportionate interference with the right of access to the Courts, which may have a chilling effect in relation to challenging decisions in the asylum and immigration area:

The impact of the requirement on solicitors to provide averments of verification as set out at paragraph 7 of the Practice Direction cannot be underestimated. Solicitors are properly reluctant to essentially provide a form of guarantee in relation to a client's instructions, because no matter how diligent a solicitor is in enquiring into the background to an application and taking instructions, they can never be sure with absolute certainty that there is not a matter that has not been disclosed or has been overlooked or which is simply not within the knowledge of their client. The requirement for a solicitor to swear a verifying Affidavit in the terms set out in the Practice Direction is likely to deter many conscientious solicitors from practising in the areas that are covered by the Practice Direction and this essentially undermines the right of access to the Courts. This requirement is also all the more difficult to comply with if a solicitor is taking instructions from the client for the first time, and that matter is one that falls within the strict time limits of section 5 of the Immigration Act 2004 (as amended) as referred to above.

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The stated aim of the requirements of Paragraph 7 of the Practice Direction is to give effect to the duty of candour. While this is of course a legitimate aim to be pursued by the Courts, in so far as it impacts on the constitutional right of access to the Courts, the means adopted to achieve it should be tailored to meet the objective in a proportionate manner which impairs the right concerned to the least extent possible. FLAC does not consider that paragraph 7 of the present Practice Direction reaches this standard. This is so because the matters sought to be addressed by the Practice Direction relate to pre-existing requirements on practitioners that are already regulated in a number of respects. The duty of candour in dealing with the Courts is a fundamental duty of the legal profession irrespective of the area of practice, whether in the area of immigration or asylum, personal injuries or in any other capacity. This duty is not one that derives from practice directions, or indeed Rules of Court but is rather at the core of a lawyers professional duties. Recalling this duty in a practice direction is in itself problematic as it singles out one set of practitioners in isolation from all others and may lead to an unfair perception that such practitioners, and by extension their clients, may not be trustworthy or that those legal representatives do not uphold normal professional standards. While FLAC is aware of instances where practitioners have fallen well below expected standards, these instances are unusual in light of the volume of litigation that goes through the Courts, and indeed are already subject to the inherent jurisdiction of the High Court to prevent abuse of the Court's processes; as well as sanctions from professional bodies and the ultimate sanction of striking off by the President of the High Court in appropriate cases. None of these instances are confined to cases that appear in the asylum list nor justifies the wider implication that the present Practice Direction carries in relation to a particular cohort of practitioners and their clients.

A further consequence of the Practice Direction is the proliferation of Affidavits required by the Practice Direction in terms of verification of facts and the translation of documents, together with the requirement to have interpreters in Court with the Applicant whether the Applicant is to be cross examined or not. In practical terms this means that the outlays involved in bringing a Judicial Review in the asylum list has increased quite considerably. These costs are often underwritten by solicitor's practices where they are dealing with clients of limited means, but the escalation of

costs arising from compliance with the Practice Direction may add a further deterrent to accepting instructions in such cases.

### *Review of the Administration of Civil Justice*

In 2017, a Review Group was established to “examine the current administration of civil justice in the State”. The Review Group, chaired by Mr Justice Peter Kelly, included members of the judiciary, civil servants, representatives from the Courts Service, the Attorney General's Office and the Chief State Solicitor's Office, the Bar of Ireland and the Law Society. However unlike other major reviews, its membership did not include any external stakeholders, litigants or other relevant state bodies.

The Group published its report in December 2020 and made extensive recommendations for reform including in relation to the judicial review process. In this regard, the report 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.<sup>29</sup> FLAC has serious concerns about the recommendations of the Review Group in this regard, particularly in light of the importance of judicial review for people from vulnerable and marginalised groups who may have access to no other mechanism to challenge decisions with major implications on their lives and rights.

### *FLAC Judicial Review Casework in 2020*

In 2020 alone, FLAC acted in nine sets of judicial review proceedings on behalf of Roma and Traveller families. Each such case related to access to social housing supports. Of these nine cases, seven settled in favour of FLAC's clients, judgment issued in favour of FLAC's client in one case and the final case awaits hearing.

In light of these concerns, on foot of the publication of the Review Groups report, FLAC wrote to the Minister for Justice and set out that, given the potentially significant

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<sup>29</sup> Department of Justice (2020), *Review of the Administration of Civil Justice*. Available at: [http://www.justice.ie/en/JELR/Review\\_of\\_the\\_Administration\\_of\\_Civil\\_Justice\\_-\\_Review\\_Group\\_Report.pdf/Files/Review\\_of\\_the\\_Administration\\_of\\_Civil\\_Justice\\_-\\_Review\\_Group\\_Report.pdf](http://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf)

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implications of the Review for access to justice in the State, it is essential that there is consultation with a wider range of stakeholders who will be affected by the proposals in the Report prior to their implementation. Such consultation should include statutory bodies with an important role in this field such as the Legal Aid Board, the Irish Human Rights and Equality Commission, the National Disability Authority and the Citizens Information Board. It should also include representatives from civil society or independent law centres like FLAC, Mercy Law Resource Centre, the Immigrant Council of Ireland, the Irish Refugee Council and Community Law and Mediation, that provide legal services, advice and information to thousands of individuals and families every year who otherwise would have no access to justice. In addition, it should involve groups that provide information, legal advice and advocacy to lay litigants such as FLAC, MABS and the Citizens Information Services as well as academics with expertise on access to justice. Such an approach would be consistent with the approach to other major reviews in the justice sector in recent years, such as the Strategic Review on Penal Policy and the Commission on the Future of Policing in Ireland.

The Department has since formed an Implementation Group in relation to the recommendations in the Review Groups Report. Again, it appears that no external stakeholders are part of the Implementation Group. While the Department stated that the Implementation Group would provide an Implementation Plan to the Government in March 2021, no such plan has been made available publicly. No details have been made available as to whether the Implementation Group will engage in a meaningful consultation process. This is a matter of great concern as it appears that the implementation process has already begun.

***FLAC recommends that:***

- The National Action Plan against Racism for Ireland should provide that High Court Practice Direction 81 is withdrawn and replaced, only if strictly necessary, with a Practice Direction that takes into account the views of the various stakeholders concerned with the asylum list, but which avoids any encroachment on the proper jurisdiction of the Superior Court Rules Committee.
- The National Action Plan against Racism for Ireland should provide that the Department of Justice conduct a comprehensive and meaningful consultation on the implementation of the Review of the Administration of Civil Justice report. Such a review must be conducted before the recommendations contained in the report are implemented. Such consultation should include statutory bodies with an important role in this field such as the Legal Aid Board, the Irish Human Rights and Equality Commission, the National Disability Authority and the Citizens Information Board. It should also include representatives from civil society or independent law centres like FLAC, Mercy Law Resource Centre, the Immigrant Council of Ireland, the Irish Refugee Council and Community Law and Mediation, that provide legal services, advice and information to thousands of individuals and families every year who otherwise would have no access to justice. In addition, it should involve groups that provide information, legal advice and advocacy to lay litigants such as FLAC, MABS and the Citizens Information Services as well as academics with expertise on access to justice.

### 3. The Public Sector Human Rights and Equality 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, 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. This includes Government Departments and local authorities. By doing so, it has the potential to transform the culture of public bodies by mainstreaming equality and human rights in all aspects of their work.

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. The Public Sector Duty complements actions which are required under European Union law and the International Convention for the Elimination of all forms of Racial Discrimination (ICERD), and requires public bodies to take a proactive approach to tackling institutional racism and promote the mainstreaming of an equality perspective in all their functions.

The Public Sector Duty has now been in effect for over five years. However, there is limited evidence to date of the duty having delivered on its potential to create a shift in culture within public bodies and the delivery of public services. For many public bodies, the process of implementation and engagement with the Public Sector Duty remains at the very early stages and the implications of the duty for the work of those bodies are largely unexplored. While public bodies are afforded flexibility in how they implement the duty, every public body has a statutory obligation under section 42(2) of the 2014 Act to first assess and address the human rights and equality issues relevant to its work in its strategic plan and, secondly, to report on developments and achievements in its annual report.

FLAC believes that the continued roll out of the Public Sector Duty is relevant to both the work of the Committee and each of the priority areas identified by the Committee in their Interim Report. It also creates a framework through which the actions provided for in the National Action Plan Against Racism may be delivered and monitored. In this

regard, the adoption of a standardised ethnic identifier across all public services, as recommended by the Committee in their Interim Report, is crucial.

### *The Public Sector Duty and the Administration of Justice*

FLAC has conducted detailed research into the implementation of the public sector duty in the Irish justice system. The forthcoming report explores how the duty is being, and might be, implemented in three organisations: the Courts Service, the Workplace Relations Commission and the Legal Aid Board. These organisations serve as important gateways, and indeed gatekeepers, for people who wish to exercise their rights and to access justice, including under human rights and equality law. If these bodies failed to give effect to the public sector human rights and equality duty, this could serve as a barrier to individuals seeking to access justice in order to defend their rights. Correspondingly, if these bodies give full effect to the duty, it could serve to reduce barriers to access to justice in order to defend their rights.

That report examined the experience of the implementation of similar duties in the United Kingdom. In the United Kingdom, the judiciary has shown itself to be proactive in the implementation of public sector duties. Perhaps the most concrete example of its approach is to be found in the Equal Treatment Bench Book, a valuable resource which enables the duty to be put into practice in the courts. The Equal Treatment Bench Book, which has been updated most recently in March 2020, provides detailed guidance on equal treatment in the courts, across a wide range of topics, including litigants in person, children, young people and vulnerable adults, persons with a physical or mental disability, victims of modern slavery, those facing social exclusion and poverty, as well as litigants falling within the scope of protected grounds such as gender (including transgender persons), sexual orientation and race and religion (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.

As well as recommending the adoption of an Equal Treatment Bench Book by Courts and Tribunals in this jurisdiction, FLAC's report makes specific recommendations to the Government, Courts Service, WRC and Legal Aid Board on the implementation of

the Public Sector Duty. The findings of that report may also inform the roll of the Public Sector Duty by statutory and public bodies generally.

***FLAC recommends that:***

- The Public Sector duty should be a core consideration of the Independent Anti-Racism Committee in carrying out their work and in the recommendations and actions contained in the National Action Plan against Racism for Ireland.
- The National Action Plan against Racism for Ireland should direct all statutory and public bodies to comply with their obligations under section 42 of the Irish Human Rights and Equality Act 2014, including their obligations under section 42(2) to “assess”, “address” and “report”.
- The National Action Plan against Racism for Ireland should direct the Department of Justice to ensure that the Public Sector Duty is a core consideration of the forthcoming review of the Civil Legal Aid Scheme. The review must be conducted with a view to ensuring the system of legal aid is compatible with the public sector human rights and equality duty and the State's obligations under European and international law.
- The National Action Plan against Racism for Ireland should direct all public bodies involved in the administration of justice to have particular regard to the Public Sector Duty in performing their functions. In this regard, we ask the Committee to consider the findings and recommendations of FLAC's forthcoming research on the implementation of the duty by such bodies upon its publication.

## 4. Equality

### *The Irish Equality Framework*

Under Irish law, the Equal Status Acts 2000-2018 prohibit discrimination in the provision of goods and services, accommodation and education on the nine grounds of gender, marital status, family status, age, disability, sexual orientation, race, religion, and membership of the Traveller community. They also prohibit discrimination in the provision of accommodation against people who are in receipt of certain "housing assistance" social security payments. The Employment Equality Acts 1998-2015 prohibit discrimination on the nine grounds in employment. Discrimination complaints are generally heard at first instance by the WRC.

There has been a significant decline in discrimination complaints to the WRC in recent years. In 2019, there was overall decline of complaints under the Equal Status Acts of 25% as compared with 2018, including a 22% decline in complaints on the Traveller Community ground and a 46% decline in complaints on the race ground. In the same year there was a 3% decline in Employment Equality complaints, including a 67% decline in complaints on the Traveller Community ground and a 14% decline in complaints on the race ground. In 2020, there was overall decline of complaints under the Equal Status Acts of 30% as compared with 2019, including a 47% decline in complaints on the Traveller Community ground and a 52% decline in complaints on the race ground. In the same year there was a 27% decline in Employment Equality complaints overall.<sup>30</sup>

These trends arise in stark contrast to FLAC's experience in providing legal services to members of the Roma and Traveller community, where discrimination matters are consistently one of the prevalent categories of cases arising from those services. In 2020, Discrimination/Equality matters constituted the second largest category of total casefiles opened by FLAC (31.4%) and the second largest number of new files opened (34%). Discrimination/Equality matters also formed the second largest category of total casefiles dealt with by the Traveller Legal Service in 2020 (25%).

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<sup>30</sup> See: *Workplace Relations Commission Annual Report 2019*, and; *Workplace Relations Commission Annual Report 2020*. Both available at: [https://www.workplacerelements.ie/en/publications\\_forms/corporate\\_matters/annual\\_reports\\_reviews/](https://www.workplacerelements.ie/en/publications_forms/corporate_matters/annual_reports_reviews/)

Discrimination/Equality casefiles also accounted for one quarter of case files dealt with on behalf of callers to the Roma Legal Clinic. In 2019, discrimination cases constituted FLAC's second largest area of case work. 29% of FLAC's casework and 30% of new casefiles opened were in this area.

*Examples of outcomes of FLAC's anti-discrimination casework in 2019 alone include:*

- A complaint against an employer in the hospitality sector on behalf of a Roma woman who was refused employment as she wears a traditional Roma skirt, was settled in her favour with the client receiving €6,000.
- Two Roma woman on behalf of whom FLAC lodged Equal Status complaints against Dublin Bus on the Race and Gender grounds after they were forcibly ejected from a bus by its driver. The cases were settled in their favour.
- A Traveller family were awarded €5,000 in compensation by the WRC on foot of a complaint against a hotel who cancelled the family's First Holy Communion celebration.
- A discrimination claim on behalf of a Roma woman on the race and gender grounds against a financial services provider settled in the client's favour with the client receiving a sum of financial compensation. The exact terms of the mediation settlement are confidential.

*International and Regional Equality Instruments*

Under EU law, the Racial Equality Directive (Directive 2000/43/EC) establishes a framework for combating discrimination and gives effect to the principle of equal treatment in the EU Member States. It operates alongside the Employment Equality Directive (Directive 2000/78/EC) which prohibits racial discrimination in employment. As has been noted above, these regional and international instruments are also concerned with the right of access to justice.

Ireland is bound by the obligations of the International Convention for the Elimination of all forms of Racial Discrimination. This legally binding international human rights

treaty requires all parties to it to pursue policies to eliminate all forms of racial discrimination. Pursuant to Article 6 ICERD, State Parties are obliged to assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunal and other State institutions, against all acts of racial discrimination which violate their human rights and fundamental freedoms, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

As Walsh notes, “one of the stated aims of the [Equal Status Act 2000] was securing compliance with Ireland’s international law obligations, particularly those under the UN Conventions on Women’s Rights (CEDEW) and Racism (ICERD)”.<sup>31</sup> The ESA also give effect to Ireland’s obligations under EU law. The Equality Act 2004 amended the legislation to give effect to the Racial Equality Directive and the Framework Directive (Directive 2000/78/EC). However, serious questions have since arisen around the legislation’s compatibility with Ireland’s obligations under these international and regional human rights instruments. There are also serious concerns as to whether Ireland’s equality legislation is robust enough to combat structural discrimination and as to whether it provides an effective remedy for all those who have experienced discrimination.<sup>32</sup> These concerns relate to the material scope of the legislation (the discriminatory behaviour which is prohibited), the personal scope of the legislation (those who enjoy the protection of the legislation) and the administrative barriers to the prosecution of discrimination complaints arising from the legislation:

### *Limitations to the Scope of the Equal Status Acts*

The definition of “services” in section 2 of the Equal Status Acts is broad enough to include the services provided by public bodies. However, the scope of the ESA does not extend to the performance of the functions of public bodies generally. Therefore,

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<sup>31</sup> Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) pp 8-9.

<sup>32</sup> In June 2021, FLAC and the Law School at Trinity College Dublin held a series of seminars in which academics, practitioners, policy-makers and activists reflected on the experience, impact and limitations of the Equal Status Acts to date, and explored its future role in Ireland’s equality framework. The full Seminar Series can be viewed at: <https://www.flac.ie/news/2021/05/12/status-check-20-years-of-the-equal-status-acts-fla/>

it is unclear to what extent the Equal Status Acts apply to public authorities performing public functions which may not come within the definition of "services" but which may nonetheless have a great impact on lives. It has been established that the "controlling functions" of An Garda Síochána, including the investigation and prosecution of crimes, do not come within the scope of the ESA.

Section 14 of the Equal Status Acts excludes complaints in relation to discriminatory effects of the operation of legislative provisions. In practical terms, this means that any legislation which discriminates on one of the nine grounds or has a disproportionately negative impact in this regard falls outside the scope of the Equal Status Acts and cannot be challenged under domestic equality legislation. The recent judgment of the High Court in *AB v Road Safety Authority* [2021] IEHC 217<sup>33</sup> has also enlarged the scope of this exemption to a worrying extent. In that decision, the High Court adopted a broad interpretation of the section 14 exception and held that the Road Safety Authority had not discriminated against a woman living in Direct Provision in refusing her application for a drivers licence on the basis of an ID requirement arising from secondary legislation.

Walsh notes that section 14 of the Equal Status Acts is incompatible with EU law: "the Racial Equality Directive does not envisage any blanket exemption for discriminatory measures required by law... the [section 14] exemption is manifestly too broad since it covers any action required by law across all fields and grounds".<sup>34</sup>

Fredman notes that "the relationship between distributive inequality and 'status' inequalities is increasingly recognised as part of the developing conception of substantive equality" and that "it needs to be recognised that there is a reciprocal interaction between socio-economic disadvantage and status".<sup>35</sup> Equinet have

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<sup>33</sup> Full judgment available at: [https://www.courts.ie/acc/alfresco/a6f51761-a591-46b8-8d2c-299e8fb6f7df/2021\\_IEHC\\_217.pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/a6f51761-a591-46b8-8d2c-299e8fb6f7df/2021_IEHC_217.pdf/pdf#view=fitH)

<sup>34</sup> Judy Walsh (2019) *Primacy of National Law over EU Law? The Application of the Irish Equal Status Act*. European Equality Law Review (Issue 2, 2019) at p.45.

<sup>35</sup> Sandra Fredman (2010), *Positive Duties and Socio-economic Disadvantage: Bringing Disadvantage onto the Equality Agenda*, European Human Rights Law Review 290.

similarly highlighted that poverty and discrimination are “two sides of one coin”.<sup>36</sup> IHREC have noted the links between protected status and socio-economic disadvantage in this jurisdiction.<sup>37</sup> The Committee's Interim Report acknowledged “the intersectionality between racism and all other forms of oppression, including the oppressions experienced by people based on gender, sexuality, gender identity, disability and *socio-economic circumstances*” (emphasis added).

FLAC's experience of the Roma Legal Clinic and Traveller Legal Service illustrate that, in addition to suffering stigma and prejudice, those from minority ethnic and migrant backgrounds, may also be subject to social and economic exclusion and disadvantage. Aside from discrimination matters, access to housing and social welfare are amongst the issues to arise most frequently among clients of those services. However, the gaps in the ESA highlighted above largely leave protected groups unable to challenge discrimination in areas related to their socio-economic rights (for example, in housing and social welfare) under domestic equality legislation. Further, disadvantaged socio-economic status is not a protected ground under Irish equality law.

FLAC's recent submission to the Joint Oireachtas Committee on Key Issues affecting the Traveller Community, on the subject of “Access to Housing and Accommodation, Including Traveller-Specific Accommodation”, highlighted a number of pieces of legislation which have a disproportionate and discriminatory impact on Travellers. That submission also expressed concern at instances of institutional discrimination against Travellers by local authorities and An Garda Síochána. However, the significant gaps in the Equal Status Acts outlined above exclude such matters from challenge under domestic equality legislation.<sup>38</sup>

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<sup>36</sup> Equinet (2010), *Addressing Poverty and Discrimination: Two Sides of the One Coin*. Available at: <https://www.archive.equineteurope.org/Addressing-Poverty-and>

<sup>37</sup> Laurence Bond, IHREC (2018), *Ireland: Making Rights a Reality for Persons in Poverty?* Slides available at: [https://equineteurope.org/wp-content/uploads/2019/02/bond\\_ireland.pdf](https://equineteurope.org/wp-content/uploads/2019/02/bond_ireland.pdf)

<sup>38</sup> FLAC (2021) *FLAC Submission to the Joint Committee on Key Issues affecting the Traveller Community: Access to Housing and Accommodation, Including Traveller-Specific Accommodation* at pp.22-4. Available at: <https://www.flac.ie/publications/flac-submission-to-the-joint-committee-on-key-issu/>

### *Intersectionality and National Equality Law*

In relation to intersectionality more generally, Ireland's equality legislation does not explicitly prohibit multiple or intersectional discrimination.<sup>39</sup> FLAC's 2019 Annual Report highlighted the intersectional and gendered nature of the discrimination frequently faced by Roma women, particularly those who outwardly express their Roma identity by wearing traditional clothing including headscarves and full-length skirts.<sup>40</sup> FLAC has also previously noted how Traveller women are exposed to multiple and intersectional forms of discrimination on grounds of gender and ethnicity and can be subjected to various forms of violence against women and discrimination.

### *Redress under the Equal Status Acts*

Walsh has highlighted how the remedies provided for in the Equal Status Acts are inconsistent with EU law.<sup>41</sup> Under the Racial Equality Directive, sanctions for findings of discrimination must be effective, proportionate and dissuasive. However, for most complaints made under the Equal Status Acts, financial redress cannot exceed €15,000 (the maximum threshold in the District Court) regardless of the circumstances of the case or the effects of the discrimination which is the subject of the complaint. Further, there is no mechanism for injunctions to be granted in discrimination cases before the WRC and there are significant limitations on the power of Adjudication Officers to make orders for "specified courses of action".

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<sup>39</sup> Complaints may be made under the Equal Status Acts and Employment Equality Acts on multiple grounds. This allows for complaints to be made where "compound" or "additive" discrimination occurs i.e. where discrimination occurs on multiple grounds and the role of each ground can be differentiated and considered separately. The legislation does not explicitly prohibit intersectional discrimination i.e. cases where discrimination occurs on multiple grounds and the grounds interact with each other in an inseparable manner (such that an individual complaint on either ground may not succeed).

<sup>40</sup> FLAC (2020) FLAC Annual Report 2019. Available at: <https://www.flac.ie/publications/flac-annual-report-2019/>

<sup>41</sup> N31 at p.349.

### *Discrimination by Licensed Premises*

Where a person considers that they have been discriminated against on or at the point of entry to a licensed premises, they must apply to the District Court for redress.<sup>42</sup> The transfer of jurisdiction from the expert tribunal for equality matters to the District Court (pursuant to the Intoxicating Liquor Act 2003) came about “following pressure exerted by vintners’ organisations”.<sup>43</sup> Walsh has noted that the consequence of this change has been a significant drop in complaints in that area.<sup>44</sup>

The Irish Human Rights and Equality Commission (IHREC) have noted that this acts as “a barrier to justice”.<sup>45</sup> In 2019, UNCERD expressed its concern that the need to initiate “complex court proceedings may effectively hinder Travellers and Roma from accessing justice and remedies for the racial discrimination they have experienced”.<sup>46</sup>

### *Review of National Equality Law*

In 2019, UNCERD also recommended that Ireland review its equality legislation with a view to: “providing for explicit prohibition of multiple or inter-sectional discrimination”; “explicitly including the functions of public authorities within the definition of the ‘services’ in Section 5 of the Equal Status Acts”; and, “ensuring that an effective remedy is provided for discrimination that has a legislative basis”.<sup>47</sup> UNCERD expressed concern at the unavailability of legal aid in equality cases before the Workplace Relations Commission and recommended that the scope of the Legal Aid

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<sup>42</sup> Section 19, Intoxicating Liquor Act 2003. Available at:  
<http://www.irishstatutebook.ie/eli/2003/act/31/section/19/enacted/en/html#sec19>

<sup>43</sup> Judy Walsh, *Equal Status Acts 2000-2011: Discrimination in the Provision of Goods and Services* (Lonsdale Law Publishing, 2013) p.11.

<sup>44</sup> *Ibid.*

<sup>45</sup> Irish Human Rights and Equality Commission (2019), *Submission to the Universal Periodic Review of the UN Human Rights Council: Second Cycle Mid-Term Review*, para. 36.

<sup>46</sup> UN Committee on the Elimination of Racism (2019) *Concluding observations on the combined fifth to ninth reports of Ireland* at para. 45. Available at:  
[https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT\\_CERD\\_COC\\_IRL\\_40806\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf) at

<sup>47</sup> *ibid* at para. 12.

Board should be extended to address this (this is discussed further in Part 4 below). They also recommended that steps should be taken to allow complaints in relation to discrimination that occurs on or at the point of entry to licensed premises to be heard by the WRC.<sup>48</sup>

Recently, the Citizens' Assembly on Gender Equality recommended that "equality legislation should be regularly reviewed to ensure effective monitoring, investigation, reporting and enforcement".<sup>49</sup>

In June 2021, the Minister for Children, Equality, Disability, Integration and Youth announced that his Department would conduct a comprehensive review of Ireland's equality code with a view to "[bringing] legislative proposals to Government in 2022".<sup>50</sup> This will constitute the first full review of the Equal Status Acts and Employment Equality Acts since their introduction over twenty years ago.

### *The Constitution*

Article 40.1 of the Constitution provides that:

"All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

Article 40.1 may in theory grant a high level of protection to the right to equality of treatment, but in actuality its interpretation and application by the Courts does not afford much potential for the enforcement of equality rights in the realm of economic, social and cultural rights that may have particular relevance to those affected by

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<sup>48</sup> *ibid* at para. 46.

<sup>49</sup> See Recommendations of the Citizens' Assembly on Gender Equality: <https://www.citizensassembly.ie/en/news-publications/press-releases/recommendations-of-the-citizens-assembly-on-gender-equality.html>

<sup>50</sup> Department of Children, Equality, Disability, Integration and Youth (22 June 2021) *Press Release: Minister O'Gorman announces review of the Equality Acts*. Available at: <https://www.gov.ie/en/press-release/24864-minister-ogorman-announces-review-of-the-equality-acts/>

racism. The authors of the definitive text on the Constitution remark that “in contrast to comparative and international jurisprudence, jurisprudence on the guarantee of equality in the Irish Constitution is remarkably underdeveloped and, to date, the debate about the differing conceptions of equality has, to a large extent, passed Article 40.1 by”.<sup>51</sup>

Doyle argues that in interpreting Article 40.1 the courts have adopted a restrictive concept of equality and that they have interpreted that conception in a restrictive way. They have regularly adopted an interpretation of the phrase ‘as human persons’ which practically foreclosed all equality arguments. The courts consistently subordinated the equality guarantee to other norms in the Constitution. Finally, the courts evolved tests for the infringement of Article 40.1 which required deference to legislative judgment, for instance, not only as to whether there was a good reason to derogate from equality.<sup>52</sup> Such an approach has regrettably also been the hallmark of the courts approach to the interpretation of Equality legislation, as illustrated in the *Portmarnock Golf Club*<sup>53</sup> case and, more recently, in the recent judgment of the High Court in *AB v Road Safety Authority* (discussed above).

Ó Cinnéide has commented that:

“Irish constitutional law has rarely benefited disadvantaged or unpopular minority groups in society. Homosexuals, non-nationals, members of the Traveller community and the disabled have found it difficult to secure any constitutional foothold to challenge discriminatory legislation or policy.”<sup>54</sup>

The results in recent constitutional referendums, by contrast, illustrated public support for the enshrinement of equality rights in the constitution. Notably, in 2021, the Citizens’ Assembly on Gender Equality recommended “[the insertion of] a new clause into Article 40 to refer explicitly to gender equality and non-discrimination”.<sup>55</sup> It is

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<sup>51</sup> Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (2019, Bloomsbury Professional, 5<sup>th</sup> Edn.) at para. 7.2.05.

<sup>52</sup> Oran Doyle, *Constitutional Equality Law* (Roundhall 2004).

<sup>53</sup> *Equality Authority v Portmarnock Golf Club & ors* [2009] IESC 73.

<sup>54</sup> Ó Cinnéide, ‘Aspirations Unfulfilled: The Equality Right in Irish law’ (2010) IHRLR 41 at 55-6.

<sup>55</sup> n49.

important to bring about much needed strengthening so Article 40 includes all protected grounds including race, ethnicity and membership of the Traveller community.

***FLAC recommends that:***

- In light of the Committee's understanding of racism as a "dynamic, living phenomenon", the National Action Plan against Racism for Ireland should provide for periodic, independent reviews of national equality law and its operation.
- The National Action Plan against Racism for Ireland should provide that any proposed amendments to Ireland's equality legislation should ensure the legislations compliance with regional and international instruments such as the Racial Equality Directive and UNCERD. To do so, the National Action Plan against Racism for Ireland should provide that:
  - As recommended by UNCERD, the definition of services in the ESA is amended to explicitly include the functions of the State, in order to ensure that bodies like An Garda Síochána, the Prison service and the Immigration Services are brought within the prohibition on discrimination and harassment.
  - As recommended by UNCERD, the exemptions in section 14 of the ESA need to be reviewed and amended to ensure that the State and public bodies are not exempted from the legislation and to ensure compliance with international and EU obligations.
  - The discriminatory grounds need to be reviewed and should be amended to include a disadvantaged socio-economic status ground.

- As recommended by UNCERD, the legislation also needs to provide protection against intersectional discrimination, the multiple and combined forms of discrimination experienced by marginalized individuals and groups such as Roma women.
- In line with the recommended of UNCERD, the provisions of the Intoxicating Liquor Act 2003 which transfer the jurisdiction for certain discrimination complaints against licensed premises to the District Court must be repealed.
- The National Action Plan against Racism for Ireland should propose that Article 40.1 of the Constitution is amended to provide for strengthened and enforceable equality rights including economic, social and cultural rights.

## 5. Social Welfare

### *The Habitual Residence Condition*

The Habitual Residence Condition (HRC) is a qualifying condition for all means-tested social security payments and Child Benefit under which an applicant has to show a connection to the State. The UN Independent Expert on Extreme Poverty<sup>56</sup> and UNCESCR have both expressed concerns about the discriminatory impact of the HRC on vulnerable and marginalised groups. In 2015, UNCESCR specifically recommended that Ireland “review the habitual residence condition so as to eliminate its discriminatory impact on access to social security benefits, particularly among disadvantaged and marginalized individuals and groups”.<sup>57</sup>

The recent *Roma in Ireland: National Needs Assessment* report set out the difficulties faced by the Roma community in accessing public services.<sup>58</sup> This assessment established that 14% of Roma adults in Ireland reported having no income. The report also identified the impact of European Directive 2004/38 (on the freedom of movement and residence) and the Habitual Residence Condition as key factors in many Roma not being entitled to employment and training supports, social protection (including Child Benefit) and housing supports.

Roma face significant difficulties satisfying the HRC due to lack of documentation, proof of address and language and literacy skills. Social Welfare issues have consistently constituted the largest category of casefiles dealt with on behalf of callers to the Roma Legal Clinic. In 2020, over 40% of casefiles opened by that service related to social welfare issues.

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<sup>56</sup> Office of the High Commissioner for Human Rights (2011) *Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona to the Human Rights Council*, Geneva: OHCHR, pp.11-12.

<sup>57</sup> UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.21.

<sup>58</sup> Pavee Point Traveller and Roma Centre & Department of Justice and Equality (2018), *Roma in Ireland: A National Needs Assessment*. Available at: <https://www.paveepoint.ie/wp-content/uploads/2015/04/RNA-PDF.pdf>

*9 of the 19 active Social Welfare files opened on behalf of callers to the Roma Legal Clinic in 2020 related to issues around satisfying the Habitual Residence Condition:*

Two such case files were opened on behalf of Roma women who have been resident in the State for over 10 years. The women were refused access to social welfare supports in respect of their families several times on the basis that they did not satisfy the Habitual Residence Condition. On foot of a request for a review of decisions refusing their applications for Child Benefit, both were awarded the payment, effective from October 2018.

FLAC also represented Roma clients in two separate social welfare appeals where access to social welfare supports was refused on the basis of the Habitual Residence Condition. In both cases the Appeals Officer found that our client's employment records gave rise to a right to reside under EU law (meaning that our clients could be considered habitually resident in the State).<sup>59</sup>

FLAC is concerned that the application of the habitual residence condition by the Department of Social Protection is having a disproportionate negative impact on Roma, which is not necessarily dictated by EU law.

*First-Instance Social Welfare Decision Making*

Issues around the Habitual Residence Condition are exacerbated by long-standing issues around the quality of social welfare decision-making at first instance. These issues have a disproportionate impact on members of vulnerable or marginalized groups whose access to social welfare supports is refused or delayed. The consistently high rate of successful social welfare appeals illustrates the deficiencies in social welfare decision-making at first instance. The Social Welfare Appeals Office decides on around 20,000 appeals each year. In each of the last five years, almost

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<sup>59</sup> FLAC (2021) *Remote Justice: FLAC Annual Report 2020* at p.39. Available at: <https://www.flac.ie/publications/flac-annual-report-2020/>.

60% of appeals have been decided in favour of the appellant.<sup>60</sup> In 2015, UNCESCR expressed concern at “the large number of social welfare appeals owing to the lack of clear understanding and consistent application of the eligibility criteria”.<sup>61</sup> They further recommended that the State should “ensure the consistent application of the [Habitual Residence Condition] by providing clear guidelines and training to the relevant officials”.<sup>62</sup>

### *Entitlement to Social Welfare and Absences from the State*

Separately, it should also be noted that the provisions of the Social Welfare Consolidation Act 2005 in relation to entitlement to social welfare payments during absences from the State appear to be inconsistent with EU law in a number of respects. Most social welfare payments are only payable during periods of absence from the State of two weeks each year. In relation to jobseekers payments, these provisions are plainly inconsistent with the rights of workers under EU law to move within the EU in search of work. Such workers are entitled to retain entitlements to benefits for three months after moving to another member State. Cousins notes the inconsistency between these provisions and persons rights under EU to travel to other member states to avail of services, including healthcare services.<sup>63</sup>

The disproportionate and discriminatory impact of these inconsistencies with EU Law on people from migrant backgrounds has been illustrated by recent incidents in relation to the administration of social welfare payments during the Covid-19 pandemic. Beginning in June 2020, significant concerns arose about the actions of the Department of Social Protection at ports and airports whereby all passengers boarding certain flights were met by Social Welfare Inspectors who queried whether they were

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<sup>60</sup> See Annual Reports of the Social Welfare Appeals Office. Available at: <https://www.gov.ie/en/publication/888e0f-social-welfare-appeals-office-annual-report-2018/>

<sup>61</sup> UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.20.

<sup>62</sup> n57.

<sup>63</sup> Mel Cousins, *Social Security Law: Ireland* (Wolters Kluwer, 2010) at p.280.

in receipt of social welfare. Claims were seemingly suspended without notice to claimants on foot of these "checks".

As has been noted above, absence from the State does not necessarily automatically disentitle claimants from receipt of social welfare payments. The suspension of claims without notice to the claimant on foot of such checks also represents a flagrant breach of claimants' rights to fair procedures including their right to respond to any allegation that they were acting in a manner which disentitled them to a social welfare payment.

Information released by the Department under Freedom of Information (FOI) also raised significant concerns in relation to the selection of flights to certain countries for airport checks. That information shows that the Department operated checkpoints at the departure gates of 30 flights between 1 April 2020 and 13 June 2020. Of these 30 flights, 70% were destined for locations in Romania or Moldova. The fact that each passenger boarding such flights was subject to questioning by the Department raises the worrying implication that Departmental officials were operating under a policy whereby travelling to a certain location was considered by the Department to be a "reasonable ground" for suspecting that a person was breaching social welfare law. In FLAC's view any such policy would be highly suspect and likely to be discriminatory, as it would appear to target the person's nationality, rather than any objective criterion independent of nationality.

*Case Study: PUP Claim summarily disallowed on foot of an Airport Check*

FLAC's client was an Irish citizen of Romanian origin who had been living and working in Ireland for 20 years. She was in receipt of the Covid PUP after having been temporarily laid off from her employment. Her claim for the payment was suspended after she travelled to Romania in April 2020 to attend to a family emergency. Every passenger who boarded her outward bound flight was subject to questioning by Departmental officials who did not identify themselves properly or explain why they were requesting certain information from passengers. Information released under FOI shows that the decision to suspend our client's claim for the PUP was made by a Social Welfare Inspector who had no clear legislative authority to make

such a decision. Further, the suspension was put in place at no notice to her and without any written decision issuing to her so that she could understand the reason for the decision and appeal same if she did not agree with the decision. This woman suffered significant financial hardship as a result of the suspension which remained in place until she returned to work in August 2020.

FLAC made representations to the Department on behalf of our client raising concerns at the manner in which her payment had been suspended, the absence of a legal basis for the Department's actions, the absence of fair procedures and the potentially discriminatory nature of the Department's actions. A notification pursuant to the Equal Status Acts was also served on the Department.

The case settled on confidential terms and FLAC's client did not need to pursue the issue further

FLAC has repeatedly called for an independent review of the activities of Social Welfare Inspectors at ports and airports with a view to establishing how many persons' claims for social welfare payments were suspended on foot "airport checks" which were conducted in a manner contrary to the 2005 Act and contrary to claimants' right to fair procedures. Such a review should also examine the manner in which flights were selected for such checks and the findings of the review and any recommendations should be published.

***FLAC recommends that:***

- The National Action Plan against Racism for Ireland should provide for an independent review of the Habitual Residence Condition which examines its compliance with human rights and equality standards, as well as EU law. The purpose of such a review should be to identify steps to eliminate the condition's discriminatory impact on access to social welfare among disadvantaged and marginalized individuals and groups such as Roma, as recommended by UNCESCR.
- The National Action Plan against Racism for Ireland should provide for the Department of Social Protection to take steps to address UNCESCR's concerns as to the quality of first-instance social welfare decision-making, including in relation to the application of the Habitual Residence Condition.
- The National Action Plan against Racism for Ireland should provide for an independent review of rules in relation to entitlement to social welfare payments during absences from the State, and the enforcement of those rules, by reference to human rights and equality standards, as well as EU law.

## 6. Housing

### *Traveller Accommodation*

The majority of casefiles opened by the Traveller Legal Service to date concern housing law issues, such as failure to provide Traveller specific accommodation, inadequate standards in Traveller specific accommodation, evictions and failure to provide emergency accommodation. This trend is consistent with FLAC's previous experience in providing legal services to members of the Traveller Community. FLAC's recent submission to the Joint Oireachtas Committee on Key Issues affecting the Traveller Community, on the subject of "Access to Housing and Accommodation, Including Traveller-Specific Accommodation", addressed several issues of concern, and set out recommendations as to how those issues could be addressed.<sup>64</sup>

### *Delivery and Standards*

That submission highlighted that the present model for the delivery of Traveller accommodation allows the deep prejudice that lies within most communities against the development of specific accommodation for Travellers to hamper the implementation of Traveller Accommodation Programmes. It also noted that there are no statutory minimum standards in relation to halting site accommodation, whether temporary, permanent or transient. Cases in relation to the delivery of and standards in Traveller-specific accommodation have been a consistent feature in FLAC case work on behalf of members of the Traveller community.

In 2020 alone, FLAC opened four new case files in relation to access to Traveller-specific accommodation and a further four files in relation to standards in Traveller-specific accommodation.

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<sup>64</sup> FLAC (2021) *FLAC Submission to the Joint Committee on Key Issues affecting the Traveller Community: Access to Housing and Accommodation, Including Traveller-Specific Accommodation*. Available at: <https://www.flac.ie/publications/flac-submission-to-the-joint-committee-on-key-issu/>

*Case Study: Provision of Traveller-Specific Accommodation*

In 2019, FLAC acted for three Traveller families living on a severely overcrowded halting site, in mobile homes that had long outlived their useful life span, and with limited access to services. The case concerned the failure of the Local Authority to complete a planning process to build proposed houses for the three families on a site adjacent to the scheme. The Local Authority received planning objections from local residents which made reference to a written agreement between the Local Authority and a Residents Association from many years previously when the halting site was originally developed and purportedly agreeing not to expand the halting site. It was argued that reliance on the purported agreement was discriminatory and in conflict with the statutory duty of the local authority. These legal cases settled after the Local Authority agreed to restart the planning process and not to be restricted or fettered by the purported agreement with the resident's association.

A set of 3 related judicial review proceedings were commenced late in 2019 when it became apparent that the 3 houses intended to be developed for FLAC's clients and which had been included in the Draft Traveller Accommodation Programme had subsequently been removed without notice in the Traveller Accommodation Programme as adopted by the local authority. It was asserted that this deliberate removal of the housing scheme from the TAP undermined the legal obligation on the Council and the elected members to proceed with the proposed development. Those proceedings were subsequently settled when the local authority conceded that it was going ahead with the development.

In 2019, an independent review group established by the Government published the *Traveller Accommodation Expert Review*.<sup>65</sup> That report called for an "overhaul" of the legislation in relation to the provision of Traveller accommodation.<sup>66</sup> The failures of the

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<sup>65</sup>Department of Housing, Planning and Local Government (2019), *Traveller Accommodation Expert Review*. Available at: <https://rebuildingireland.ie/news/minister-english-publishes-the-report-of-the-expert-review-group-on-traveller-accommodation/>

<sup>66</sup> Department of Housing, Planning and Local Government (2019), *Traveller Accommodation Expert Review*.  
Page i.

Housing (Traveller Accommodation) Act 1998, they reported, are evidenced by failures to meet the scale of accommodation needed by Travellers, an “extremely high rate of Traveller homelessness”, and an increase in those living in “overcrowded conditions”.<sup>67</sup>

In March 2016, the UN Committee on the Rights of the Child (UNCRC) criticised “drastic reductions” in the capital budget for the provision of Traveller accommodation over a ten-year period.<sup>68</sup> Further, in December 2019, UNCERD highlighted its concern at “the persistent underspending of available budgets by local authorities on culturally appropriate housing for Travellers”.<sup>69</sup>

These issues were raised in a collective complaint against the State to the European Committee of Social Rights (*ERRC v Ireland*). In its decision, the Committee found that Ireland violated the Charter by failing to provide safe and adequate accommodation to Travellers.<sup>70</sup>

### *Evictions*

The collective complaint submitted by the ERRC against Ireland also referred to the several mechanisms that are available to local authorities, either directly or indirectly, to eliminate unauthorised encampments by Travellers, by essentially allowing the forcible removal of temporary dwellings, backed up by criminal sanctions for non-cooperation. Those provisions are as follows:

- Section 19C, Criminal Justice (Public Order) Act 1994;
- Section 10 of the Housing (Miscellaneous Provisions) Act 1992;

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<sup>67</sup> Department of Housing, Planning and Local Government (2019), *Traveller Accommodation Expert Review*. Page i.

<sup>68</sup> United Nations Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland*, Geneva: OHCHR, para.69(c).

<sup>69</sup> UN Committee on the Elimination of Racism (2019) *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR, para. 27.

<sup>70</sup> *ERRC v Ireland* Complaint 100/2013. Decision on the Merits published 16 May 2016. See: [https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset\\_publisher/5GEFkJmH2bYG/content/no-100-2013-european-roma-rights-centre-errc-v-ireland?inheritRedirect=false](https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-100-2013-european-roma-rights-centre-errc-v-ireland?inheritRedirect=false)

FLAC Submission to the Independent Anti-Racism Committee's Public Consultation:  
Towards a National Action Plan against Racism in Ireland

- Section 69 of the Roads Act 1993;
- Section 46 of the Planning and Development Act 2000, and
- Section 31 of the Local Government (Sanitary Services) Act 1948.

Each of these provisions (aside from the Planning and Development Act 2000) all have common features in terms of coercive enforcement on short notice without any form of judicial review or sanction resulting in forced evictions and sometimes seizure of the family home. There is no merits based hearing in relation to any evictions under the above legislation. Seeking urgent injunctive relief in the High Court to stop an eviction is a completely illusory safeguard in the majority of cases.

The Committee found that there were violations of Article 16 of the Charter on the grounds that Part 2A of the Criminal Justice (Public Order) Act 1994 and section 10 of the Housing Act 1992 provide inadequate safeguards for Travellers threatened with eviction. The European Committee of Social Rights published findings on its follow-up to its decision in the collective complaint in March 2021 which stated, in relation to the eviction procedures scrutinised, that:

“The legislation permitting evictions fails to provide for consultation with those affected and also does not ensure reasonable notice of and information on the eviction. Nor does all the legislation require the provision of alternative accommodation or provide for adequate legal remedies. Moreover, as regards legal remedies, there is no legal aid for those threatened with eviction.”

In addition to the findings of the European Committee of Social Rights, the constitutionality of such eviction mechanisms is questionable, as is their compliance with the European Convention on Human Rights.<sup>71</sup> However, all such legislation

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<sup>71</sup>The European Court of Human Rights has considered the situation of Travellers and evictions. These cases establish some useful legal principles as to when evictions from an unauthorised site will be in compliance with the Convention or not. For example, the case of *Winterstein v France* concerned eviction proceedings through local courts against a large number of Traveller families who had been camped on the relevant land for a considerable number of years. In that matter, the Court conducted applied a proportionality test and found that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

See: *Winterstein v France*, Chamber Judgment, 17 October 2013. The judgment is only available in French, but extracts from the judgment have been published in English at:

<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-127539%22%5D%7D>

remains in place and is still being used against Traveller families, even during the Covid-19 pandemic. In March 2016, UNCRC called on the State to:

“Respect the right to the cultural practice of nomadism, including by repealing/amending relevant legislation to ensure that this cultural practice is not criminalised; in doing so, the State party should also ensure adequate safeguards against forced eviction and access to timely recourse and commensurate reparation for victims of such forced evictions.”<sup>72</sup>

### *Case Studies: Evictions*

In the last five years, FLAC has dealt with the legal consequences of the use of some of this legislation. In all those cases, unless FLAC acted on behalf of the families concerned, the evictions would have gone ahead unimpeded and, unfortunately, in one case it did.

In three cases concerning the service of a section 10 Notice, the local authority agreed not to enforce same in light of representations made concerning technical compliance with the legislation and the homeless situation of the families. In another case, an interim injunction was granted by the High Court to stop the eviction, and the case was settled in favour of the clients thereafter.

In cases concerning the Planning and Development Act 2000, a Council agreed not to enforce the Notice served as the procedure followed was flawed in one case. In

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In the recent European Court of Human Rights decision of *Hirtu v France* in which Roma families were forcibly evicted from land they had occupied for six months, the Court found that the absence of consideration by the national authorities as to the applicants' underprivileged social status and attendant repercussions of the eviction amounted to a breach of their Article 8 (right to respect for their private and family life) and Article 13 (right to an effective remedy) rights. In particular, the Court noted the short period of time between the eviction order and its implementation, both of which occurred via an administrative procedure, as depriving the applicants of an effective opportunity to seek judicial relief. In particular, the Court noted the short period of time between the eviction order and its implementation, both of which occurred via an administrative procedure, as depriving the applicants of an effective opportunity to seek judicial relief. See: *Hirtu and others v. France* (no. 24720/13). The judgment is only available in French, but a summary is available in English at:

<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-202442%22%5D%7D>

<sup>72</sup> United Nations Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland*, Geneva: OHCHR, para.70(d).

another, the local authority agreed not to pursue enforcement when representations were made by FLAC.

In one file, where the so-called "criminal trespass" legislation was engaged, despite extensive submissions made to the relevant local authority and An Garda Síochána, the eviction went ahead without adequate time to bring proceedings in the High Court to seek injunctive relief. The family concerned were shortly thereafter re-housed by the local authority, but not without the family having to go through the trauma of the forced eviction at the hands of An Garda Síochána on foot of a complaint from the local authority.

### *Evictions and the Covid-19 Pandemic*

During the Covid-19 Pandemic, FLAC raised concerns at the absence of sufficient protection for Travellers against evictions. The pandemic necessitated extraordinary legislative intervention that severely curtailed people's liberty in an effort to limit the spread of the coronavirus. As part of the suite of legislative measures that were introduced, Part 2 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 (the 2020 Act) provided for a ban on evictions for the duration of the "emergency period" as defined by the 2020 Act.

The protection against evictions in Part 2 of the 2020 Act applied to Travellers following the late inclusion in the 2020 Act of section 5(7)(c) which stated, in its relevant part, that:

"all Travellers who are currently resident in any location should not during this crisis be evicted from that location except where movement is required to ameliorate hardship and provide protection and subject to consultation with the Travellers involved."

While section 5(7)(c) of the 2020 Act should be welcomed as an effort to provide safeguards to Travellers, it suffered from a number of interpretative ambiguities

which, in FLAC's experience, allowed local authorities to proceed with evictions against Travellers.<sup>73</sup>

*Case Study: Eviction during the Covid-19 Pandemic*

In July 2020, FLAC was contacted by a Traveller family with 4 young children who had been on the housing list for 13 years and resident on an unauthorised site for in and around 4 months. The local authority issued a notice pursuant to section 10 of the Housing (Miscellaneous Provisions) Act 1992 requiring the family to vacate the site in 48 hours or risk seizure of their caravan. Correspondence was prepared noting the prohibition on evictions then in force pursuant to section 5(7)(c) of the 2020 Act. By responding letter, the Council denied that the 2020 Act had application to the situation. However, after receiving the notice, the family moved on to another unauthorised site.

The position of Travellers vis-à-vis evictions was rendered even more precarious by the deletion of section 5(7)(c) of the 2020 Act by the Residential Tenancies and Valuation Act 2020, which was commenced on 1 August 2020. This served to remove any statutory prohibition on evicting Travellers while maintaining such a prohibition in respect of formal tenancies.

Considering that the justification for prohibiting evictions of any type was, at least in part, to limit the movement of individuals and thereby limit the spread of COVID-19, it is not clear why the only statutory protection afforded to Travellers was removed while protections for other tenants were maintained.

Following the deletion of section 5(7)(c) of the 2020 Act, the Department of Housing, Local Government and Heritage issued circulars 34/2020 and 5/2021. The Circulars directed that:

“Where ever possible, local authorities should not move families on from where they are residing. If there is no alternative to moving the family, local

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<sup>73</sup> For a full analysis of the ambiguities in section 5(7)(c) of the 2020 Act see section 4 of FLAC's Submission to the Oireachtas Special Committee on COVID-19. Available at: [https://www.flac.ie/assets/files/pdf/summary\\_of\\_flac\\_submission\\_to\\_covid19\\_committee.pdf](https://www.flac.ie/assets/files/pdf/summary_of_flac_submission_to_covid19_committee.pdf)

authorities should where possible engage with the family to try to find a solution in these difficult cases.”

Similar to the situation that pertained during the currency of the 2020 Act, it was FLAC's experience that in certain cases local authorities did not follow the directions of the Department of Housing, Local Government and Heritage and continued, where deemed appropriate, to invoke eviction procedures against Travellers.

### *Access to Social Housing Supports for Roma*

Issues relating to housing and homelessness have also been a consistent feature of the work of the Roma Legal Clinic. In 2020, one-third of new casefiles opened on behalf of callers to FLAC's Roma Legal Clinic related to housing matters. Included amongst those files were two new files opened on behalf of Roma families who were excluded from accessing social housing supports on the basis of Department of Housing Circular 41/2012. During the same period, FLAC also continued to act for three further Roma families whose access to social housing support was impeded by the Circular. Circular 41/2012 does not properly reflect EU law and excludes certain categories of EU nationals from accessing social housing supports.

In each of those five cases, following representations and/or legal proceedings issuing from FLAC, the families' housing applications were assessed and they were added to the housing list. Detailed case studies and analysis of the impact of the Circular are included in a recent post on FLAC's legal blog, *The FLAC Casebook*.<sup>74</sup>

Housing Circular 41/2012 was introduced in December 2012. Paragraphs 5 and 6 of the Circular states that local authorities should only assess housing applications from non-Irish EU/EEA nationals where: they are in employment in the State; they are unable to work due to accident or injury, or; they are a jobseeker with a record of 52 weeks employment in the State.

The Circular states that only those EU/EEA nationals with a right to reside in Ireland under Directive 2004/38/EC are eligible to be assessed for social housing supports.

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<sup>74</sup> FLAC (2021) *A Barrier to EU Nationals accessing Social Housing Supports: The Impact of Housing Circular 41/2012 on Roma families in Ireland*. Available at: <https://www.flac.ie/blog/a-barrier-to-eu-nationals-accessing-social-housing-supports/>

However, no such criteria arises from the Housing Act 2009 which does not stipulate that having a right to reside in the State under EU Law is required in order to access social housing supports. The 2009 Act provides that local authorities may provide social housing supports subject to an eligibility assessment. The details of that assessment are set out in the Social Housing Assessment Regulations 2011.

The Directive is transposed into Irish law by the European Communities (Free Movement of Persons) Regulations (Statutory Instrument No. 548 of 2015). However, the Circular does not accurately reflect the Directive or the 2015 Regulations. Indeed, the Circular refers to the predecessor 2015 Regulations which have since been repealed.

While being currently employed in the State or having a work history of over 52 weeks in the State may afford an EU/EEA national a right of residence in the State, the Directive and the 2015 Regulations provide for several wholly separate bases on which a right of residence may be established. They also provide for equal treatment for all EU citizens in access to public services such as housing.

In 2020 alone, FLAC advocated for five Roma families who were unable to access social housing on the basis of the Circular despite being lawfully resident in the State under EU law, as illustrated below.

*Case Study: The Impact of Housing Circular 41/2012 on Roma Families in Ireland*

FLAC's clients in this matter were a Roma couple who had resided in Ireland since 1998. One client was undergoing treatment for cancer and they were in receipt of Disability Allowance and Carer's Allowance respectively. They first applied for social housing to South Dublin County Council in December 2015. However, the Council sent them a letter indicating that they could not carry out a full assessment of their application as they did not have 52 weeks employment in the State. They submitted subsequent applications in 2016 and again in 2018. The latter application resulted in another letter issuing to the clients stating that the Council could not carry out a full assessment at that time and that the application would be considered when they could provide a record of 52 weeks employment in the State.

The couple had cared for their granddaughter since she was a young child and so wished to have her formally considered on their housing application. A further letter issued to the clients in October 2018 referring again to 52 weeks employment requirement and also indicating that their granddaughter could not be listed on their application. FLAC wrote to the Council in October 2019 seeking clarity as to the status of the couple's application in circumstances where it appeared no formal decisions had been issued in relation to any of their applications to date. The Council responded in March 2020 and stated that, on foot of a "review" of their application, it had decided that they were ineligible for social housing supports on the basis of the Circular. It also stated that their granddaughter could not be listed on their application.

Judicial review proceedings were initiated against the Minister for Housing, Local Government and Heritage on 8 June 2020 in relation to the Circular, and against the Council in relation to their refusal to consider the couple's granddaughter as part of their household. The proceedings were settled in July 2020 after the Council agreed to add the couple to the housing list and agreed to consider their granddaughter as a member of their household.

In FLAC's experience, many local authorities adopt a rigid and formulaic approach in applying the Circular when dealing with applications for social housing supports from non-Irish EU/EEA nationals. Local authorities treat the Circular as if it is legally binding on them and that they have no discretion regarding its application. Another feature of FLAC's experience of casework involving the Circular is the fact that, while local authorities rigidly apply the Circular at first instance, they do not appear to be prepared to defend decisions made pursuant to the Circular when faced with the fact or threat of legal proceedings. In each case in 2020 where FLAC initiated or threatened legal proceedings in relation to decisions made on the basis of the Circular, the local authority agreed to assess (or re-assess) the housing application without reference to the Circular.

In several cases, FLAC has joined the Minister for Housing to proceedings relating to the Circular, or put him on notice of potential proceedings relating to the Circular. In each instance, those proceedings have settled in favour of FLAC's clients before being

determined by the High Court. It appears to FLAC that local authorities and the Minister for Housing are now well aware of the issues with the Circular and its legal infirmity. However, local authorities continue to refuse non-Irish EU/EEA nationals access to social housing supports on the basis of paragraphs 5 and 6 of the Circular

***FLAC recommends that:***

- The National Action Plan against Racism for Ireland should provide that the Department of Housing, Local Government and Heritage implement the recommendations set out in the Expert Review Group on Traveller Accommodation's report without delay, and within a specified timeframe, through legislation and any other measures necessary.
- The National Action Plan against Racism for Ireland should provide that the Department of Housing, Local Government and Heritage and the Department of Justice review the legislation allowing for summary evictions without judicial oversight. The Government should bring forward reforming legislation in relation to evictions that ensures that, other than in the most exceptional of circumstances, a family home can never be interfered with in the absence of a merits based determination involving a proportionality assessment by a Court accompanied with a requirement to offer alternative appropriate accommodation to homeless families.
- The National Action Plan against Racism for Ireland should provide for the repeal of Section 19C of the Criminal Justice (Public Order) Act 1994 (the so-called "criminal trespass" legislation).

- The National Action Plan against Racism for Ireland should provide for a review of the frequency of the use of the eviction procedures identified by the European Committee of Social Rights as transgressing Article 16 and the establishment of a central database to record use of the relevant provisions against Travellers.
- The National Action Plan against Racism for Ireland should provide that the Minister for Housing, Local Government and Heritage immediately review the Guidelines published in 1998 in relation to Traveller Accommodation; to update guidance in relation to the design and delivery of Traveller Accommodation standards, and; to amend the Housing (Standards for Rented Houses) Regulations 2019 to include halting sites (including transient, temporary and permanent halting sites).
- The National Action Plan against Racism for Ireland should provide that the Minister for Housing, Local Government and Heritage withdraw or Housing Circular 41/2012 or, at the very least, amend it to ensure its compliance with EU law and to eliminate its discriminatory impact on groups such as Roma. This would accord with the recommendation of UNCERD to “improve access to social housing by...Roma.”

## 7. Racial Profiling

Irish law contains no explicit prohibition against racial profiling by An Garda Síochána and other law enforcement officers. FLAC's experience of the Traveller Legal Service and Roma Legal Clinic has revealed that many Roma and Travellers perceive that their communities are disproportionately targeted by An Garda Síochána. However, as has been noted above, the functions of An Garda Síochána may not be challenged as discrimination under domestic equality legislation. Further, the Garda Síochána Ombudsman Commission may only investigate individual complaints rather than systemic issues. As a result, there is no complaint specific mechanism available to those who consider that they have been subject to racial profiling.

FLAC notes that the Code of Ethics for An Garda Síochána contains a number of commitments in relation to equality, respect and opposing and challenging behaviour or language that demonstrates discrimination or disrespect.<sup>75</sup> However, FLAC is concerned by institutional discrimination against Travellers and Roma within the scope of some Garda functions.

For example, the removal of two Roma Children from their families by An Garda Síochána in 2013 was subsequently subject to an inquiry by the Ombudsman for Children.<sup>76</sup> Further, FLAC has previously expressed concern at the nature of certain disclosure made by members of An Garda Síochána, purportedly as part of the vetting prior to the allocation of local authority housing, including disclosures of irrelevant information and hearsay:

Section 14 of the Housing (Miscellaneous Provisions) Act 1997 allows a local authority to refuse or defer an allocation of local authority housing or halting bays where the local authority considers that a member of the household is engaged in anti-social behaviour or that the allocation is not in the interests of good estate management. Section 15 of the same Act makes provision for the exchange of information between

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<sup>75</sup> Policing Authority (2017) Code of Ethics for the Garda Síochána. Available at: <http://www.policingauthority.ie/website/PA/PolicingAuthorityWeb.nsf/page/Publications-en>

<sup>76</sup> Emily Logan, Ombudsman for Children (2014) *Garda Síochána Act 2005 (section 42) (Special Inquiries relating to Garda Síochána) Order 2013: Report of Ms Emily Logan*. Available at: <http://www.justice.ie/en/JELR/Emily%20Logan%20report.pdf/Files/Emily%20Logan%20report.pdf>

local authorities and a number of specified bodies including An Garda Síochána in relation to anti-social behaviour in the context of the allocation of social housing.

A concern that FLAC has identified is the vague and imprecise nature of the legislation dealing with Garda vetting prior to the allocation of local authority housing and the nature of certain disclosures being made by An Garda Síochána itself. There are no specific regulations made under either section 14 or 15 to define further the information that is relevant or to indicate what constitutes "good estate management".

*Case Studies: Garda vetting prior to allocation of housing*

A case taken by FLAC in 2018 concerned a judicial review of Council's refusal to assess a family as homeless. On foot of a Freedom of Information request it emerged that An Garda Síochána was providing extensive information to the Council in relation to the family. Most of the stated information was inaccurate and largely based on hearsay, and went far outside the particular knowledge of the Garda members concerned. The filing and contents of an Affidavit by An Garda Síochána on behalf of the Council in the court proceedings in support of the Council's position indicated that they lacked objectivity in how they engaged in the dispute between the client and the Council. The Affidavit contained information in relation to parking offences and locations where the clients were picked up by traffic cameras as they were driving, which was not relevant in relation to whether the clients were homeless or not, and went outside the purpose for which the data was collected in the first place. The case ultimately settled with the family being assessed as homeless by the local authority.

Another case concerned a Traveller woman with a number of children who became homeless. The local authority agreed to allocate her a particular house. Local residents became aware of the allocation and went to An Garda Síochána stating they had concerns about the family as they had a bad reputation. The woman concerned had a common surname among Traveller families but was not part of the family with the stated "bad reputation". Local Gardaí then contacted the Council by email to express concern regarding the allocation. The offer of housing to her was withdrawn without explanation. The contact between An Garda Síochána and the local authority only emerged on foot of an FOI request, and in the course of adjudicating on a subsequent complaint. The email contained significant hearsay in relation to the family

concerned and passed through many email accounts within An Garda Síochána and the local authority before causing what appeared to be a wholly unjustified denial of access to housing and considerable hardship to the woman and her children. This exchange was without any statutory basis as the information requested by the local authority pursuant to section 15 of the Housing Act 1997 indicated that the woman concerned had no history of criminality or anti-social behaviour.

The two case studies above are just two of a number of files where the issue of information exchange between An Garda Síochána and local authorities appears to have strayed beyond the purpose of the statutory regime. Such instances also raise concerns that information is potentially being shared between An Garda Síochána and local authorities in breach of the General Data Protection Regulation (GDPR).

In 2019, UNCERD stated that:

“The Committee is concerned about the reportedly high incidence of racial profiling by the Gardaí (the police) targeted at people of African descent, Travellers and Roma and the disproportionately high representation of these ethnic minority groups in the prison system. It is also concerned about the absence of legislation proscribing racial profiling, the absence of independent complaint mechanisms dealing with racial profiling and the lack of statistics on racial profiling.”<sup>77</sup>

***FLAC recommends that:***

- The National Action Plan against Racism for Ireland should provide for the full implementation of the recommendations of UNCERD in relation to racial profiling to:
  - (a) Introduce legislation prohibiting racial profiling;

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<sup>77</sup> n5 at para. 15.

(b) Put in place an independent complaints mechanism to handle racial profiling;

(c) Review, in collaboration with communities mostly affected by racial profiling, policy, practices and training of An Garda Síochána;

(d) Incorporate racial profiling issues into the training curriculum of police officers;

(e) Fully implement the Garda Diversity and Integration Strategy 2019-2021;

(f) Collect disaggregated data on racial profiling and regularly publish it, and provide the data in its next periodic report.

- The National Action Plan against Racism for Ireland should provide that the Government engage in periodic reporting outlining the monitoring of racial profiling in practice, including through the Public Sector Duty under Section 42 of the Irish Human Rights and Equality Commission Act 2014 and in relation to any proposals to address deficits in the area.
- The National Action Plan against Racism for Ireland should provide for legislative measures that would allow individuals, or groups representing their interests, to make complaints through the WRC in relation to discrimination, including discriminatory profiling, that would allow for such allegations to be investigated and remedied independently.
- The National Action Plan against Racism for Ireland should provide that section 15 of the Housing (Miscellaneous Provisions) Act 1997 is amended to clarify the exact nature of the information which may be exchanged between local authorities and An Garda Síochána, having regard to the right to privacy and proportionality. Further, the Minister for Housing should issue guidance to local authorities on the statutory vetting process for applicants for social housing setting out the statutory limits on that process and their obligations under the GDPR. Similar guidance should also be provided to members of An Garda Síochána about their role in vetting applicants for local authority housing.