



FLAC Submission to the Review of the Implementation of the National Action Plan for Social Inclusion 2007-2017

January 2019

About FLAC

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

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

You can download/read FLAC's policy papers at

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

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Summary of Recommendations

- ***Make the Public Sector Duty a core consideration in the process of developing, implementing and monitoring the Action Plan.***
- ***Access to justice be included as a core goal in the new National Action Plan on Social Inclusion.***
- ***The National Action Plan on Social Inclusion should include mechanisms to address debt as part of its work on poverty and social exclusion.***

- **Introduction**

FLAC operates a telephone legal information and referral line and runs a network of legal advice clinics where volunteer lawyers provide basic free legal advice. FLAC also provides specialist legal advice to advisers in MABS and CISs. FLAC works to improve access to justice for marginalised communities. More than 25,800 people received free legal information or advice from FLAC in 2017 from the telephone information line and the network of legal advice clinics at 66 locations around the country.¹ It also operates PILA the Public Interest Law Alliance which operates a Pro Bono Referral Scheme for NGOs, community groups and independent law centres. FLAC is also an independent law centres and engages in strategic litigation, seeking to achieve outcomes which will have benefit beyond the individual, and which may test and possibly bring about change in law and practice.

The focus on these services as a way of enabling individuals and groups to assert their rights is a fundamental aspect of FLAC's work in promoting access to justice.

FLAC welcomes the opportunity to make a submission to the public consultation Public Consultation Review of the Implementation of the National Action Plan for Social Inclusion 2007-2017. This submission makes recommendations informed by our experience in working on social welfare, access to justice issues and human rights in Ireland. It highlights the obligations imposed on statutory bodies by section 42 of the Irish Human Rights and Equality Commission Act 2014, to have regard to, in the performance of their functions, the need to eliminate discrimination, promote equality of opportunity and treatment for litigants, potential litigants and staff and to protect the human rights of staff and litigants and potential litigants.

FLAC recommends that the Public Sector duty be a core consideration in the development of the new finalisation of a new action plan. We believe that this would go some way to improving progress in meeting the goals set out in the National Social Target for Poverty Reduction.

FLAC has made a number of submissions and presentations to the Government and others in the past on social inclusion issues, including pre-budget submissions and Submission to inform the Department of Social Protection on its Statement of Strategy 2016 – 2019.

¹ FLAC Annual Report 2017

We participate in a range of initiatives relevant to social inclusion, including the Migrant Consultative Forum and the External Consultative Panel to the Legal Aid Board. We also host specific legal clinics for marginalised communities in Ireland.

As an organisation, FLAC focuses on the use of law as a tool for social change and on the right of equal access to justice for all. We work particularly on the protection of economic, social and cultural rights. FLAC is fully supportive of and eager to be involved in any endeavors to ensure social inclusion within the social welfare system in operation in Ireland.

FLAC is happy to meet with the facilitators of the consultation to expand on any of the issues contained in this submission or other matters relevant to our work.

- **Public Sector Duty**

FLAC notes that since the introduction of the National Action Plan for Social Inclusion 2007-2016, the Public Sector Duty has been introduced pursuant to section 42 of the Irish Human Rights and Equality Act 2014. The Public Sector Duty provides one of the most important national mechanisms for mainstreaming equality and human rights. It imposes a positive obligation on a broad range of statutory and public bodies to have regard to in the performance of their functions, the need to eliminate discrimination, promote equality of opportunity and protect the human rights of its members, staff and persons to whom it provides services.

The National Action Plan for Social Inclusion will be a key instance of cross-departmental strategic planning by the Government to which the Public Sector Duty applies. FLAC suggests that the National Action Plan for Social Inclusion should show how the duty has influenced the process for developing the plan and be reflected in the outcome. FLAC urges the Department of Employment Affairs and Social Protection to make the Public Sector Duty a core consideration in the process of developing, implementing and monitoring the Action Plan.

Recommendation

Make the Public Sector Duty a core consideration in the process of developing, implementing and monitoring the Action Plan.

- **Access to justice**

FLAC's focus is on how the law excludes marginalised and disadvantaged people. We propose fair solutions to protect everyone equally.

Our work in offering basic legal information and advice to the public means that we act as a bridge for those who cannot afford to access law, given the desperately underfunded and stretched state services providing assistance.

FLAC notes that in the last National Action Plan for Social Inclusion the Government prioritised a small number of high level goals to make an impact on poverty, together with targeted actions and interventions designed to address longstanding and serious social deficits.

Access to justice is a fundamental human right and is recognised as such under a range of regional and international instruments including the European Convention on Human Rights,² the Charter of Fundamental Rights of the European Union,³ and the International Covenant on Civil and Political Rights.⁴ 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. It encompasses access to fair systems of redress and states' obligations to vindicate and protect human rights. In the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.⁵

Research in the area of social exclusion has suggested 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).⁶ The lack of effective and accessible mechanisms for resolving legal disputes prevents individuals from protecting and asserting their rights. Unless the right of access to justice is vindicated, the risk of social and economic exclusion, particularly for marginalised or vulnerable communities

² Article 6(1) and Article 13 of the European Convention on Human Rights

³ Article 47 of the Charter of Fundamental Rights of the European Union.

⁴ Article 14(1) of the International Covenant on Civil and Political Rights.

⁵ See United Nations Development Programme website at: <http://bit.ly/204OeWJI>

⁶ 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.

is greatly increased. Access to justice on a truly equal basis, facilitating social inclusion, will be signified by equality of outcome regardless of resources.

Equal access to justice means that everyone should have equal access to the court as a matter of law, and as an element of social inclusion and cohesion. Those who have rights must have a meaningful and effective way of enforcing them. It is a necessary corollary to this right that there be a right to legal aid to implement the fundamental right of access to justice and to an effective remedy. Indeed, previous action plans on social inclusion issued by the UK government gave access to justice a similar priority to health and education, thereby recognising access to justice as a basic right and a vital element in social inclusion policies.⁷ The objective of protecting and promoting the right of access to justice should be included in all appropriate National Action Plans, crucially, in those being prepared against Poverty and Social Exclusion.

People who are socially disadvantaged very often experience legal problems in areas of addressing debt, accessing social welfare, housing and unemployment, many of which might occur at the same time. There is a clear association between levels of disadvantage and difficulties in resolving legal issues, and assistance in resolving those legal problems would assist individuals in addressing difficulties in debt, housing, employment etc. if it were provided, thereby positively impacting in reducing social exclusion and disadvantage. Further, if those problems could be resolved at a faster rate it would also assist in improving social inclusion. For example, the Social Welfare Appeals Office had a workload of 27,596 appeals in 2017 (including cases that were carried over from the year prior). Of these cases, 18,890 were processed with 60% resulting in a favourable outcome for the appellant. The average processing time of complaints increased from 20.5 weeks in 2016 to 23.6 weeks in 2017. Appeals concerning claims for Supplementary Welfare Allowance may wait up to 30 weeks in some cases.⁸ Improving decision-making in the first instance, as well as ensuring timely hearings for appeals in quasi-judicial tribunals would assist in rectifying matters for disadvantaged individuals. In many cases, having their social welfare payment established will provide them with the means address debt and housing issues. However, for some individuals facing complex matters, such as habitual residence condition queries, they will be unable to do this without the assistance of a legal representative.

FLAC have repeatedly called for make reform of the social welfare appeals system. FLAC's key report on the appeals system, *Not Fair Enough*, made the case for thorough reform based on human rights standards of transparency, fairness and access to an

⁷ *ibid.*

⁸ Social Welfare Appeals Office Annual Report 2017

effective remedy. As well as calling for a database of appeals decisions, other key proposals were to place the Appeal's Office on a statutorily independent footing, and to establish a system for prioritising urgent appeal cases and to make civil legal aid available for appeals hearings.⁹

The scope of civil legal aid in Ireland is defined by the Civil Legal Aid Act 1995 and the regulations that have been made by the Minister for Justice and Equality. If the right to legal aid is to be respected, a civil legal aid scheme must address unmet legal need. Instead of doing so, the Irish scheme provides a service which is focused almost exclusively on family law and where delay and lack of resources introduce significant barriers to the right of access to civil legal aid, subsequently resulting in a barrier to the access to justice that is integral for ensuring social inclusion. Housing issues are in large part excluded from the civil legal aid scheme.¹⁰ As a consequence, individuals engaged in repossession or eviction proceedings are either unable to access state-subsidised legal services or experience considerable difficulties in doing so. For example, one group which was disadvantaged during the recession was people facing repossession proceedings instituted by local authorities.¹¹ Though the decisions handed down in such proceedings are of huge significance, those affected cannot get legal aid. In addition to lack of legal aid for local authority tenants facing repossession proceedings, another housing problem which came to the fore during the economic crisis was lack of legal aid for issues connected to landlord and tenant law. During the economic crisis, legal need in this area rose considerably, though legal aid is only available for such issues in very limited circumstances.¹² Legal aid is also not available for social welfare appeals leaving many individuals at a severe disadvantage when dealing with legally complex issues such as the Habitual Residence Condition and the 'right to reside' clause.¹³

⁹ FLAC, Not Fair Enough Accessible at <https://www.flac.ie/publications/not-fair-enough/>

¹⁰ There are two main exceptions to this. First, section 28(9)(c)(iii) of the Civil Legal Aid Act 1995 provides that where a subject matter of a dispute is the applicant's home, where the applicant either suffers from an infirmity of mind or body due to old age or to other circumstances, or may have been subjected to fraud, duress or undue influence in the matter and where a refusal to grant legal aid would cause hardship to the applicant, legal aid may be granted. Secondly, legal aid may be granted in respect of proceedings arising out of a dispute between spouses as to the title to or possession of any property and in respect of proceedings under the Landlord and Tenant Acts, 1967 to 1994 (insofar as they relate to residential property), the Residential Tenancies Act 2004 and a limited number of other Acts in accordance with section 28(9)(c)(i) of the Civil Legal Aid Act 1995 as amended.

¹¹ Local authorities can provide mortgages to people who are refused a loan from a bank or building society.

¹² See for instance Section 28(9)(c)(i) of the Civil Legal Aid Act 1995.

¹³ Section 15 of the Social Welfare and Pensions (No. 2) Act 2009 amended Section 246 of the Social Welfare Consolidation Act 2005 by inserting Section 246(5), which provides that a person who does not have a right to reside in the State shall not be regarded as being habitually resident in the State. For example, asylum-seekers do not have a 'right to reside' in Ireland until their applications for refugee status or subsidiary protection have been determined.

The State has consistently resisted calls to broaden the remit of the Legal Aid Board to include more areas in which a person could receive civil legal aid. For example, on the issue of broadening the scheme to include more quasi-judicial tribunals, the State has argued, inter alia, that tribunals are intended to be relatively informal, that legal representation works against the objective of accessibility to users and that legal representation would have adverse resource implications.¹⁴ While FLAC accepts that not all cases before tribunals such as the Social Welfare Appeals Office, Equality Tribunal and the Employment Appeals Tribunal will require legal representation, the European Court of Human Rights has been clear that there will always be cases where the requirements of justice demand legal representation.

In *Airey v Ireland*, the European Court of Human Rights held that in terms of the scope of the right to a fair trial, there is a positive duty on the State to provide legal aid in matters where the rights and obligations of the individual were in question and the matter was of such complexity that the applicant could not reasonably be expected to represent him or herself effectively. Furthermore, in *Steel & Morris v the United Kingdom*,¹⁵ the European Court of Human Rights found that the blanket exclusion of any area of the law from the United Kingdom's civil legal aid scheme violates Article 6(1) of the Convention. Given the jurisprudence of the European Court of Human Rights and the blanket exclusion of certain areas from the remit of the Legal Aid Board, it is highly likely that some provisions of the Civil Legal Aid Act 1995, including s.28(9), are incompatible with the protections afforded to the right to a fair hearing guaranteed by the European Convention on Human Rights.

Beyond the operation of the scheme, certain areas of law may not be specifically excluded from the scheme by legislation or regulation, but rather by the operation of the system itself. Civil legal aid concentrates very heavily on family law, reducing the service far below its potential and ignoring substantial areas of legal need. Long waiting lists may make the scheme available only to those who have sufficient time to wait their turn. As a scheme dedicated to ensuring that "persons of insufficient means" have access to legal services, restrictions, cuts and delays disproportionately impact on vulnerable and marginalised groups. According to figures from September 2018, there are delays of up to 42 weeks. In Smithfield, where a person may wait up to 31 weeks for an appointment, 74 out of 166 individuals had been identified as needing an priority

¹⁴ Department of Foreign Affairs and Trade (2015) Written responses to questions from the UN Committee on Economic, Social and Cultural Rights, which were unanswered due to time constraints during the third periodic review of Ireland, available at: <http://bit.ly/1nxYK7R>

¹⁵ *Steel and Morris v UK* No.68416/01 [2005] 41 EHRR 22 (15 February 2005)

appointment with a solicitor. Matters that will be given a priority service include domestic violence, childcare, and child abduction.¹⁶

Contrary to popular belief, civil legal aid generally is not free. In most cases a person accessing civil legal aid will have to make a financial contribution means tested on disposable income and assets. The minimum advice contribution is €30 and depending on income may be as much as €150. If legal aid representation is provided a financial contribution of a minimum of €130 is required. FLAC is concerned that these prohibitive costs may have both excluded and deterred some people from accessing the scheme. For example, people who are solely reliant on social welfare may have been dissuaded from applying for legal aid. Given the rate of contribution against the rates of social welfare payment it can be very difficult for those living on the basic rate of social welfare to find the money to pay for legal services, particularly those under the age of 26 who receive a reduced rate of social welfare payments.

Lack of affordable legal representation can have other costly implications. First, an applicant may discontinue their case. This results in a rank denial of justice. Secondly, the applicant may pursue their claim on their own, in which case it will be pursued inefficiently, meaning greater costs for the system and delays for other litigants.¹⁷ Further long delays in family disputes may permanently damage relationships between parents and children. Similarly, prolonged delays can place victims of domestic violence at serious risk of harm from an abusive partner where they have ended their relationship. Access to justice must be efficient to ensure that issues can be resolved quickly and that matters do not escalate.¹⁸

While the Legal Aid Board is permitted to waive an applicant's legal fees where failure to do so would cause hardship, FLAC has continually raised the issue regarding lack of public awareness about the fact that a provision for waiver on grounds of hardship exists and no statistics are currently available detailing the number of applications made for a waiver on hardship grounds. As a result, individuals may have been dissuaded from making an application for legal aid, creating an extra barrier for those seeking access to justice.

Civil legal aid plays a vital role in enabling disadvantaged and marginalised individuals and groups to claim their socio-economic rights and obtain appropriate remedies,

¹⁶ Legal Aid Board Law Centre Waiting Times and Other Statistical Information Sept 2018

¹⁷ Lord Neuberger, "Justice in an Age of Austerity", Tom Sargant Memorial Lecture 2013, 15 October 2013.

¹⁸ Justice for All (2011) Saving Justice: Where next for legal aid? Views from the responses to the Ministry of Justice Green Paper consultation Reform of Legal Aid in England and Wales, available at: <http://bit.ly/1PE8sBI>

particularly in the areas of employment, housing and forced evictions, and social welfare benefits¹⁹ - all of which are core aspects of social inclusion. Civil legal aid schemes must be inclusive, comprehensive and well-resourced to ensure that people on low incomes can vindicate their socio-economic rights.

Recommendation

Access to justice be included as a core goal in the new National Action Plan on Social Inclusion.

- **Financial Exclusion and Access to Justice**

Improving access to justice means providing better information and advice, ensuring people have access to legal representation in the courts process as well as giving people more options to resolve disputes outside of the courts. Debt can be a barrier to accessing justice in general as well as a justiciable problem in itself. Families on low incomes experiencing debt can find it difficult to manage when large or unexpected bills arise and may experience exclusion.

While Abhaile provides individuals experiencing mortgage arrears vouchers for free financial and legal advice and help from experts, which are available through MABS, a wider and deeper range of services needed. FLAC has advocated that the merits test for legal aid should not apply in proceedings involving repossession of the family home by borrowers or local authorities.

FLAC have in the past proposed a range of other policies that would go some way to addressing financial exclusion.²⁰

¹⁹ 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.

²⁰ These have included:

- The reintroduction of Mortgage Interest Supplement as a short-term measure to assist people in new cases of mortgage arrears to pay the interest on their mortgage
- That action to be taken to implement the recommendations of the 2010 Law Reform Commission Report on 'Personal Debt Management and Debt Enforcement' (LRC 100 2010) to modernise the law concerning the enforcement of judgments in debt cases, particularly around the system of making Instalment Orders against debtor on low incomes and in relation the types of goods that may be seized from households by Sheriffs for the purposes of enforcement
- Proper monitoring and regulation of new providers of credit and new expensive forms of credit such as rental agreements and online offers of credit, in order to reduce the risk of exploitation of people on low incomes
- An assessment of how the Personal Microcredit (PMC) scheme is operating in terms of meeting its objective of making low amount, low cost loans available from credit unions to people getting a social welfare payment who may have difficulty getting credit from other sources.

Recommendation

The National Action Plan on Social Inclusion should include mechanisms to address debt as part of its work on poverty and social exclusion.