



**FLAC Submission to The Workplace
Relations Commission on the
“Consultation Paper on Remote
Hearing and Written Submissions
Dealing with Adjudication Complaints
During the Period of Covid-19 related
Restrictions”**

FLAC, April 2020

About FLAC:

FLAC (Free Legal Advice Centres) 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 works in a number of ways:

- 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 area of homelessness, housing, discrimination and disability
- During 2017 FLAC was an associate partner of and facilitated the JUSTROM programme, which promoted access to justice for Roma and Traveller women. FLAC currently operates a Roma legal clinic and is establishing a dedicated legal service for Travellers.
- Operates the public interest law alliance 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 marginalised and disadvantaged, including legal aid, access to the courts, personal debt and social welfare.

The submissions most relevant to the subject matter of this meeting include

- FLAC Submission to the Joint Oireachtas Committee on Justice and Equality: Access to Justice & Costs
- FLAC submissions to the Review of Administration of Civil Justice February and June 2018
- FLAC submission to the Courts Service Statement of Strategy 2018-2020, October 2017
- FLAC submission on High Court Practice Direction 81

You can access FLAC's policy papers at:

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

For more information, contact us at:

FLAC, 85/86 Upper Dorset Street, Dublin D01P9Y3

01-8873600 | info@flac.ie | www.flac.ie | www.pila.ie

| [@flac.ie](http://fb.me/flacireland)

Recommendations:

1. FLAC urges the WRC to make access to justice and the effective implementation of Public Sector Duty central considerations in the process of developing, implementing and monitoring the WRC's work on dealing with Adjudication Complaints during the period of the Covid-19 restrictions and thereafter.
2. FLAC recommends that the WRC explore the possibility of continuing with face to face hearings with appropriate measures in place to ensure to comply with Government restrictions in force.
3. While mediation can play a useful role in certain cases, it should not be regarded as the primary response to the challenges posed by the Covid-19 and the primary function of the WRC to adjudicate upon and enforce statutory rights must be maintained.
4. Any move to remote hearings or disposal by way of written submission only should be based on the consent of the parties.
5. Covid-19 related claims in connection with annual leave, payment of wages and Covid-19 related equality claims should be fast-tracked so that they might be resolved quickly and act as a precedent.
6. Resources should be dedicated to proactively identifying parties who may be vulnerable and ensuring that accommodations are made to enable them to participate fully in proceedings.
7. Parties to the new/different modes of hearing whether by written submission, mediation, or remote hearings, must be given support to understand the implications of the different modes of participation and provided with an opportunity to access legal advice (including free legal advice) in advance of participating in the new form of hearings.
8. If the proposed changes are implemented, it is vital that practical support and safeguards are put in place to ensure that access is not impeded and that an assisted digital programme be introduced, which would be designed to help those who are 'digitally excluded' or lack digital skills to engage with new processes. In any event an assisted digital programme should be introduced to assist in the completion of the online complaint referral form.
9. If the proposals are implemented, it is important that the impact of the reforms on access to and confidence in the system would also be monitored.

Introduction

FLAC welcomes the opportunity to make a submission to WRC on the Consultation on Remote Hearings and Written Submissions Dealing with Adjudication Complaints During the Period of Covid-19-related Restrictions. We are happy to clarify any point or expand on the contents of this submission and attend any stakeholders meeting by videoconference or otherwise. We would welcome an opportunity to make further submissions once the scoping exercise has been finalised and more details of the proposals are available.

FLAC recognises the unprecedented challenges posed by the Covid-19 global public health emergency. While there is hope that online processes may increase access to justice for many, there is also concern that some may be digitally excluded from such processes. There is a further concern that new online processes will not compensate adequately for reduced service provision in respect of traditional processes. The core question in relation to remote hearings and/or the use of written submission is whether such measures can be implemented in a manner which ensures access to justice for all.

Background

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. Approximately 25,000 people receive information or legal advice from FLAC per annum. Of the 12,469 calls to FLAC's Telephone Information and Referral Line in 2019, 1,439 queries concerned employment law. Employment law queries rose by 17% compared with the previous year and accounted for 12% of all calls last year.

Of the 14,526 consultations held at FLAC's free legal advice clinics in 2019, 2353 queries concerned employment law. Employment law queries rose by over 10% compared with the previous year and were the second most frequently discussed queries in the clinics in 2019. FLAC operates specialist employment clinics, which are heavily subscribed.

FLAC also provides specialist legal advice to advisers in MABS and Citizens Information Centres. PILA, the Public Interest Law Alliance, operates a Pro Bono Referral Scheme for NGOs and community groups. FLAC is also an independent law centre and engages in litigation in the public interest and 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.

As part of the JUSTROM (Joint Programme on Access of Roma and Traveller Women to Justice) programme, a Council of Europe initiative, FLAC supported the running of legal clinics for Travellers and Roma.

FLAC currently operates a legal clinic for the ROMA community. It also continues to engage in legal representation for members of the Traveller community, primarily in the area of accommodation provision and discrimination and is establishing a dedicated legal service for Travellers.

FLAC regularly represents claimants before the WRC in claims of discrimination under the Equal Status Acts concerning goods and service, education and accommodation and in claims under the Employment Equality Acts.

FLAC's response to the Covid-19 Crisis

Our Telephone Information and Referral Line remains open with staff working from home. In response to the Government issued guidelines, FLAC closed all of our free legal advice clinics around the country for the safety of our volunteers and service users.

FLAC have organised Phone Legal Advice Clinics in response to the urgent need for legal advice. The most urgent queries and the areas of greatest legal need arise in relation to family law and employment law.

FLAC have also produced a series of 'FLACsheets' to provide information on rights during the current, including a FLACsheet on Employment Law Rights during Covid-19 outbreak. As part of a series of webinars for charities on the law and Covid-19, PILA & TrustLaw hosted a webinar on Employment Law.

We have drawn on this wealth of experience - in the information lines and advice clinics, our experience in litigation as well as the queries received through PILA – in making this submission.

Specific Covid-19 Related Issues

Payment of Wages

The calls coming into FLAC's phone line indicate that many employees are expressing concerns over payment of wages. This mirrors what happened around the period 2008- 2010 where employees were asked to take or forced to take pay cuts or have their hours of work compulsorily reduced. In many instances this was directly as a result of the economic difficulties being experienced by employers. However, in some instances some employers may have sought to exploit the opportunity to undermine contractual entitlements.¹ It is important to ensure that history is not allowed to repeat itself where large

¹ There was also a dispute in relation to the admissibility of complaints concerning reduction in wages as potentially unlawful deductions in wages. It was not until the case of *Earagail Eisc Toeranta V Doherty and Others* that the High Court held that the EAT was entitled to and indeed obliged to consider complaints relating to wage reductions to investigate whether they constituted a breach of the Act: [2015] IEHC 347.

numbers of payment of wages complaints wait in a queue to be processed with the employees in question struggling to meet day-to-day expenses.

Annual leave issues

A further matter arising on FLAC's phone line is the timing of annual leave. On the one hand, there are cases where an employee is seeking to avail of a period of paid annual leave, often for childcare purposes, and the employer refuses such a request. On the other, there are cases where the employer seeks to compel an employee to take periods of paid annual leave, potentially leading to the erosion of future leave entitlements that the employee might wish to avail of at a more suitable time for rest and recreation. These may be cases where the core facts are not in dispute but what is required is a clarification of the application of s.20 of the Organisation of Working Time Act 1997 to such cases.

Equality issues

A number of equality issues have arisen in relation to the Covid-19 pandemic which may be referred to the WRC under the Equal Status Acts or the Employment Equality Acts. For example:

- People who are not being allowed avail of the wage subsidy as they had been on maternity leave on the critical date in February;
- People being required to go on maternity leave early rather than avail of the wage subsidy;
- The banning of children from attending supermarkets;
- Allegations of discrimination in relation to difficulties faced by Travellers and people in direct provision in being able to engage social distancing and access basic facilities such as running water on halting sites.

These issues – particularly the application of the wage subsidy scheme and how it interacts with contractual entitlements – are likely to give rise to litigation before the WRC. At this stage, it is too early to assess the level of complexity of such claims which may depend on the individual circumstances.

Drawing on FLAC's experience, we submit that these kinds of complaints should be prioritised and fast tracked so that they might be resolved quickly and allow individuals to vindicate their rights in a timely manner. Decisions in early course on these issues – which are likely to have significant implications across the State – would serve as valuable precedents. In this way, such fast-tracking and prioritisation may also have benefits for the WRC in terms of efficiency.

OVERARCHING CONSIDERATIONS: THE PUBLIC SECTOR DUTY AND ACCESS TO JUSTICE

PUBLIC SECTOR DUTY

Section 42 of the Irish Human Rights and Equality Commission Act 2014, introduced the Public Sector Duty, which imposes a positive obligation on a broad range of public bodies including the Workplace Relations Commission, in the performance of their functions, to have regard to the need to eliminate discrimination, to promote equality of opportunity and to protect the human rights of its members, staff and persons to whom it provides services.

The scoping exercise and consultation process on remote hearings is a key instance of strategic planning by the WRC to which the Public Sector Duty applies. This being so, it is important that the WRC gives active consideration to the Duty in this process and addresses how this has been done in any outcome document.

The scoping exercise should encompass an assessment of the impact of the proposed reform measures on those individuals with protected characteristics under the Employment Equality Acts and the Equal Status Acts.² The impact of the shift in the mode of proceedings on individuals with characteristics under the equality legislation should be monitored (for example patterns in attrition at different and different types of outcome such as settlement or withdrawal from the system).³

There is some emerging evidence indicating that individuals who are neurodiverse, have a learning disability, or who are experiencing mental ill health which impacts on their communication and comprehension skills may be particularly adversely impacted by appearance via video link.⁴

² The protected characteristics identified in the equality legislation are: gender, civil status, family status, age, disability, sexual orientation race, religion, membership of the Traveller Community and, under the equal status regime, housing assistance.

³ In the UK the HMCTS have designed systems for capturing characteristics under the UK Equality Acts 2010 as part of their ongoing programme of court reform: see Appendix 1 below. These 13 data points that could be collected in relation to individual users of the justice system in order to identify vulnerability and assess the impact of reform, may be of assistance to the WRC but would need to be adapted to include all of the grounds under Irish equality law.

⁴ UK Equality and Human Rights Commission Inquiry. See also: See House of Commons Justice Committee, "Court and Tribunal reforms" 31 October 2019 HC 190 31 October 2019, Second Report of Session pp24 para 67

For this reason, resources should be dedicated to proactively identifying parties who may be vulnerable and ensuring that accommodations are made to enable them to participate fully in proceedings, whatever form they may take.

Recommendation

FLAC urges the WRC to make the Public Sector Duty a core consideration in the process of developing, implementing and monitoring the WRC's work on dealing with Adjudication Complaints during the period of the Covid-19 restrictions and thereafter.

ACCESS TO JUSTICE

FLAC has a longstanding commitment to promote human rights and equal access to justice.⁵ Access to justice is both a process and a goal, and is crucial for individuals seeking to benefit from the large range of statutory employment rights which are adjudicated upon by the WRC.

While it has no single precise definition, core elements of access to justice include effective access to information, advice, legal aid, access to the courts, access to an effective hearing, access to a decision in accordance with substantive law, and access to an effective remedy.

It is recommended that the scoping exercise examines the impact of the programme on each of these components to arrive at a determination regarding the impact of the programme on access to justice.

While there is not a significant degree of detail in the WRC paper, it is clear that the reform proposals will alter significantly the processes through which claims are processed. FLAC recognizes the challenges posed by the Covid-19 public health emergency for all areas of the administration of justice, including the courts and tribunals such as the WRC. On the one hand, a shift towards alternative modes of hearing may ensure that complaints are processed and adjudicated upon in circumstances where the parties would otherwise be deprived of access to justice, potentially for a lengthy period of time. On the other, such a significant change may have exclusionary effects for certain categories of litigants or materially affect the quality of justice, particularly for complex claims. This being so, it is important that careful consideration, based on research where possible, is given to these issues before implementation and

⁵ This is reflected in FLAC's current strategic plan which includes goals of access to legal aid, access to the Courts, access to effective remedies and the objective of improved first and second tier decision making

that the WRC ensures that any significant changes would not impede access to justice by creating barriers to bringing or pursuing a claim.

Recommendation

FLAC requests that the WRC make access to justice a central focus in the process of developing, researching, implementing and monitoring the WRC's work on dealing with Adjudication Complaints during the period of the Covid-19 restrictions and thereafter.

Legal aid and access to legal advice

An important context for this scoping exercise is the lack of legal aid for claims before the WRC. The provision of legal aid is a critical matter for access to justice.⁶ The current system of civil legal aid provided by the Legal Aid Board under the provisions of the Civil Legal Aid Act 1995 is limited. There is no legal aid available for claims before the WRC irrespective of the complexity or sensitivity of the issue, the capacity of the person to represent him/herself and the resources of the individual and this exemption will extend to the new forms of procedure. While in theory the Legal Aid Board may provide legal advice in employment cases, in reality this does not occur to any significant extent. Studies have shown that in cases where hearings are conducted remotely by video-link, parties are less likely to seek legal advice and representation.⁷ The WRC needs to be particularly attentive to these issues in any move towards alternative forms of participation, as not all parties to a hearing may be similarly placed in terms of access to legal advice and representation.

Recommendation

Parties to the new/different modes of hearing whether by written submission, mediation, or remote hearings, must be given support to understand the

⁶ The right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights, guaranteeing the right to a fair trial, to an effective remedy and legal aid for those who lack sufficient resources in order to ensure effective access to justice. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteed.

⁷ See e.g. Eagly, I. (2015) "Remote Adjudication in Immigration" Northwestern University Law Review Vol 109, No. 4 2015 <http://escholarship.org/uc/item/5p1044zc>. This research, conducted into the impact of the introduction of remote hearings in immigration detention settings in the USA, demonstrated that remote hearings impacted negatively on the level of litigant engagement in the process- litigants perceived the process as less legitimate and therefore did not take full advantage of the legal safeguards available to them. Studies suggest that failure to seek legal advice may be linked to diminished ability to present their case effectively.

implications of the different modes of participation and provided with an opportunity to access legal advice, including free legal advice, in advance of participating in the new form of hearing.

Assisted digital programme

Recent case law has affirmed the principle that access to formal legal processes must be “practical and effective” as opposed to “theoretical and illusory” and that the state has a duty not to place obstacles in the way of access to⁸ and that: “application processes are not so complex that users of the system cannot effectively use them.”⁹

In that regard the WRC already has experience of using an online process in relation to its Workplace Relations Complaint Form. This experience should inform the current scoping exercise.

It has been the experience of FLAC that this form is somewhat difficult to use for practitioners and is especially difficult to use for people with literacy, language issues and for people who do not have easy access to the internet or who may not know how to use an online form. The complaint form is not downloadable making it extremely difficult to make a complaint off line. The forms ES1 and ES2 in relation to complaints under the Equal Status Acts are hard to find on the WRC website. Further the online form is directed to employment complaints, and the fields identifying the location of your employment and other employment related fields are compulsory even in complaints under the Equal Status Acts.

It is unknown whether the WRC has carried out any research into the impact of the use of this form on the making of complaints under various pieces of legislation. In circumstances where there has been a decrease in the number of complaints under the Equal Status Act, there would be merit in researching whether this decrease may, at least in part, be due to the difficulties in making a complaint online.

If the proposed changes are implemented, it is vital that practical support and safeguards be put in place to ensure that access is not impeded and that an assisted digital programme be introduced, which would be designed to help those who are ‘digitally excluded’ or lack digital skills to engage with new processes. In any event, an assisted digital programme should be introduced to assist in the completing of the online form.

⁸ Children’s Rights Alliance for England v Secretary of State for Justice [2013] EWCA Civ 34, [2013] HRLR 17 [38]. 8.3 As Adams and Prassl (2018) have argued, citing R(Unison) v Lord Chancellor [2017] UKSC 51 [96] this requires (amongst other things)

⁹ Adams, Byrom, Prassl, 2018

If the proposals are implemented it is important that the impact of the reforms on motivation and confidence in accessing the system would also be monitored.

THE CONTINUED EXISTENCE OF ADJUDICATION HEARINGS

While FLAC acknowledges the challenges posed by the restrictions in place in response to the Covid-19 crisis, FLAC submits that the WRC should assess whether – and, if so, when – it would be possible to continue hearings safely within the WRC’s existing physical infrastructure. In this regard it is noted that the Courts are continuing to operate on an albeit limited basis so, subject to appropriate safeguards being in place, it may well be possible for the WRC to continue to operate safely with face to face hearings, at least as the restrictions are eased in the coming months.

Recommendation

FLAC recommends that the possibility of continuing with face-to-face hearings be explored as a matter of urgency, with appropriate measures in place to ensure to comply with Government restrictions in force.

MEDIATION

The consultation paper states that “many of the types of complaint most suited to written procedures or “virtual” hearings are those where the facts themselves are not in dispute. As such, it is the view of the WRC that such complaints/disputes are eminently suited to mediation”.

While mediation may have a role to play in certain disputes, it is not appropriate in all cases, even in what might appear straightforward cases. It is a fundamental feature of mediation that it is a voluntary process and it is vitally important that any increased recourse to mediation is based on the informed consent of the parties.

The literature on alternative dispute resolution models reveals that: “the apparent informality of alternative processes can replicate existing power disparities”.¹⁰ In FLAC’s experience this is particularly true for more vulnerable claimants attending mediation who may not have access to legal advice, and who may have language, literacy or mental health issues. Further there is a risk that a claimant in a mediation of a claim with very little factual dispute may end up with less than would be achieved in adjudication where the emphasis is on an effective and proportionate remedy.

Moreover, in terms of resources, for relatively straightforward cases, there is unlikely to be a significant saving in terms of time, costs and resources for the WRC by having recourse to mediation instead of adjudication.

In this regard, it is important to bear in mind the role of the WRC in ensuring the constitutional right of access to justice.¹¹ FLAC is concerned that the emphasis on mediation in the consultation paper should not detract from the basic function of the WRC under the employment and equality legislation, which is to vindicate rights.

It is vital that the voluntary nature of mediation is absolutely evident to the parties concerned throughout the whole process and that any new procedures make it clear that the parties may refuse or withdraw from mediation at any

¹⁰ Reynolds, 2014:250

¹¹ UK Supreme Court in the decision handed down in the case of R(on the application of UNISON) [2017] UKSC 51. Lord Reed, in a powerful judgment that attracted the concurrence of his seven fellow justices, stated that:“Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by parliament and the common law created by the courts themselves are applied and enforced.” (Lord Reed, per para 68).

stage and will be facilitated with a prompt adjudication without any adverse consequence.

Recommendation

While mediation can play a useful role in certain cases, it should not be regarded as the primary response to the challenges posed by the Covid-19 and the primary function of the WRC to adjudicate upon and enforce statutory rights must be maintained.

REMOTE HEARINGS AND DISPOSAL BY WAY OF WRITTEN SUBMISSION

Power to Hold Remote Hearings

The paper notes that “*The WRC is satisfied that it has the power to conduct hearings remotely by way of video-conference where the Director General considers this necessary and appropriate, subject to complying with the requirements of fair procedure and natural justice*”. It is suggested in the paper that the WRC has such jurisdiction by virtue of Section 41(5) of the WRA 2015 read together with Section 11(4) of that Act. There is, however, no explicit power conferred on the WRC in this regard. Where the system is untested, a party may become unhappy with how it is operating or its fairness in the course of a hearing and it is difficult to see how the WRC could insist upon a hearing continuing in these circumstances. As such, in FLAC’s submission, any move to remote hearings should be based on the consent of the parties.

Recommendation

Any move to remote hearings or disposal by way of written submission only should be based on the consent of the parties.

Right to an effective hearing: Adjudication by written submission or remotely:

Assessment as to suitability

FLAC notes the emphasis on adjudicating complaints by means of written submission and/or remote hearings.

FLAC agrees with the consultation paper wherein it states that it considers that claims under the Unfair Dismissals Act, Employment Equality Acts and Protected Disclosures Acts are less suited to “Virtual Hearings”. In addition FLAC submits that claims under the Equal Status Acts would not ordinarily be suitable for “Virtual Hearings” given their complexity, the nature of the case and the requirement for oral evidence and cross examination.

It is noted that the consultation paper considers that the types of complaint most suited to “Virtual hearings” include disputes/complaints in relation to trade disputes under Section 13, pay and hours of work (under the Organisation of Working Time Act 1977 and Payment of Wages Act, 1991), terms and conditions (under the Terms of Employment (Information) Act , 1994).

There is no reference to the remainder of employment legislation that is adjudicated upon by the WRC and therefore it is unclear whether it is intended that claims would be decided by written submission or by remote hearings and, if so, what criteria will be used to determine this question (whether on the basis of the type of claim or a case-by-case assessment). In FLAC’s submission, this requires a case-by-case assessment, which should take account of the capacity and vulnerability of the parties as well as the suitability of the case.

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

“As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.’¹²

If a party has a concern about the suitability of a remote hearing of the claim, or the fairness of such a procedure, the parties should be afforded the opportunity of a face-to-face hearing in relation to the claim.

Furthermore, if a serious dispute as to fact or law arises during the written submission procedure or a remote hearing, the parties should be afforded the opportunity of a face-to-face hearing in relation to these issues.

Right to cross-examine

Physical presence in court can be a very important part of both effective cross-examination of witnesses and assessing veracity in the context of an adversarial tribunal system.¹³ Both claimant and respondents may be disadvantaged by the remote nature of the hearings if any remote witness examination is contemplated. This is particularly so in circumstances where the status of an unsworn written submission as evidence is unclear.

An effective hearing requires both that individuals are able to present the information necessary to enable a decision maker to make a determination based on applying the law to the facts of the case and that the decision maker is able to comprehend this information.

Demonstrating procedural fairness has been held to be important for a number of reasons. People are more willing to accept decisions when they feel that those decisions are made through decision-making procedures they view as fair. In addition, perceptions of procedural justice have been found to be linked

¹² Per Megarry J in *John v Rees* [1970] 1 Ch 345 at 402 and quoted with approval by O’Flaherty J in *Gallagher v Revenue Commissioners (No 2)* [1995] 1 IR 55 at 82.”

¹³ The duty of the WRC to act in accordance with fair procedures, including by allowing cross-examination of witnesses, has recently been recognised in *Zalewski v WRC* [2020] IEHC 178.

to public trust and confidence in legal authorities and institutions, including courts¹⁴.

Further the right to be heard is a pillar principle of due process.¹⁵ Cregan J in *Flynn v. National Asset Loan Management*¹⁶ characterised the principle of *audi alteram partem* as follows

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

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

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

¹⁴ Tyler, 2000:117 and Tyler, 2001:216

¹⁵ See Further “Remote Hearings: Overview of UK Experience; Patricia Sheehy-Skeffington, the Bar of Ireland

¹⁶ [2014]IEHC 208

PRACTICAL CONCERNS AND CONSIDERATIONS WITH REMOTE HEARINGS

IT platforms

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

Conduct of Remote/Video hearing

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

Recording Hearings

Platforms like Zoom have a built-in capacity to record the proceedings it is unclear how this can be controlled in a way that is compatible with GDPR and section 41(13) of the WRA 2015, section 79(2) of the EEA 1998, section 25(2) of the ESA 2000 and section 8(6) of the UDA 1977.

Conference with legal representatives

Section 41(5) of the Workplace Relations Act 2015 provides that a complainant and respondent may be accompanied and represented at the proceedings. This is not just a legislative technicality but a safeguard with the most profound implications in the context of the adjudication of disputes by adversarial means. It is difficult to envisage how a complainant or respondent can be properly "accompanied" by a representative at a hearing if they are in fact remote from their client, and cannot take instructions or give advice at a hearing. Therefore, the WRC must take care to ensure that any implementation of remote hearings is fully compatible with the legislation.

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

Available IT staff

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

Document availability

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

Simultaneous translation

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

Plain English

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

Ground rules

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

Appendix 1

VULNERABILITY AND FAIRNESS DATAPOINTS

Individual attributes to be captured Vulnerability Digital Exclusion.

Equality Act 2010

1 Age

2 Disability

3 Employment status/Income

4 English as a foreign language

5 Gender reassignment

6 Highest level of education (proxy for literacy)

7 Postcode (Permanent address, to identify whether in a care home, homeless, in an area of low internet coverage etc.)

8 Pregnancy and maternity

9 Race

10 Religion or belief

11 Sex

12 Sexual orientation

13 Fear or distress connected with the case e.g. domestic violence/abuse, in detention, survivor of trafficking/trauma.