Submission of FLAC to
Joint Oireachtas Committee on Justice, Defence and Women's Rights
Dated 27 October 2010

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all.

The Immigration, Residence and Protection Bill was published on 2nd July 2010. The Bill includes amendments to the Immigration, Residence and Protection Bill 2008, which was withdrawn from Oireachtas earlier this year. This new Bill is a significant piece of legislation which will affect not just those who seek to come to live in Ireland, but a large part of existing Irish society, including long established citizens and residents. This Bill also has implications for the right of access to justice in Ireland.

FLAC focused particularly how this new legislation may affect the access to justice of some of the most vulnerable people in Irish society in this submission to the Joint Oireachtas Committee on Justice, Defence and Women's Rights. We are grateful for the opportunity to make this submission. We are happy to supplement any aspect of the submission through additional information or through an oral submission.

FLAC has focused on the following aspects of the Bill:

- *Access to Information;*
- *Access to an independent appeals mechanism*
- *Access to the Courts;*
- *Access to services.*

Within these main headings, FLAC submits the following recommendations for amendments to the Bill for the consideration to the Oireachtas:

1. ***FLAC recommends that the Bill be amended to include rules to govern such matters as when workers' families may join them in the State.***
2. ***FLAC recommends that the new restrictions on access to documents relating to a protection declaration be removed, and that the Ombudsman be given power to investigate complaints about the workings of the immigration and protection mechanisms.***
3. ***FLAC calls on the Oireachtas to include an independent appeals mechanism for all decisions made under the Immigration, Protection and Residence Legislation.***
4. ***FLAC recommends that all those who can make a first instance protection application should be permitted an appeal against a negative decision.***
5. ***Decisions of the Protection Review Tribunal should be reported and published.***
6. ***FLAC recommends that all members of the Tribunal when appointed should have experience and expertise in human rights and protection matters, should be obliged to engage in ongoing high quality training and should be qualified lawyers with a thorough grounding in all law needed to ensure a fair, independent appeal.***
7. ***FLAC recommends that no person should be deported from the country without being given reasonable access to their lawyer, and to the courts if necessary. Further, the***

intimidatory provision which will leave lawyers vulnerable to personal liability for costs should be removed.

8. ***FLAC recommends that any person detained because of the failure of the State to issue an entry permit should be brought before a court as soon as possible. All detentions which occur because the State finds it not practicable to issue a permit should have a very limited time span. If there is to be delay, then such person should be brought before a court and any further detention should be reviewed by a court at short, regular intervals.***
9. ***FLAC also recommends that any notice furnished to a person in detention, such as the notice referred to at S.78 (2) should contain information about the right of the applicant to access a lawyer, and legal aid. There should also be an obligation on the person detaining the protection applicant to facilitate all appropriate contact to the lawyer.***
10. ***In order to ensure that people have effective access to justice, FLAC recommends that the legislation should specifically provide that all those in detention for the purposes of the Act should be notified of the right to legal aid and to consult a lawyer. In addition, protection applicants should be notified of their right to consult UNHCR.***
11. ***FLAC recommends that, the Oireachtas insert an overall provision that no person is to be left destitute or without the necessary provisions for a reasonable quality of life by virtue of the withdrawal or ending of residence status.***
12. ***FLAC recommends that the legislation specify that all persons are entitled, without discrimination to equal access to all courts, tribunals, ombudsman's offices and like bodies***
13. ***FLAC recommends that the restriction which limits civil legal aid be removed in order to enable reasonable access to justice.***

1. *ACCESS TO INFORMATION*

1.1 One of the components of access to justice is access to information. Those seeking to access Ireland's law and practice on protection from serious harm or on immigration have, for many years, been hampered by the lack of a comprehensive code setting out rights, responsibilities and procedures. What legislation existed was widely scattered. Many important procedures were not included in legislation at all. The Immigration, Residence and Protection Bill 2010 provides a great opportunity to reform existing outdated legislation and unclear process in the area of immigration.

FLAC however is concerned that many areas which were previously unclear remain unclear under the current draft. The lack of clarity in admitting certain family members of migrant workers into the State and the conditions in which family reunification may be granted are examples of the extended discretionary power afforded to the Minister and the need for transparency throughout the legislation. The details of many important matters and the circumstances in which powers given to the Minister and his officials are to be exercised are left to be spelled out in Regulations to be made later. This means that the full import of the Bill will not be known until after it has been passed into law. While regulations will undoubtedly be

needed from time to time, it would be a great pity not to use this opportunity to provide legislation which is in keeping with the aim of introducing clarity and a comprehensive code to cover immigration law and protection law.

Recommendation 1.
FLAC recommends that the Bill be amended to include rules to govern such matters as when workers' families may join them in the State

1.2 The Bill introduces a new restriction on the right to official information. The Freedom of Information Acts are not to apply to a record relating to the determination of a protection application.[1] This restriction is puzzling. It is hard to understand why an applicant should be denied access to the records relating to the application made for protection.

Any exclusion of access to these records further reduces accountability of decision makers in an area which is already affected by wide administrative discretion. Immigration and Protection decisions are already outside the remit of the Ombudsman – something which the Ombudsman herself has called a "gap in my remit". She has called the restriction unwarranted and has pointed out that best international practice demands the full legal scrutiny of an independent Ombudsman.[2] Under the legislation now proposed, the already weak remedy available to an applicant, to inspect most official documents relating to the application, is to be removed.

Recommendation 2.
FLAC recommends that the new restrictions on access to documents relating to a protection declaration be removed, and that the Ombudsman be given power to investigate complaints about the workings of the immigration and protection mechanisms.

2. <u>ACCESS TO AN INDEPENDENT, IMPARTIAL APPEALS MECHANISM</u>

2.1 FLAC is concerned at the very limited appeal system which will be available to applicants if the Bill is enacted as it stands. All applications for protection or permission to enter into the state or remain in it are made to the Minister for Justice & Law Reform, are examined by agents of the Minister and, from the time of the application to the time when a person may be refused entry to the State or expelled from it, many applicants will have no recourse to any review mechanism outside of the Department of Justice & Law Reform. For some decisions, there is not even an internal review mechanism.

[1] S.68(1) Immigration, Residence and Protection Bill 2010
[2] Introduction to Annual Report of the Ombudsman 2006.

There is an important but limited exception to this through the establishment of a Protection Review Tribunal, but even there, the opportunity has not been taken to ensure that justice is seen to be done, as well as being done, and that the Tribunal is operating in an independent, consistent and impartial manner.

The absence of an independent appeal– or in some cases any appeal at all – for most decisions is disappointing in the context of the Programme for Government 2007-12 where the Government promised that the Bill would "ensure a visibly independent appeals process".[3] *It is hard to understand what the State fears. Decision makers should make independent, consistent and fair decisions at first instance.*

Common sense and experience teaches that not all decision makers will always do that. The chances of making good decisions are increased where the decisions may be reviewed by someone outside the body which is forming the rules, making the decisions and implementing the decisions. This is the task of an appeals body. An independent, fair appeals process would help deliver a consistent high quality in decisions. This would benefit the person who is affected by the decision, and would also benefit the administration of justice in general.

The UN Human Rights Committee in its Concluding Observations on Ireland's compliance with the International Covenant on Civil and Political Rights (ICCPR) in 2008 stated that "Ireland should also introduce an independent appeals procedure to review all immigration- related decisions. Engaging in such a procedure, as well as resorting to judicial review of adverse decisions, should have a suspensive effect in respect of such decisions".[4]

Recommendation 3.
FLAC calls on the Oireachtas to include an independent appeals mechanism for all decisions made under the Immigration, Protection and Residence legislation

2.2 *FLAC also calls on the Oireachtas to amend the provisions relating to the Protection Review Tribunal which are currently contained in the draft legislation. The categories of person who can appeal should be extended and the procedures of the Tribunal should be strengthened to increase the transparency and consistency of the Tribunal. The current draft Bill only makes the Tribunal remedy available where applications have been refused from those who sought to be recognised as refugees under the Refugee Convention or as persons at risk of serious harm under an EU directive. Strangely, those who apply under the same procedure for recognition as persons who need residence permissions – perhaps because of the danger of severe harm if returned to their home – will not be entitled to apply to the Protection Review*

[3] Programme for Government 2007-2012 p.57
[4] UN Human Rights Committee, Concluding Observations, ICCPR Ireland (2008) CCPR/C/IRL/CO/3

Tribunal.[5] *There is no particular reason given as to why this should be the case and it seems to be an entirely unnecessary restriction.*

Recommendation 4.
FLAC would recommend that all those who can make a first instance protection application should be permitted an appeal against a negative decision.

2.3 *For the limited number of people who have access to it, the Tribunal should supply an independent and fair appeal against first instance decisions which are made by an agent of the Minister for Justice and Law Reform. According to newspaper reports, High Court Judge Mr. Justice John McMenamin said in 2008 that the existing Refugee Appeals Tribunal lacked transparency and that its failure to disclose decisions could not accord with the principles of natural and constitutional justice, fairness of procedure or equality.*[6] *In early March 2008, a report in the Irish Times*[7] *disclosed that three Tribunal members had taken legal advice because they contested the Tribunal's assertion to the High Court that decisions of a named Tribunal member were consistent with decisions of all other members.*

Consistency can be achieved in a transparent way through publication of decisions. Decisions are published in many other jurisdictions and in all other common law jurisdictions. Concerns about anonymity can be dealt with in the same way as they are dealt with in child law and family law cases. Concerns about facts being fraudulently used in other cases can be dealt with in the same way that they are dealt with in all other court proceedings and proceedings of Tribunals such as the Employment Appeals Tribunal, where decisions are published. Secrecy and opaqueness in decided cases is not in the interest of anyone, and does not advance access to justice.

Recommendation 5.
Decisions of the Protection Review Tribunal should be reported and published.

2.4 *A further concern in the new bill is the proposed composition of the Tribunal. No member of the Tribunal is required to have expertise or experience in human rights law or protection law although all of their decisions revolve around these areas of law. Nor does the Bill include any stipulation that such training must be undertaken to a high level by all tribunal members. Further, in a new proposal, the ordinary members of the tribunal will not now be required to have legal experience. It may be sufficient for them to have "such experience of protection matters as may for the*

[5] S.92(1) Immigration, Residency and Protection Bill 2010 (as initiated)
[6] "Lawyer accused of bias against refugees quits appeal tribunal" Irish Independent 4 March 2008
[7] Members of Refugee Appeal body considered taking legal action. Carol Coulter, Irish Times 4 March 2008

purpose be prescribed"[8]*. This again leaves a wide discretion to the Minister. It could potentially mean that a protection applicant may never have a decision from anyone other than a civil servant working within the Department of Justice & Law Reform, or that person's employer, the Minister if later regulations prescribed those working in immigration matters within the department as persons with the appropriate "experience of protection"*

Recommendation 6.
FLAC recommends that all members of the Tribunal when appointed should have experience and expertise in human rights and protection matters, should be obliged to engage in ongoing high quality training and should be qualified lawyers with a thorough grounding in all law needed to ensure a fair, independent appeal.

3. *ACCESS TO THE COURTS*

3.1 FLAC is greatly concerned at the substantial restriction on access to the courts in the current Bill. One of the key components of access to justice is access to courts. As the then Chief Justice, Mr. Justice Ronan Keane stated in 2000[9] *in delivering a judgment of the Supreme Court:*

"It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights. In Murphy -v- Green [1992] IR. 566 at 578 Griffin J. observed 'it is beyond question that every individual, be he a citizen or not, has a constitutional right of access to the courts. Stated in its broadest terms, this is a right to initiate litigation in the courts.'

"It may be that in certain circumstances a right of access to the courts of non-nationals may be subject to conditions or limitations which would not apply to citizens. However, where the State, or State authorities, make decisions which are legally binding on, and addressed directly to, a particular individual, within the jurisdiction, whether a citizen or non-national, such decisions must be taken in accordance with the law and the Constitution. It follows that the individual legally bound by such a decision must have access to the courts to challenge its validity. Otherwise the obligation on the State to act lawfully and constitutionally would be ineffective…… The court is satisfied that, in the case of applications to the High Court to challenge the validity of such decisions or other matters, a non-national is entitled to the same degree of natural justice and fairness of procedures as a citizen."[10]

[8] S.101 (2)(b)(i) Immigration, Residence and Protection Bill 2010 (as initiated)
[9] In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999, 2000 IESC 19, 2000 2IR 360 (28 August 2000)
[10] Ibid, at para.s 57-59

3.2 In a system which is already largely administrative, the existing access for those who seek the protection of the courts against negative decisions is very limited. The proposed legislation, if not amended, would limit this even further. Because a person will be liable to summary deportation, they may never have the opportunity to contact a lawyer or a court. The types of case which can only get to court by way of High Court Judicial Review are increased.[11] The time limits within which judicial review must be brought have been further restricted to 14 days beginning on the date when the person was notified of the act.[12] Lawyers, having already explained their case to the court and obtained leave from one High Court judge to begin legal proceedings now run a risk of being personally penalised by an award of costs against them if another judge at the end of the case concludes that the grounds put forward are "frivolous or vexatious".[13]

3.3 An application for judicial review shall not "of itself" suspend the removal of a foreign national from the State.[14] While recognising the inherent power of the Courts generally, the draft legislation provides that deportations may be suspended if it was difficult for the applicant to instruct their representative from outside the State[15]. This makes access to the court extremely difficult, greatly restricting a lawyer's access to the client, and thus inhibiting the capacity of the lawyer to present the case in court.

The new legislation conflicts directly with Supreme Court judgements Ogukwe v Minister for Justice Equality and Law Reform[16], and Dimbo v Minister for Justice Equality and Law Reform[17], in that the Bill does not contemplate of constitutional and Convention rights are necessary prior to the arrest, detention, and removal of a person who an immigration officer is "satisfied" is "unlawfully present in the State".

3.4 Taken together, FLAC is concerned that many people will be physically or logistically unable to access a lawyer or a court before or after they are removed from the country. When seen in the context of the summary deportation proposals, it may be that a person could be removed from the State without even knowing that their residence permission had expired. This will not allow them to access lawyers, let alone a court. Even if permitted to stay in Ireland for two weeks, the 14 day limit does not allow for the concept of working days and so includes holidays, and weekends. Even if a person can contact a lawyer and prepare papers within 14 days, lawyers will now have to do an additional and impossible risk assessment whereby they will have

[11] S. 133 (2) Immigrant, Residence and Protection Bill 2010 (as initiated)
[12] S. 133 (2)(a) Immigration Residence and Protection Bill 2010 (as initiated)
[13] S. 133 (7) Immigration Residence and Protection Bill 2010 (as initiated)
[14] S. 133(8) Immigration Residence and Protection Bill 2010 (as initiated)
[15] S. 133 (8) Immigration Residence and Protection Bill 2010 (as initiated)
[16] [2008] IESC 25 (2008)
[17] [2008]IESC 26 (2008)

to decide whether they are likely to be at personal risk of costs. Given that judicial review will only be granted in immigration and protection cases on much more stringent grounds than in most other cases[18]*, the lawyer should not have to take this extra risk. No such risk attaches to the State, even if it opposes an application on grounds which a judge might also conclude are frivolous and vexatious. It is worth repeating that as it stands, many lawyers bring cases to the High Court without any prospect of payment unless the decision is found to be invalid or a settlement is achieved with the State prior to the hearing.*

Recommendation 7.
FLAC recommends that no person should be deported from the country without being given reasonable access to their lawyer, and to the courts if necessary. Further, the intimidatory provision which will leave lawyers vulnerable to personal liability for costs should be removed.

3.5 *At a different level, there is a worrying lack of judicial oversight for those who make protection applications and are placed in detention*[19] *because "it is not practicable" to issue a protection application entry permit to the applicant. In these cases, it appears that the person may never appear before a court. There is no obligation to notify a person of their right to contact a lawyer or to access legal aid.*

Recommendation 8.
FLAC recommends that any person detained because of the failure of the State to issue an entry permit should be brought before a court as soon as possible. All detentions which occur because the State finds it not practicable to issue a permit should have a very limited time span. If there is to be delay, then such person should be brought before a court and any further detention should be reviewed by a court at short, regular intervals.

Recommendation 9.
FLAC also recommends that any notice furnished to a person in detention, such as the notice referred to at S.78 (2) should contain information about the right of the applicant to access a lawyer, and legal aid. There should also be an obligation on the person detaining the protection applicant to facilitate all appropriate contact to the lawyer.

[18] Immigration, protection and planning law cases have to meet more stringent criteria than other challenges to administrative decisions.
[19] S.78 Immigration, Residence and Protection Bill 2010 (as initiated)

4. ACCESS TO SERVICES.

4.1 The right of access to a court must be practical and effective, not one which – in the words of the European Court of Human Rights – is theoretical and illusory[20]. Thus, the right of access to a lawyer is often an important part of the right of access to the courts. This is particularly true in circumstances where the only remedy available for judicial scrutiny of a decision is the complex and technical one of judicial review and where potentially, many of those challenging decisions will be detained.

4.2 FLAC has already noted a concern about the lack of judicial scrutiny for those who seek protection and are detained pending the issue of an entry permit "when practicable". In addition, others may be detained for various purposes under the Act. There is no provision that persons in detention should be notified of their right to consult a lawyer.

Recommendation 10.
In order to ensure that people have effective access to justice, FLAC recommends that the legislation should specifically provide that all those in detention for the purposes of the Act should be notified of the right to legal aid and to consult a lawyer. In addition, protection applicants should be notified of their right to consult UNHCR.

4.3 An underlying theme of the Bill is the manner in which it proposes that a person will be regarded as unlawfully in the State as soon as their specific permission expires, or is withdrawn. At that stage then, such persons will only be able to access very limited services[21]. All social welfare, except emergency supplementary welfare allowance and a once-off "exceptional needs" payment are to be withdrawn. The legislation provides that other benefits "of a humanitarian nature" can be provided by later regulation.

Recommendation 11.
FLAC recommends that the Oireachtas insert an overall provision that no person is to be left destitute or without the necessary provisions for a reasonable quality of life by virtue of the withdrawal or ending of residence status.

4.4 While the Bill provides that certain essential services should be excluded from the remit of S.9, it is not clear whether those deemed unlawfully present in the State will have access to the Courts, the Social Welfare Appeals Office, the Employment Appeals Tribunal, the Equality Tribunal, the Ombudsman and like bodies. As noted

[20] Airey v Ireland, European Court of Human Rights 1979
[21] S. 9 Immigration, Residence and Protection Bill 2010 (as initiated)

above[22]*, the courts have held that access to the courts is essential in a country where the rule of law is observed.*

Recommendation 12.
FLAC recommends that the legislation specify that all persons are entitled, without discrimination to equal access to all courts, tribunals, ombudsman's offices and like bodies

4.5 *The withdrawal of civil legal advice and aid, except in proceedings relating to the removal of a foreign national from the State*[23] *is a matter of serious concern to FLAC. This will mean that a person will not even be entitled to legal advice about why their residence status was withdrawn or to any advice as to their rights and obligations following on withdrawal of status. One effect of this is to exclude people from access to legal aid based on the area of law involved, rather than on the basis of the person's need for legal advice and assistance. Exclusion from legal aid by topic, rather than by need has been found by the European Convention on Human Rights to be contrary to the right of a fair hearing in civil matters*[24]*. For people whose status may be summarily deemed to be unlawful, the right of access to justice requires access to lawyers.*

Further, it seems that this would remove the right to legal advice and representation in all non-immigration related matters. Thus the victim of domestic violence, the person seeking advice on non-payment for work done and other similar cases would not be able to access legal aid and advice.

Recommendation 13.
FLAC recommends that the restriction which limits civil legal aid be removed in order to enable reasonable access to justice.

[22] See footnote 9 above
[23] S.9(3)(e) immigration Residence and Protection Bill 2010 (as initiated)
[24] Steel & Morris v United Kingdom. 22 European Court of Human Rights 403. 2005

For further information, please contact:
Noeline Blackwell, Director General
FLAC (Free Legal Advice Centres)
13 Lower Dorset Street, Dublin 1.
Phone: 01-8745690.
Fax: 01-8745320
E-mail: info@flac.ie
A copy of this submission, together with Information on FLAC and its work can be found on www.flac.ie