

FLAC
Submission to the Combat Poverty Agency
On the examination of additional indicators for development of a periodic monitory
report on poverty and social exclusion

Introduction

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all. It campaigns through advocacy, strategic litigation and authoritative analysis for the eradication of social and economic exclusion.

FLAC's core aim as a campaigning organisation is to seek equal access to justice for all. This includes as a basic building block, access to lawyers, legal advice and representation. For many in our society, that will only be achieved through the expansion of the scope and funding available for an adequate civil legal aid scheme. That in turn will make a very significant contribution to the eradication of social and economic exclusion.

FLAC welcomes the opportunity to contribute to the Combat Poverty Agency in the examination of developing additional indicators in a number of areas which are recognised as relevant for social exclusion.

Access to justice is one of such areas, as has been recognised by the Council of the European Union. Pursuant to the Lisbon and Santa Maria da Feira European Councils, the Council adopted in October 2000 a set of "appropriate objectives" for the fight against poverty and social exclusion which were endorsed by the Nice European Council in December 2000 and later revised in 2002¹. In the introductory note to those objectives the Council stated the following:

"Poverty and social exclusion take complex and multi-dimensional forms which require the mobilization of a wide range of policies under that overall strategy. Alongside employment policy, social protection has a pre-eminent role to play, while the importance of other factors such as housing, education, health, information and communication, mobility, security and justice, leisure and culture should also be acknowledged"²

Objective 1 of the "appropriate objectives" adopted by the Council³ is:

"1. To facilitate participation in employment and access by all to resources, rights, goods and services."

In addressing the issue of access by all to rights, this objective goes further by stating:

"1.2.d. To develop, for the benefit of people at risk of exclusion, services and *justice* accompanying measures which will allow them effective access to education, and other public and private services, such as culture, sport and leisure."

In this context, FLAC wishes to highlight the need to include as a primary indicator "access to justice" which relates to the main themes in the National Anti-Poverty Strategy/National Action Plan on poverty and social exclusion.

The right of access to justice

The right of access to justice should guarantee that every person has access to an independent and impartial court and the opportunity to receive a fair and just trial when the person's fundamental rights are at risk.

¹ Fight against poverty and social exclusion: common objectives for the second round of National Action Plans- Endorsement; Social Protection Committee- Brussels, 25 November 2002 (14164/102 REV 1)

² Ibid, Annex II – Introductory note

³ Ibid, Annex to Annex II – Objectives 1 the Fight against Poverty and Social Exclusion

Access to justice is an imperative in human rights law. That *all* persons can avail themselves of the judicial resources afforded by the legal system to protect their rights is essential in a democratic State that is to be guided by the principles of rule of law and equality.

Equal access to justice is a fundamental human right which is recognised in Irish law, and in international human rights law. Following the incorporation of the European Convention on Human Rights into Irish law in 2003, each organ of the State, including all government departments, is obliged to perform its functions in a manner compatible with the State's obligations under the provisions of that Convention, subject to any law to the contrary.

The State also recognises, as a matter of law, that all of the rights contained in the Universal Declaration of Human Rights are universal and indivisible. Similarly, Irish constitutional law and international human rights law recognise the doctrines of equality before the law and of non-discrimination as core principles.

A crucial element of access to justice is the effective availability of the services of a lawyer. It is in the pursuit of an agenda of equality that the question of legal aid becomes relevant. For people who cannot afford the services of private practitioners, legal aid is the only mechanism possible to ensure that their rights are effective and not just theoretical.

Access to justice as an element of social inclusion and cohesion

The lack of effective and accessible mechanisms for resolving legal disputes prevents citizens 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 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.

Monitoring Poverty and Social Exclusion

In its latest report *Access to Justice: a Right or a Privilege?*⁴, FLAC recommended that 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.

FLAC contends that the adoption of a human rights proofing process is a practical way of monitoring the realisation of the "appropriate objectives" adopted by the EU Councils. Furthermore, the State is obliged to respect, protect and promote the right to equal access to justice for all. FLAC's submission to the Office of Social Inclusion on a review of the poverty proofing process⁵ expressed concerns in relation to the guidelines that the OSI circulated in April 2005 which do not at any stage refer to the need to proof law, policy and procedures against human rights entitlements. If there is no way of checking that laws, policies and procedures respect, protect and promote human rights, then there can be no effective monitoring. This in turn impedes the realisation of those rights.

In addition, FLAC stated to the OSI that a process which aims to achieve social inclusion must be grounded in the underlying rationale for the process. In this case the need for the process derives from:

⁴ *Access to Justice: a Right or a Privilege?*, page 63 - FLAC, July 2005

⁵ FLAC – Free Legal Advice Centres' Submission to the Office of Social Inclusion on a review of the Poverty Proofing Process – July 8th, 2005

- the obligation of the State through its domestic, EU and international human rights commitments to realise fundamental human rights;
- the universality and indivisibility of all human rights;
- the right to equality and non-discrimination.

FLAC submitted that those principles should be specifically named as overarching principles within the construction of a poverty proofing process, and in its implementation, monitoring and evaluation. This recommendation is consistent with the recommendation of the European Commission 2002 and 2004 Joint Reports on Social inclusion.

Access to justice as an indicator to monitoring and assessing social inclusion

Access to justice is a recognised relevant aspect of the multidimensional phenomenon of poverty and social exclusion. Therefore, it should be included as a key area in the Irish National Action Plans and indicators measuring the extent to which this fundamental right is effective and available to all should be developed. This, as the EU Social Protection Committee⁶ proposed, would be part of the national set of indicators which would reflect the priorities of the Irish government in tackling poverty and social exclusion.

It is noted that the issue of legal aid was addressed in the National Action Plan 2003-2005 under the heading “legal assistance” (Ch.1.8.5). The policy task undertaken by the State in that area was “to monitor and improve the effectiveness of services, especially for the most vulnerable”. In discussing legal assistance, the Plan states that the Legal Aid Board provides advice and representation on many areas of civil law to those requiring such information and assistance. However, as FLAC’s report shows, that is not the case.

Figures from the Legal Aid Board’s Annual Report 2004 indicate that 91.72% of litigation services and 80.68% of the cases involving legal advice provided by the Board to its clients were in the area of family law⁷. The narrow focus of the Legal Aid Board in terms of both legal representation and advice on the specific area of family law contrasts with FLAC’s findings from its Statistical Report for Year 2004 which shows that only 35.3% of clients who sought legal advice at its network of centres during that year queried family law. The reminder 64.7% indicates that unmet legal need is far broader than family law. Employment law accounted for slightly over 10 percent indicating a considerable need for legal advice in this complex area. Housing was another area of considerable need for legal advice and information with seven percent of the total number of queries. Other significant areas of civil law include consumer/debt, succession/probate, social welfare and civil litigation matters, such as medical negligence and personal injuries.

The range of legal need is far wider than family law. That wider need is not being met. This was clearly not picked up by poverty proofing and, as far as FLAC is aware, has not been noted or addressed by any monitoring which took place between 2003 and 2005 what suggests that there is a need for a thorough basic assessment and audit of the current service in the context of social exclusion.

Further, no account at all is taken in the NAPs/inclusion 2003-2005 of the harsh limits of the means test. The income limits for the means test have only been increased once, in 2002. On that occasion, the overall adjustments led more towards social exclusion than inclusion by abolishing allowances which previously existed for hire purchase and loan interest payments, for life insurance and for work travel expenses. This was not mentioned in the NAPs/inclusion, nor was there any concern expressed at the abolition of valuable allowances in low-income households. Such abolition was clearly regressive and could not possibly improve the effectiveness or accessibility of services, especially for the most vulnerable.

⁶ The Laeken European Council 2001 agreed a set of 18 common indicators to monitor the progress of member states in tackling poverty and social exclusion which were proposed by the EU Social Protection Committee (SPC) who also proposed the building of a set of national indicators which would reflect the priorities of member states.

⁷ Legal Aid Board Annual Report 2004, page 9

As indicated in FLAC's report on legal aid, there are other deficiencies in the provision of the state funded civil legal aid that also remain unaddressed, such as the lack of public awareness of the legal services provided by the Legal Aid Board. While recognising that the LAB has produced a range of leaflets and developed a web-site, FLAC contends that the scheme has not been adequately publicised. This conclusion is supported by FLAC's statistical report for 2004 which found that more than half of FLAC's clients were not aware of the existence of the LAB services.

The waiting times at the LAB Law Centres have also been of concern for FLAC. In recent years waiting lists for civil legal aid in many centres have been extremely long, leaving people without any legal assistance for as long as two years in some locations. People who cannot afford their own solicitor and meet the criteria for civil legal aid have been, as result of long delays, effectively being denied this fundamental right of access to the courts.

Although the issue of waiting lists, which had gravely affected the right to civil legal aid and which has been the subject of a recent constitutional court action⁸ was recognised by the Department of Justice, Equality and Law Reform⁹ in its submission to the Implementation Report dated 30 June 2005 to the European Commission on the NAPs/inclusion 2003-2005 in relation to Civil Legal Aid, the other issues mentioned above were not raised at all. The failure to note or, even to notice these very pressing concerns, fails to accord with the statement made in the NAP that a key determinant in social inclusion is the further development of quality public services (Ch.3.3.1).

FLAC believes that the service for civil legal aid recipients remains seriously under-funded and under-resourced and is not moving towards including vulnerable people more effectively. Barriers to access to justice that mainly impact on people of low-incomes or the most vulnerable should be examined and taken into consideration when building a national set of indicators for monitoring progress towards the goal set by the European Councils of achieving social cohesion.

⁸ *O'Donohue v Legal Aid Board, the Minister for Justice Equality and Law Reform, Ireland and the Attorney General* [2004] IEHC 413 (High Court, 21 December 2004)

⁹ The DJER is the government department with primary responsibility for delivery of the civil legal aid scheme.