

F L A C. free legal advice centres

Submission to the Consultation on Ireland's National Action Plan against Poverty and Social Exclusion 2006-08

19 Oct. 05

INTRODUCTION.

Flac is an independent human rights organisation which is dedicated to the realisation of equal access to justice for all. It campaigns through advocacy, strategic litigation and analysis. Its aim is the eradication of social and economic exclusion. Flac welcomes the opportunity to submit its views to the OSI at this important time when government is preparing its national action plan against poverty and social inclusion.

Equal access to justice is a fundamental human right which is recognised in Irish statutory and constitutional 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. It is also well accepted that 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 is a matter of fact. Access to justice on a truly equal basis, facilitating social inclusion, will be signified by equality of outcome regardless of resources.

The objective of protecting and promoting the right of access to justice should be included in all appropriate National Action Plans, including that being prepared against Poverty and Social Exclusion. We now turn to the specific objectives. Our responses below should be read in the overall context set out in this introduction.

FACILITATING PARTICIPATION IN EMPLOYMENT

No comment, save in relation to protecting the right of access to justice relating to employment rights, which is dealt with below.

FACILITATING ACCESS TO RESOURCES, RIGHTS, GOODS & SERVICES.

2A FACILITATING ACCESS TO RESOURCES.

The courts and other bodies which administer justice.

Everyone should have equal access to the courts, 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. See further on this issue in the section “facilitating access to rights”.

Improvements to present system

- (i) Adjust the means test for Civil Legal Aid.
- (ii) The Legal Aid Board should provide legal services to its full capacity.

Modifications

- (iii) The scope of actions which qualify for legal aid under the Civil Legal Aid Act 1995 should be extended. See further below.

New Measures

- (iv) To protect it, and ensure its recognition as a part of social inclusion, the right to civil legal aid should be codified in legislation.

Priorities.

- (v) Adjust the means test to take account of current realities.
Extend the scope of civil legal aid.

Social Welfare Assistance payments.

These are particularly directed at people who are in need. The habitual residence condition attached to a number of assistance payments, as well as to child benefit, a payment heretofore seen as universal. This discriminates between EU nationals/ workers and non-EU nationals and contributes towards social exclusion of non-EU nationals. The definition of “worker” is very narrowly defined and is not consistent either with international human rights law or the case law of the European Court of Justice of the European Union. The situation in relation to child benefit is dealt with below.

Improvements to the present system:

- (i) The definition of “worker” should be that of Art.2 of the UN Convention on the Rights of Migrant Workers and their Families namely: *“a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”* to the intent that any person who is seeking work, or who is seeking re-employment, or has been employed should be able to benefit in the same way as a migrant worker in active employment or work.

Modifications.

- (ii) The application of the habitual residence condition to Carers Allowance should be abolished. This payment contributes to the dignity, and physical and mental integrity of people who are vulnerable and living in their own homes.

New Measures.

- (iii) Review the habitual residence condition against State obligations arising from all relevant human rights treaties including those referable to elimination of racial discrimination, discrimination against women and against children.

Priorities

- (iv) Review of the condition against all applicable human rights standards and adjust the scheme in line with that review.

2B FACILITATING ACCESS BY ALL TO RIGHTS.

Right Of Access To Justice.

See the overall context for this submission set out in the introduction, above. Within the civil legal aid scheme, the means test has only been adjusted once since 1995. The allowances made bear no reality to the real cost of a dependent relative, childcare, or accommodation. Several allowances which are crucial to those on limited incomes, such as the cost of credit, are excluded entirely. This means that many on low incomes, without any real possibility of accessing justice from their own funds, are excluded from civil legal aid.

Even those who qualify for legal aid have to pay a subscription which can be so extensive that for some people, legal aid is of no benefit at all. The limits which govern this subscription have only been adjusted once, as above. A person's family home is included in the assessment.

Within the civil legal aid scheme, nine categories of cases including some housing cases, cases before social welfare tribunals or at the social welfare office, are excluded. Such cases may involve complex claims to vindicate fundamental rights.

The civil legal aid scheme is operated in a minimalist way. The Legal Aid Board is mandated to carry out work in all areas of law save those cited above, but more than 95% of its work is done in family law. This ignores substantial need in housing, debt/credit representation, welfare, employment and immigration law.

The number of staff employed in 30 Law Centres around the country is insufficient if the service is to operate to best capacity.

Flac's report "*Access to Justice: a Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland*" (Flac. July 2005) showed the need to deliver legal services to

particularly vulnerable communities through community based law, catering for the needs of a particular community in a way that is effective for that community. The delivery of community law is a different model to the central service model delivered by the Legal Aid Board. The community law model is a driver for social inclusion in the key area of access to justice.

A conference organised by Flac on 6 October 2005 entitled *“Public Interest Law in Ireland – The Reality and the Potential”* explored the use of law in the public interest for the benefit of marginalised and vulnerable communities. Arising from the conference, it is clear that there is a need to further explore and support the use of law in the public interest in Ireland. If it is to be effective in improving the access of disadvantaged communities to justice, this review should be undertaken by all sectors of society, including the State.

Improvements to the present system.

- (i) Adjust the means test for civil legal aid. Amend cost of living allowances including accommodation and child care so that they relate reasonably to the actual cost of living. Re-introduce allowances which actually impact on low income families such as the cost of credit and the expenses of travel to work.
- (ii) Adjust the disposable income and capital limits which make the subscription which legal aid clients have to pay disproportionately high.
- (iii) The family home should be excluded from any calculations in relation to means or subscription.
- (iv) The Legal Aid Board, a semi-state organisation, all of whose members are appointed by the State, should ensure that it offers the full range of legal advice and representation permitted by law, rather than just providing a family law service.
- (v) The Legal Aid Board should engage in an appropriate strategic information and advertisement campaign in relation to the existence and extent of its services.
- (vi) The State should provide secure funding to the Legal Aid Board to allow it to deliver a sufficient service to fulfil its legal mandate.
- (vii) The State should appoint representatives of communities which are heavily dependent on legal aid as members of the Legal Aid Board.

Modifications

- (viii) Increase the scope of civil legal aid so that no person is denied access to justice just by virtue of the nature of the case. This should permit legal representation wherever necessary.
- (ix) Legal aid should be available for matters before the employment appeals tribunal and social welfare appeals tribunal.
- (x) Resource community law centres, and initiatives which seek to deliver legal services with a community based approach.

- (xi) Advance partnerships between community law services and the Legal Aid Board.
- (xii) The Law Reform Commission has recently noted that no legislative changes are required to permit class actions in the Irish courts, although some court regulations will need change. These regulations should be altered to permit class actions.
- (xiii) The said Commission also noted that class actions were excluded under the current civil legal aid scheme. This exclusion should be repealed to advance the use of law in the public interest.
- (xiv) The State should engage with the judiciary, legal system and community and voluntary sectors to explore and advance the use of law in the public interest

New Measures.

- (xv) The State should provide resources to allow interested groups to provide public and community legal education to improve knowledge of legal rights and entitlements.
- (xvi) The State should provide resources to communities to encourage legislative and policy advocacy and community group representation.

Priorities

- (xvii) Adjust the financial limits so that those who reasonably need financial assistance to access justice may do so.
- (xviii) Increase the resources to improve knowledge of legal aid and of legal rights to the public and to vulnerable communities.
- (xix) Amend court regulations to permit class actions.
- (xx) Ensure that no area of law is excluded from the right to legal aid.
- (xxi) Advance partnerships between community law services and the legal aid board.

Debt Enforcement/ Imprisonment

It is the right of every person (Article 11 International Covenant on Civil and Political Rights) not to be imprisoned solely for non-payment of a civil debt. Imprisonment as a result of debt usually arises where a person has failed to appear to proceedings. There is no requirement for a thorough, up to date assessment of an indebted person's ability to pay, or circumstances, before such an order can be made.

Debt collection and enforcement proceedings impact disproportionately on those on low income and those who are particularly vulnerable. In its report to the UN Human Rights Committee in April 1999, the Irish government reported that legislation was then being prepared to end imprisonment for civil debt and non-payment of fines where practicable. Flac's report on how the legal system in

Ireland treats uncontested consumer debt cases *An End based on Means?* Paul Joyce, *Flac*, May 2003 found that such proposed legislation seems to have been abandoned or perhaps never commenced, in the case of non-payment of civil debt. In order to ensure that the rights contained in Art.11 of the ICCPR are respected, there should be a thorough and actual assessment of an indebted person's means and circumstances (including multiple debts and demands) prior to a court decision that a person is in contempt of court.

Improvements to present system.

- (i) All documents initiating a legal claim for debt should be accompanied by an informative explanation of the procedures in intelligible form, in a language that the person understands. This document should also advise indebted persons of the legal aid and money advice bureau facilities available, together with an advice to take such advice immediately.
- (ii) Improve the awareness of indebted people of right to legal aid and to advice from money advice bureaux.
- (iii) Strengthen the MABs money advice system to permit it to better reach out to indebted people who are at risk of imprisonment.

Modifications

- (iv) No decisions should be made on instalment payments without an agreed statement of means, to avoid unrealistic and punitive court orders which are more than likely to lead to default.

New measures

- (v) Undertake a review of debt enforcement procedures, with a brief to eliminating imprisonment as a result of non-payment of civil debt and protect the human rights of the participants to such proceedings, and to ensuring that the courts and court offices are used appropriately and effectively in the area of debt enforcement.
- (vi) Examine alternative systems, in particular those used in Northern Ireland, and in England and Wales.
- (vii) Consider the application of a scheme of attachment of earnings to debts.

Priorities

- (viii) Provide for an agreed statement of means prior to instalment orders.
- (ix) Review debt enforcement procedures to come up with an alternative to imprisonment as a result of non-payment of civil debt or fines.
- (x) Extend the knowledge of indebted persons of their rights.

Rights Of The Child

Children's rights should be enjoyed without discrimination of any kind, irrespective of the child's or his or her parent's or guardian's race, national ethnic or other origin, or other status. (Article 2 UN Convention on the Rights of the Child). Currently, child benefit and one-parent family allowance, formerly universal benefits, are applied in a discriminatory manner which deprives a child of its rights based on the status of its parent as an EU national/ worker, or otherwise. The discrimination arises in the application of the Social Welfare Habitual Residence Condition, where these child centred payments are not available:

- to parents who are asylum seekers or those seeking leave to remain; and
- to other immigrant parents who cannot satisfy the two year criterion unless they are actually employed at the time of the payment.

Improvements to present system.

Child benefit should be restored as a universal benefit immediately. The habitual residence condition should be removed from other payments which have a direct bearing on child welfare and child poverty such as the one parent family allowance.

No modification or new measure is required to facilitate the above, which is the priority.

2C FACILITATING ACCESS BY ALL TO GOODS.

No comment.

2D FACILITATING ACCESS BY ALL TO SERVICES.

This has been covered under 2B – access to rights.

PREVENTING THE RISKS OF EXCLUSION

Our comments on this are covered under No.2 above.

HELPING THE MOST VULNERABLE GROUPS

Asylum seekers and their children are experiencing as result of the direct provision scheme. Suffer material deprivation and social exclusion.

In its report *Direct Discrimination? An analysis of the scheme of Direct Provision in Ireland* (Flac July 2003) Flac notes that the rationale behind the introduction of the scheme stemmed from the government's policy of discouraging asylum seekers. However, the system is a misconstruction of the social welfare code

and that the objective of discouraging asylum seekers is at odds with the other government objective of meeting the needs of those who cannot provide for themselves in the State under the social welfare code. As that report sets out, many of the needs of asylum seekers and their children are not being met under the scheme of direct provision. Unsuitable accommodation and the lack of control in relation to diet under the direct provision policy have adversely affected mental health problems on the asylum seeker population and even malnutrition of their children. The report also concludes that the direct provision scheme fails to respect the principles contained in the NAPS and does not appear to have been poverty-proofed in line with these principles.

Flac has recommended that the scheme of Direct Provision be abandoned and that asylum seekers be dealt with in the line the existing social welfare legislation, and in particular, in line with the original spirit and intention of the social welfare code. In addition, the report recommends that all future measure in relation to asylum seekers be subject to poverty-proofing and equality-proofing.

New measures.

The scheme of direct provision should be abandoned.

MOBILISING ALL RELEVANT BODIES IN FIGHTING POVERTY AND SOCIAL EXCLUSION,

It is helpful that the plan envisages mobilisation of all relevant bodies in the fight against poverty and social exclusion. As our comments above show, much valuable work can be done by communities themselves, by independent voluntary and community sector actors, and by partnerships between the State, the semi-state sector and those other actors.

While policy makers are often aware of the need to mobilise all relevant bodies, there is often a lack of connection between them and those who actually work on the ground, on the issues, and in community. This is a question of lack of information, and a lack of real participation by the community in the delivery of services and rights that are crucial.

Improvements to present systems.

- (i) Drawing on the above, an existing partnership model between the Legal Aid Board and a community law centre at Ballymun could be extended.
- (ii) Vulnerable community representatives should sit on the Legal Aid Board.
- (iii) Those involved in public and community legal education should be better resourced, for a more effective service.
- (iv) Where people are asked to contribute to consultations, they should be given a reasoned response to the contributions that they make whilst

the debate is ongoing. Too often, the response is a final plan or piece of legislation without any opportunity for discussion or debate.

New.

- (v) The judiciary, legal professions, the State, the Legal Aid Board, community law sector and NGOs should continue how to explore how law may be better used in the public interest.

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