Submission on the Multi-Party Actions Bill 2017

A submission by FLAC to the Joint Oireachtas Committee on Justice and Equality

FLAC, February 2018

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FLAC welcomes the opportunity to address the Joint Committee on Justice and Equality as part of its detailed scrutiny of the Multi-Party Actions Bill, a Private members Bill sponsored by Deputies Donnchadh Ó Laoghaire and Pearse Doherty. We have also been invited to address some of the Government's criticisms of the Bill, as expressed by the Minister of State, Catherine Byrne, at Second Stage debate.

We welcome and applaud the drafters of the Multi-Party Actions Bill 2017 and the intention behind it to increase access to justice for vulnerable /disadvantaged individuals. We are also grateful to the Joint Committee on Justice and Equality for giving detailed consideration to this access to justice issue. The Chief Justice has committed to making access to justice a central focus of his tenure. FLAC is requesting that the Law Reform Commission make access to justice a central theme of its 5th programme of law reform. FLAC would very much welcome if the Justice and Equality Committee would also make access to justice an ongoing focus of its deliberations. We would also welcome an opportunity to address it separately on another critical related issue of access to justice, namely legal aid.

Introduction

FLAC (Free Legal Advice Centres) is a voluntary independent human rights organisation which exists to promote equal access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights.

FLAC operates a telephone legal information and referral line and runs a network of legal advice clinics where volunteer lawyers provide basic free legal advice. FLAC also provides specialist legal advice to advisers in MABS and CISs. FLAC has recently worked to improve access to justice in particular for Roma and Traveller women [1]. Within JUSTROM, FLAC supported the running of legal clinics for Travellers[2] and Roma.[3]

More than 25,700 people received free legal information or advice from FLAC in 2016 from the telephone information line and the network of legal advice clinics at 67 locations around the country. FLAC also runs PILA the Public Interest Law Alliance which operates a Pro Bono Referral Scheme for NGOs, community groups and independent law centres. FLAC also provides legal representation in a small number of cases that may have strategic value beyond the individual.

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[1] As part of the JUSTROM (Joint Programme on Access of Roma and Traveller Women to Justice) programme, a Council of Europe initiative.

[2] In relation to Travellers 40 casefiles were opened with accommodation and housing constituting 75% of them, discrimination 20% and civil cases 5%. FLAC is engaged in advocacy on behalf of 26 others (Accommodation/Housing: 18 (69.2%); Civil Issues: 5 (19.2%); Discrimination: 2 (7.7%) and Social Welfare: 1 (3.8%).

[3] Arising from the Roma clinic, FLAC opened 39 case files: (Social Welfare Cases: 13 (33.3%): Accommodation/Housing Cases: 11 (28.2%); Citizenship Cases: 7 (17.9%); Civil Cases: 3 (7.7%); Discrimination Cases: 3 (7.7%); Criminal Cases: 1 (2.6%); Administrative law Cases: 1 (2.6%). FLAC also provided advocacy in respect of 89 Roma with the following breakdown:-Citizenship: 28 (31.4%): Social Welfare: 19 (21.3%): Accommodation/Housing: 17 (19.1%); Discrimination: 12 (13.4%); Administrative Issues: 10 (11.2%); Civil Issues: 2 (2.2%) and Criminal: 1 (1.1%).

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

FLAC identifies and makes policy proposals on laws that impact on marginalised and disadvantaged people, with a particular focus on social welfare law, personal debt & credit law and civil legal aid. Most recently FLAC made a detailed submission to the Department of Justice and Equality on the review of the personal insolvency legislation. We would welcome an opportunity to address this committee separately on this issue.

FLAC's Experience of Multi-Party Litigation:

FLAC was involved in one of the earlier examples of litigation involving a significant numbers of plaintiffs in relation to the non-implementation of the 1978 Directive on Equal Treatment in Social Welfare.[4] FLAC initially took a case on behalf of 1800 married women arguing the entitlement of married women to back-payments during the 2-year period when Ireland's discriminatory policy was in breach of EU law.

The cases led to several different sets of legal proceedings on behalf of over 11,000 women against the State, involving a number of firms of solicitors. The litigation eventually led to full implementation of the Directive, after a number of judgements and three referrals the CJEU, with the Government announcing that the required payments would be made to the entire group of 69,000 women, including the women who had not lodged proceedings with this amount totalling £265 million including interest. The overall cost has been €300m.

FLAC was also recently involved in a collective complaint pursuant to the European Social Charter, which was lodged in 2014 against Ireland on behalf

[4] Council Directive (EC) 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security OJ 1979 L 6/24

of tenants from 20 local communities. The complaint was lodged by FLAC's affiliate FIDH, the International Federation for Human Rights [5] as FLAC could not lodge the complaint directly as Ireland had not granted representative national non-governmental organisations the right to lodge complaints against it.

In a landmark decision in 2017 the European Committee of Social Rights found that Ireland has failed to take sufficient and timely measures to ensure the right to housing of an adequate standard for many families living in local authority housing across the country.[6]

The current position.

Ireland, at present, has no formal statutory or court rules for Multi-Party Actions so neither multi-party nor specifically "class" actions are provided for. There are a number of ways in which litigation involving multi parties are brought. Representative actions are rarely invoked because they are of such restricted use, they cannot be used for tort claims and damages cannot be awarded.

[5] The European Social Charter is a binding human rights treaty that Ireland ratified in 1964 and again in its revised version to allow for the collective complaints procedure in 2000. The Charter is a Council of Europe convention which guarantees economic and social rights, including the right to adequate housing and the right to social, economic and legal protection. The European Committee of Social Rights is the body in charge of upholding the Charter

[6] The evidence for the collective complaint was gathered over five years through the work of Community Action Network working with tenants from 20 local communities, closely supported by The Centre for Housing Law, Right and Policy at NUI Galway and Ballymun Community Law Centre.

There is a possibility of joinder[7], or consolidation[8]. The test case is the preferred means of dealing with multi-party actions.[9]

In England and Wales, GLOs were introduced as a form of multi-party litigation in May 2000, yet, despite the LRC recommendations, there has not yet been any such major change in Ireland. This is a major distinguishing factor in Ireland and is a gap in the Irish legal framework.

FLAC welcomes this Bill as a tool in achieving the overall objectives of expanding access to justice, procedural efficiency and fairness. The Bill if enacted can enable litigants to overcome some of the many impediments facing citizens who take legal actions individually.

Access to justice involves access to legal aid, access to the courts and access to effective remedies. There are numerous barriers to access to justice in all of these areas and it would be unfair to expect that the content of one bill would eliminate them. FLAC's information line regularly receives calls from lay litigants who are endeavouring to represent themselves in complex court cases and who are desperately in need of assistance, advice and representation, which FLAC does not have the resources to provide. We come across cases which we believe would constitute significant test case with potential significant result for e.g. social welfare recipients but where the potential litigant is paralysed by the prospect of a costs order being made against him/her. Another feature we have observed regularly is that good cases which may have

[7] This is a process whereby the court can simply join additional litigants to an action where it is necessary in the interests of justice and in this way it can hear related cases together.

[8] It occurs where the court rules that disputes must be consolidated together by a plaintiff uniting several causes of action in the same proceedings.

[9] A plaintiff proceeds on an individual basis. The test case establishes a benchmark and, while subsequent actions by other litigants are not bound by the result, the test case outcome gives an indicator of the outcome of future litigation both in terms of formal precedent and the similarity of subsequent proceedings

significant impact are often settled on the basis of strict confidentiality thus minimizing the impact of the litigation.

Legal aid

The courts system is predicated and planned on the basis that a litigant is represented by a lawyer. The provision of legal aid is a critical matter for access to justice and is central to the administration of justice and the rule of law.[10].

The current system of civil legal aid provided by the Legal Aid Board under the provisions of the Civil Legal Aid Act 1995 is very restrictive and limited. The applicant's disposable income must be below €18,000 and the disposable capital threshold is €100,000. Applicants must also pay a financial contribution which in some instances may be quite significant. There are lengthy waiting times in many law centres. Core areas of law such as housing are in large part excluded from its remit. The operation of the merits and means test means that people facing family home repossessions are not entitled to legal representation.

In many cases members of the public have no option but to attempt to represent themselves or allow judgement to be entered in default of a response to a claim. In many other cases, members of the public with good claims will be left with no option but to abandon their rights and leave problems unresolved and

[10] 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, which guarantee the rights to a fair trial, to an effective remedy and to legal aid to those who lack sufficient resources so far as this is necessary to ensure effective access to justice. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteedthe European Court of Human Rights has held that the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively (Eur. Court H.R., judgments in Airey v. Ireland, § 26; McVicar v. the United Kingdom, §§ 48 and 49; P., C. and S. v. the United Kingdom of 16 July 2002, ECHR 2002-VI, § 91, and Steel and Morris v. the United Kingdom, § 61)

potentially worsening, unless they are prepared to attempt to represent themselves. Navigation of the court process without representation can be difficult, complicated and emotionally draining on the person concerned. It can also add significant delay to court hearings. Litigation of this nature often arises out of housing law and debt disputes involving particularly vulnerable litigants.

The result is no access to justice for some and compromised access to justice for others. The Minister has recently indicated that the Department may be in favour of reviewing the eligibility criteria for legal aid. This is to be welcomed.

Exclusion of Legal Aid in Multi Party Actions

Section 28(9) (a) (ix) of the Civil Legal aid act in effect excludes legal aid in respect of representative actions and is worded in such a way as to likely to prohibit the provision of legal aid in Multi-Party litigation. The Law Reform Commission report addressed this in its report in Annexe B which contained a draft amendment to the Civil Legal Aid Act 1995 providing that Multi Party Actions were not excluded matters.

Flac recommends that that the Joint Oireachtas Committee would recommend that the provision of Civil legal aid is a fundamental part of the administration of justice and needs to be appropriately resourced. It further requests the Review Group recommend a root and branch review of the scheme of Civil legal aid and advice including eligibility criteria, means tests, contribution requirements and exclusion of areas of law such as the exclusion of Multi party actions

Response of FLAC to some of the Government's criticisms of the Bill, as expressed by the Minister of State, Catherine Byrne, at Second Stage debate as requested by the Joint Oireachtas Committee

It has been suggested that the Bill is technically flawed in that it seeks, inappropriately, to enact as primary legislation a scheme that was intended by the Law Reform Commission to be in the form of rules of the Superior Courts.

The Superior Court Rules Committee[11] has the power (exercisable with the concurrence of the Minister for Justice and Equality) of making and changing the rules of the superior courts. To date the Committee has not made rules governing Multi-Party Actions, notwithstanding the recommendations of the Law Reform Commission. In line with the ordinary principles governing delegation of power under legislation, decisions on policies and principles should be made by way of primary legislation and delegated legislation - which is the form the rules take, adopted under SIs - should only fill in the details.

The Law Reform Commission appears to have recommended reform by way of the rules rather than primary legislation. While this is a legitimate choice, there is nothing in principle or in law which would prevent the changes being brought in by way of primary legislation. Indeed, where there are clearly policy implications to multi-party actions, it would appear more desirable in principle that the relevant decisions are taken by the political organs, rather than the Rules Committee. It would be constitutionally suspect if the Oireachtas was in some way disbarred from introducing legislation seeking to improve access to the courts in the absence of the Superior Courts Rules Committee making such rules for whatever reason.

The primary legislation could set out the major lines of the procedure leaving the detailed rules for their implementation to be determined by the Rules

[11] Section 67 of the Courts of Justice Act 1936 and, under section 68 of that Act

Committee in accordance with their statutory mandate. Indeed, Part 4 of the recently enacted Mediation Act 2017 is an example of just such an approach.

The Bill includes a saver in section 10 in relation to the power of the Rules Committee to adopt rules. It may be more appropriate to require the adoption of rules to give effect to the provisions of the Bill. It may be that some of the matters addressed in the earlier provisions would be better addressed by way of rules rather than statutory provision.

Tracker mortgages:

An overarching point is that the tracker mortgage scandal is the catalyst for the publication of this Bill. Whether multi-party actions are or are not an appropriate way of dealing with the tracker mortgage issue or whether or not there is a more efficient redress system available does not take way from the fact that we do not have formal effective procedures for multi-party litigation and this Bill is a significant improvement and development in this regard. In the course of November's debate mention was made variously by deputies of the Social Welfare equal treatment arrears cases, the Army deafness claims, the De Puy hip replacement cases, pyrite in homes amongst others. There will almost inevitably be others in the future. The decision then is whether and how to a multi-party action procedure is introduced in our legal system, not necessarily its applicability to dealing with tracker mortgages.

A more efficient redress and compensation scheme is in place

The assertion that '*a more efficient redress and compensation scheme is in place'* is perhaps somewhat disingenuous. The original complaints to the FSO that began to publicly expose the issue were, as we understand it, made in 2011. PTSB appealed the FSO's decision to the High Court which rejected the appeal in August 2012. A subsequent appeal to the Supreme Court by PTSB was ultimately withdrawn.

It has taken a substantial number of years for the State/Central Bank to treat this issue with the seriousness it merits, yet alone for the institutions to even identify the number of customers affected and there is still no definitive total in early 2018. Had a multi-party action procedure been in place in 2011/2012, it is arguable that these matters would have been dealt with by now.

The Central Bank's programme of redress proceeds apace from a rather slow beginning. A substantial number remain to be compensated and there is a major question hanging over the adequacy of the proposed compensation that has been or will be provided but it is not at all clear that every customer will content themselves with the compensation determined by a lender in an individual case, especially as the amounts in respect of damages seem to range from 10% to 15% of the amount overcharged. Indeed, the Bank has made it clear in its 2017 update report that '*the impacted customer has the option of bringing a complaint to the FSO or initiating court proceedings'.*

It was widely reported at the end of October 2017 that one case against a lender in the Circuit Court was settled for a sum that was a multiple of what was first offered by the bank in question and legal costs. The solicitor acting for the client was reported to have forecast at the time that it will be the first of many such cases to be brought before the courts. Thus, it is not at all clear that the redress programme will achieve the resolution of all tracker cases particularly the more egregious cases where repossession proceedings have been brought or family homes have been repossessed.

Are Multi party actions a viable way of dealing with tracker mortgages?

It has been questioned whether a multi-party action mechanism would be a viable way of dealing with the tracker mortgage scandal, given its scale and complexity.The Law Reform Commission report recognised that the contents of the proposed bill were not to be considered as a solution to all problems, but rather as providing an alternative procedure where it was appropriate.

The point is fairly made in the Minister for State's contribution that "series of class actions would likely be necessary given the likely multiple defendants involved, both multiple banks and a number of funds to which mortgages have been sold, and the multiple different forms of mortgage contracts involved, both within each bank and-or across banks". Even if it this multi-party procedure is not the proper vehicle for all tracker mortgage claims, it may well be appropriate for some of them.

It is useful to look at the discussion by the LRC in its 2005 report on the question of the potential scope of a multi-party action. It goes without saying that a class action is never likely to present itself as a homogeneous set of plaintiffs, facts and legal arguments. Thus, for example, the LRC recommends 'that the cases for which certification is sought should give rise to common issues of fact rather than be required to show strict commonality' (Para 2.53, Page 36). Thus, it seems to be envisaged that a multi-party action may involve related but distinct claims that are best resolved from an administration of justice perspective by being dealt with collectively, rather than having each Plaintiff issue separate proceedings, which might be both inefficient and act as a deterrent to vindicating rights.

Insofar as it concerns the tracker mortgage issue, it certainly would be arguable that, although there are different types of claims against a variety of lenders within the now very wide pool of customers affected, there are common issues of fact which predominate over the distinct issues, with the degree of loss by the individual varying considerably but the core issue of the overcharging of interest in breach of contract giving the group considerable commonality. Crucially, when it comes to the test that '*the procedure constitutes an efficient and fair means of resolving the cases',* it would be hard to argue that a multi-party action would not a suitable vehicle.

Review of Civil Justice: Developments elsewhere.

It is wholly appropriate to review intervening developments that have taken place at national, European and wider international levels since the publication of the LRC report. However such a review would show a growing acceptance of the need for greater access to the courts, for example,

- by developing the laws on standing to allow NGOS bringing actions on behalf of their members, allowing a greater use of the amicus curiae application, developing the concept of protective costs orders
- increasing the discretion of a judge to award costs to an unsuccessful litigant
- modifying the doctrine of mootness so that courts can deal with issues which may be moot for the immediate parties but which may continue to affect many others
- devising more effective methods of extending the benefits of judicial decisions to those who are not directly party to the litigation
- examining the rules of funding of litigation.[12]

European developments have seen the growth of EU instruments, which permit a nominated competent authority (for example in Ireland's case the Director of Consumer Affairs) to initiate proceedings on behalf of consumers. There has also been a growth ADR and non-litigations remedies such as redress schemes. None of these developments suggest that the current exclusion of MPAs is in any way justified or should be maintained.

[12] Social Inclusion and the Law: The Implication of Public Interest Litigation for Civil Procedures and Remedies, pages 117-197.

Review of the Administration of Civil Justice

It is to be welcomed that President of the High Court agrees to consider the question of multi-party actions as part of the review of the administration of civil justice that is under way. It is to be hoped that the review would extend beyond multi-party actions and also consider broader matters such as class actions and allowing NGOS standing to bring cases and other barriers to access to justice. The Law Reform Commission is the body charged under statute with making recommendation for law reform and have clearly given this issue considerable thought and analysis. It is also clear from the LRC report that it does not consider the proposal to be a radical change to the existing regime. Further it would be unfortunate if this review was to inhibit the Oireachtas from considering and legislating on matters that relate to access to justice. In this regard it is noted that the Mediation Act 2017 was commenced in early January 2018 notwithstanding the ongoing review and its terms of reference.

Some technical issues in the Bill

"A most important element of the Law Reform Commission proposal is omitted, namely, the requirement that any person joining a multi-party action scheme agrees, at or before the time he or she joins it, on the terms of any settlement arrangement."

It is correct that Rules 21-24 of the LRC proposed draft Order 18A to amend the Superior Court rules are not replicated in the Multi-Party Actions Bill and this does seem to be an omission which might be rectified. These deal with the 'compromise of proceedings' or the rules relating to the settlement of proceedings.

It is apparent from reading the LRC's discussion on 'Register Lock-In' (pages 45-47) and 'Global Settlement' (pages 47-48) that the circumstances under

which settlements may be agreed either by individual members of the multi-party action or by the group as a whole is a difficult one.

Thus, in terms of individual settlements, the Commission suggests that any lock-in mechanism must attempt to strike a compromise between the interest of the individual and those of the collective group. Here it proposes that *'where individual litigants wish to remove themselves from the Register after the filing of the defence, the authorisation of the court must first be sought'.*

In terms Global (or Group) settlement, it recommends '*that the **terms upon which** a settlement would be accepted or rejected should be agreed by the individual members of the group at the opt-in stage'.* In our view, this is not as strict as the assertion by the Minister of State that the Commission proposed that '*any person joining a multi-party action scheme agrees, at or before the time he or she joins it, on the **terms of** any settlement arrangement'.*

"We would need to consider carefully the designation of a lead solicitor under a Bill in case this impinges on the right of access to the courts by an individual with a legal representative of his or her free choice."

The LRC ultimately recommended an 'opt-in' system. Thus each potential litigant buys into a common approach. It is only when the Register for a particular action is closed that the Lead Solicitor is to be chosen. The Multi-Party Actions Bill provides a mechanism for the nominated High Court judge to oversee that appointment.

"It is also considered that the proposed Bill raises legal issues regarding the mandatory obligations imposed, for example, by section 7. These may have an impact on the independent role of the Judiciary under Articles 34 to 37 of the Constitution and the right to fair procedures of potential defendants to such class actions."

Section 7 concerns itself with the appointment of a lead case or cases following the appointment of a lead solicitor or solicitors. Again the nominated High Court judge has key role and must be satisfied that the lead case '*fairly and adequately represents the interests of all those on the Register'.*

"The fact this Bill purports to apply to existing proceedings may also pose legal issues regarding legislative intervention in ongoing proceedings, which may alter the outcome of those proceedings contrary to the separation of powers. It would be considered safer for any such Bill to apply to new proceedings only."

It is not immediately clear to us where the Bill purports to apply to existing proceedings already under way. In any event the bill deals more case management and does not purport to amend existing rights and entitlements.