



Summary of FLAC Submission to the Oireachtas Special Committee on COVID -19 response.

September 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
- Operates a Roma legal clinic
- Has established a dedicated legal service for Travellers.
- Operates the public interest law project 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

FLAC's submissions most relevant to the subject matter of this committee include

- FLAC Submission to the "Workplace Relations Commission on the Consultation Paper on Remote hearing and Written Submission Dealing with Adjudication Complaints During the period of Covid-19 Related Restrictions"
- 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/>

Introduction

FLAC welcomes the opportunity to make a submission to the Oireachtas Special Committee on COVID -19 response. We are happy to clarify any point or expand on the contents of this submission and attend at the Special Committee in person or by video conference or otherwise.

FLAC's response to the Covid-19 Crisis

Our Telephone Information and Referral Line remains open. Our Phone line team is determined to provide quality information to callers during this crisis and we have taken steps to reinforce the phone line service to seek to ensure quality. However, it is extremely difficult to meet and respond appropriately to the level of demand that the phone line is experiencing. In addition, the calls are more complex and are taking longer due to ongoing changes in regulations, policies and practices along with the lack of usual supports and places to refer callers to.

As well as increased numbers, the nature of the calls has changed over the last six months. They include queries about social welfare, access, domestic violence, queries from people who have been made unemployed, people who cannot get the Covid payment, people who are afraid of being evicted, people who are worried about their capacity to pay the arrears in mortgage, people who have been unable to get legal aid for divorce proceedings, people who are nervous going into court because of Covid, and a wide range of employment law related queries which are described further below.

Our Phone line provides a unique insight into the acute and stressful situations that people are facing as a result of the lockdown, the lifting of restrictions and the re-imposition of some restrictions. Our phone line team are reporting that a lot of callers are experiencing unmanageable stress and desperation, just last week one caller stated he had tried to commit suicide, he was facing eviction after going into rent arrears when the landlord would not accept rent subsidy as rent.

Phone legal advice clinics.

In response to the Government issued guidelines, FLAC closed all of our face-to-face 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 in the areas of family law and employment law.

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

Benefit take up campaign on rent supplement

FLAC published an information sheet outlining the details of the newly extended rent supplement scheme which was designed to assist those struggling to pay rent in private accommodation during the Covid-19 pandemic.

Although this scheme was expanded to meet Covid-19 demands in March, there was relatively low uptake because not many people were unaware that they may qualify under the new criteria. FLAC wanted to ensure that people who are struggling to make their rent are aware of the rent supplement support so that they can apply for assistance. In the absence of this information being widely circulated by the Department of Social Protection, many people were unaware that they may qualify for this assistance since the scheme was expanded in March. We urged people to apply as soon as possible as the scheme was now been extended.

Given the limited time available it has not been possible to address all of the queries raised and carry out the requisite research into other jurisdictions. In making this submission we have drawn on our experience in the information lines and phone advice clinics, our policy work to date, our work with Travellers and Roma, our experience in litigation as well as the queries received through PILA.

1. Human Rights Context:

In considering the State's legislative framework and the extent to which it contributed to an effective response, FLAC would like to draw the Committee's attention to relevant Human Rights and equality framework and in particular to the ENNRHI 's statement on Covid with its principles which include that measures must be legally based, proportionate and time limited, measures cannot have any discriminatory impacts, situations of vulnerability must be addressed, broad public debate is as important as ever, parliaments must hold government to account, judicial independence must be protected, restrictions on democratic rights must be kept in check, states should engage with their NHRIs .

The key questions set out in the IHREC guidance on Covid -19 and the public sector equality and Human Rights Duty in relation to developing responses, implementing responses, consultation, communication, and assessing/monitoring impact are key questions for the work of this committee.

Developing responses

- Have you taken action to ensure that special measures or changes in service delivery introduced in response to COVID-19 are non-discriminatory?
- Have you considered the specific needs of people protected under the equality legislation: gender, civil status, family status, age, sexual orientation, disability, race, religion, membership of the Traveller community; and people at risk of poverty and social exclusion?
- Are there are specific targeted measures you need to consider to ensure that all persons are covered and no-one is left behind?
- Have you identified specific steps to make reasonable accommodation for people with disabilities?

Implementing responses

- Have you equality proofed any legislation, regulation or policies in terms of their impact across the grounds of the Equal Status Acts?
- Have you scrutinised any legislation, regulation or policies in terms of their impact on human rights; civil, political, economic, social and cultural rights?
- Have you reflected on your legal obligations as employers under the Employment Equality Acts to ensure any decision or policy you make in response to COVID-19 does not directly or indirectly discriminate against employees on any of the nine grounds protected under that legislation?

Consultation

- Have you consulted with civil society organisations, representatives of the equality grounds, and with staff and/or their representatives when a decision, plan or programme is at draft stage, seeking to involve everyone in your response?
- Have you consulted and coordinated planned action with other key actors and stakeholders working on the response to the issues identified?

Communication

- Are you proactively ensuring that all sections of the community have access to information, considering how traditional communication methods have been impacted by COVID-19?
- Have you taken any measures to adapt communications to target certain audiences, e.g. children?
- Is the language you use inclusive, recognises and respects diversity, and avoids prejudice and stigma directed to particular communities?

Assessing/monitoring impact

- Are you gathering and reviewing disaggregated equality data and information on the impact of COVID-19, for example gender, age, disability, sexual orientation, and ethnicity?
- Have you put in place a mechanism to monitor the impact of decisions, policies and plans on different groups, through feedback or complaint mechanisms?
- Have you in place a regular review process whereby your policies and plans are living documents that can be adapted based on emerging evidence from groups experiencing inequality and discrimination?"

Access to up to date accurate information about changes to the law.

FLAC stresses the importance of access to up to date information, especially where there are changes to the existing law. However, it has not always been possible to get access to legally binding measures before they come into force or immediately after they came into force, in order to carry out appropriate scrutiny or to become informed as their content and consequences for ordinary citizens

In some cases, there has been uncertainty as to whether particular measures are legally binding or merely advice/guidance – this leads to significant uncertainty for ordinary citizens and it is important that there is clarity around this issue. In a recent comparative example, the New Zealand High Court recently found that Government and police had presented advice during the first nine days of lockdown as legally binding measures

Recommendations

- **FLAC recommends that the Committee in its consideration would have regard to the human rights and equality infrastructure, the equality legislation and the role of the state as employer and service provider, the Siracusa Principles, the ENHRI statement of principles, and the key question set out in the IHREC guidance on COVID-19 and the Public Sector Equality and Human Rights Duty.**
- **FLAC recommends that it is vital that there is up to date accurate information made available about changes to the law.**

2 Social Welfare

In late March 2020, the Minister for Social Protection signed a number of Statutory Instruments to amend rules in relation to existing Social Welfare schemes in response to the Covid 19 pandemic. During the same period, S.I. 97 of 2020 was introduced, which provided specific regulations in relation to the Enhanced Illness Benefit Scheme. By contrast, no primary legislation or regulations were introduced in relation to the Covid Pandemic Unemployment Payment at that time.

On 5 August 2020, however, the Social Welfare (Covid-19) (Amendment) Act 2020 was signed into law. The 2020 Act amends the Social Welfare Consolidation Act 2005 to include a specific legislative basis for the payment. Notably, the 2020 Act refers to the Covid-PUP as having been paid pursuant to section 202 of the 2005 Act prior to its enactment. It does not appear to FLAC, however, that a non-means-tested payment such as the Covid PUP could have been paid pursuant to section 202, in circumstances where section 189 of the 2005 Act only allows for the payment to be made under section 202 where it has been established that a claimants means are insufficient to meet their needs. In FLAC's submission, the Covid PUP should properly be considered as having been paid pursuant to a non-legislative, administrative scheme prior to the introduction of the 2020 Act on 5 August.

The absence of a clear legislative basis for the Covid PUP for a five month period after its introduction is regrettable of itself, in that it potentially contributed to a lack of clarity around eligibility for the payment amongst those who may have been entitled to it, and confusion amongst existing claimants as to their continuing eligibility for the payment.

These issues were exacerbated by unclear and conflicting information published by the Department of Social Protection as to the eligibility criteria for the payment. It is notable that the amendments were made to section of the Covid PUP webpage on gov.ie setting out the eligibility criteria for the payment at least seven times between 13 March and 5 August 2020.

These changes including the addition of criteria to the effect that claimants were required to abide by certain "Holiday Rules" while in receipt of the payment and to "genuinely seek work". In FLAC's submission, these criteria cannot be considered as having been conditions for receipt of the payment prior to 5 August.

The issue of what the Department refer to as "Holiday Rules" gained particular attention in June 2020 in light of reports concerning the actions of Departmental officials at ports and airports. Having reviewed the relevant legislation, it appears to FLAC that Social Welfare Inspectors have been conducting checks in such settings which exceed their powers under the 2005 Act, which only provides for the questioning of persons in such settings on the basis of a "reasonable grounds" for suspicion and after the production of the Inspectors Certificate of Appointment.

These actions raise considerable concerns in relation to Data Protection and recent information released by the Department under FOI raises significant questions around

the Department's rationale for targeting certain flights, with 70% of the flights targeted for checks during this period flying to either Romania or Moldova. However, the Department actions also reflect the imposition of rules around absences from the State while in receipt of social welfare which are stricter than allowed for under primary legislation in the case of payments such as Jobseeker's Allowance and Supplementary Welfare Allowance. Further, it appears that no fair procedures were afforded to persons targeted by such checks, in circumstances where person's claims for social welfare were seemingly suspended at no notice to them.

A further concern arises in relation to the introduction of regulations amending the so-called "Holiday Rules" for Jobseeker's Benefit payments which disqualify claimants from receiving those payments during travel abroad that does not comply with the Department of Foreign Affairs' travel guidance. Similar rules have been introduced in relation to Jobseeker's Allowance and SWA by way of circular. In the case of Jobseeker's Allowance and SWA, FLAC considers the impositions of such rules as being contrary to the provisions of the 2005 Act in relation to those payments. Further, it is concerning that while the Department of Foreign Affairs' travel guidance" exists only as guidance for the majority of the population, the same advice is being enforced with harsh, punitive effect against persons who are in receipt of certain social welfare payments.

The circular which gives rise to these new "Holiday Rules", also suggests that the Department has adopted a policy to the effect that persons cannot be considered as "genuinely seeking work" during the two-week period following certain travel abroad during which they are advised to self-isolate. Given the proliferation of online working and recruitment, the basis for this policy is questionable.

While the 2020 Act provides welcome clarity in relation to the eligibility criteria for the Covid PUP scheme, FLAC is concerned about the imposition of a requirement to "genuinely seek work" while in receipt of that payment. Many claimants for that payment have been temporarily laid-off, and have every expectation of resuming their previous employment or self-employment. It seems unreasonable to expect such claimants to seek alternate work in circumstances where they have every expectation of resuming employment imminently.

Further, employees who have been laid off may have to forego statutory redundancy payments from their original employer if they take up other employment elsewhere. Further, those who have no access to child care services due to the pandemic may be unable to seek work while in receipt of the Covid PUP and their entitlement to the payment may therefore be prejudiced.

No regulations have been introduced for the purpose of setting out how recipients for the Covid PUP are to be assessed as "genuinely seeking work". Similarly, despite an undertaking from the Minister to do so, no regulations have been introduced providing for the circumstances in which claimants may receive the payment while absent from the State. It is therefore the case that the new legislative regime under the 2020 Act disqualifies claimants from receiving the Covid PUP during any travel abroad for any period, however brief, and for any reason, however urgent.

Many of the issues which arise in the context of the Covid PUP were exacerbated by the absence of clarity as to eligibility criteria for the scheme and its legal basis. Unlike the enhanced Illness Benefit scheme introduced by the Department at the onset of the Covid-19 pandemic, the Covid PUP scheme was only belatedly provided with a clear legislative basis. While the 2020 Act purports that the payment was made under section 202 of the 2005 Act between 13 March 2020 and 5 August 2020, this proposition does not stand up to legal scrutiny.

It should also be noted that in introducing social welfare legislation and regulations in response to the Covid-19 pandemic, the Department remains under a duty, pursuant to section 42 of the Irish Human Rights and Equality Act 2014, to consider the human rights and equality impact of their policies. It is notable in this regard that the Department's amended "holiday rules" in respect of social welfare payments, including the Covid PUP, may have a disproportionate impact on migrant workers who are entitled to such payments. Further, the imposition of a requirement to "genuinely seek work" while in receipt of the Covid PUP may disproportionately impact families who presently have limited access to child care services.

Recommendations

- **The Department of Social Protection should review the activities of Social Welfare Inspectors at ports and airports and ensure any such activities are carried out in a manner compliant with the significant restrictions on their powers in such settings under the 2005 Act. The Department must also ensure that any person who provide information to Social Welfare Inspectors in such settings are subject to fair procedures which respect their rights to natural and constitutional justice.**
- **The Department should review its administrative "Holiday Rules" for all payments and ensure that the rules applied in respect of each payment are reflective of the conditions in respect of absences from the State arising from primary legislation and not more restrictive. Any such review should include a review of Departmental Circular 35/20 including the policy contained therein to the effect that persons cannot be considered to be "genuinely seeking work" during periods when they are advised to self-isolate.**
- **The Department should review all claims for social welfare payments which were suspended on foot of airport checks with a view to ascertaining whether the checks were carried out lawfully, whether any suspension arising from the checks was allowed under primary legislation in relation to the relevant payment and whether the claimants subject to such checks were afforded fair procedures or given any notice before a suspension was put in place. The Department should lift any suspensions which were imposed arising from unlawful airport checks or which were imposed in circumstances where the relevant primary legislation did not allow for a suspension on the basis of an absence from the State alone. Further claimants subject to suspensions under such circumstances should be awarded back payments for the period of any unlawful suspension.**

- **The Minister for Employment Affairs and Social Protection should urgently introduce regulations allowing claimants of the Covid PUP to take holidays/leave the State, in a likewise manner to claimants for Jobseeker's Benefit.**
- **The Department should review the imposition of a requirement to "genuinely seek work" while in receipt of the Covid PUP. At the very least, regulations should be introduced setting out how this criteria is to be applied to claimants for the payment which take into account the fact that many claimants have limited access to childcare and, further, that many claimants for the payment are temporarily laid-off and have every expectation of resuming their previous employment or self-employment.**
- **FLAC recommends that in the event that in the event of a resurgence of Covid-19 or in the event of another similar major occurrence requiring the introduction of emergency social welfare measures that any such measures are introduced by way of primary legislation so as to provide a clear legislative basis for any such measures and to provide clarity as to who is eligible to avail of any new social welfare scheme. Further, in introducing any such emergency measures the Department should be cognisant of its duty, pursuant to section 42 of the Irish Human Rights and Equality Act 2014, to consider the human rights and equality impact of their policies.**
- **FLAC recommends that in the event of a resurgence of Covid-19 or in the event of another similar major occurrence requiring the introduction of emergency social welfare measures that any such measures are introduced by way of primary legislation so as to provide a clear legislative basis for any such measures and to provide clarity as to who is eligible to avail of any new social welfare scheme.**

3. Employment law

FLAC has seen a steady increase in employment law queries over the last few years but there has been a definite jump since the pandemic. Between March 2020 and August 2020, employment law queries increased by 58.7 per cent compared to same period in 2019. For the first time at the end of May employment law queries were the top queries on our phone line overtaking Family law for the first time in FLAC history.

Over the past six months the range and number of employment related queries received arising in the context of the Covid crisis illustrates that the system of access to information/advice/advocacy legal representation/assistance on employment rights issues in Ireland requires review and improvement. The crisis has been marked by the absence of any State service to assist employees with advice to deal with some very specific queries, particularly for employee who are not members of trade unions and who do not have access to legal advice the need for dedicated services to assist employees with often very difficult queries. The queries also illustrate fault lines in existing legislative standards and a potential programme of law reform in the area of employment rights

Some examples here include:

Issues concerning lay-off

Lay-off is provided for under the terms of the redundancy payments acts but there is still a question over whether an employer has a legal right under the legislation to put an employee on lay-off and, if so, whether the employer has to first substantiate his/her decision.

Notable also here is the absence of a legal obligation on employers to use a mandatory procedure in writing to place employees on lay-off from their jobs and to use a specific written procedure to notify employees that their lay-off was coming to an end and of the date when they would be expected to return to work.

Thus, for example, many employers have ignored the RP9 form recommended for lay-off purposes with the result that many laid off employees had no documentation or written proof of the date of lay-off. This has resulted in instances where some employees have been in a 'lay-off limbo', unsure when they will be called back to work or even if they will ever be called back. We have had callers who are dismayed that some of their colleagues have returned to work but they have not. We have had callers who have reported that they have been replaced by new employees that the right of an employee who has been 'laid off or kept on short-time for four or more consecutive weeks or, within a period of thirteen weeks, for a series of six or more weeks' to claim a redundancy lump sum was temporarily removed for the duration of the Covid crisis by virtue of s.29 of the Emergency Measures in the Public Interest (Covid 19) Act 2020 (March 27th).

Many employees have suffered a significant loss of earnings while on lay off. Although the PUP payment of €350 per week may have mitigated this somewhat. The fact that an employee cannot pro-actively claim a redundancy lump sum (even if s/he has found another job, which happened with at least one of our callers) but must wait, in some cases interminably, for the return to work, is deeply unfair

Requests for and impositions of annual leave

There is ambiguity concerning how requests for statutory annual leave from employers by employees and impositions of annual leave by employers on employees are to be decided and by whom and these concerns have been amplified during Covid. We have seen some employers request employees take annual leave that has not yet been earned through the employee's service. Some employees were not happy about this as they felt it would deprive them of future entitlements to annual leave at a time when it may be most needed. Requests from employees to take leave for childcare reasons were also refused.

The Covid crisis would suggest that Section 20 of the OWT Act 1997 should be subject to a review, with the purpose of framing a section that would at least attempt to put in place rules that are more precise in terms of reconciling what might be considered to be the competing rights of employers and employees. A helpful reform perhaps would be making it mandatory for employers to have a written policy on annual leave with a written request mechanism on both sides and rights to adequate notice, consultation, appeal and associated measures.

Parental leave/Childcare issues

Child care issues have clearly loomed large for many employers and employees during the lockdown. At present, it would appear that there is no explicit legal protection available to employees who cannot attend at work due to a lack of childcare provision, although it has been suggested that employees might conceivably be protected by the 'family status' ground in the employment equality legislation, though the extent of this protection has not been tested.

There is a need to look at providing more certainty and clarity in this area. For example, there may be potential for extending the paid force majeure leave rights of employees under the parental leave legislation to cover emergency situations not solely consisting of illness or injury but otherwise clearly beyond the employee's control, such as what is perhaps the ultimate force majeure event - a global pandemic.

Issues of health and safety at work

We received a number of queries from employees who are concerned about health and safety issues at work, who are unaware of the protections afforded by section 27 of the Safety, Health and Welfare at Work Act 2005, which provides that an employee who has raised a health and safety concern at work (as defined) and has been penalised (as defined) by his/her employer is entitled to make a complaint to the Workplace Relations Commission and obtain appropriate compensation, and in any event are fearful of taking action.

FLAC recommends an information campaign about the rights of employees in this regard and that consideration should be given to strengthening s.27 of the Safety, Health and Welfare at Work Act 2005, by providing specifically for a reinstatement remedy and an injunction mechanism. However, this must be accompanied by swift and robust enforcement of health and safety laws by the State.

4. Evictions and Part 2 of the Emergency Measures in the Public Interest (Covid-19) Act 2020

In assessing the government's response to the crisis caused by covid-19, what is effectively being considered is the success of a legislative effort to sustain a system already in crisis. It is FLAC's submission that the failures of successive governments to address a worsening housing and homelessness crisis and to ensure the provision of culturally appropriate accommodation to members of the Traveller community must be factored into any consideration of the success or failure of the State's legislative response to covid-19 and the opportunity used to reconsider and reimagine the State's approach to these issues.

It should also be remembered that in relation to evictions, the European Committee on Social Rights⁴ found that Ireland violated the Charter by failing to provide safe and adequate accommodation to Travellers and also found that there were violations of Article 16 of the Charter on the grounds that Part II A of the Criminal Justice (Public Order) Act 1994 and section 10 of the Housing Act 1992 provide inadequate safeguards for Travellers threatened with eviction. These findings relate specifically to accommodation provision and protection from arbitrary eviction of Travellers.

On its face section 5(7) of the 2020 Act, which was deleted by section 23 of the Residential Tenancies and Valuation Act 2020, extended the prohibition on evictions under the 2004 Act to all tenancies, as well as prohibiting the forced movement of members of the Traveller community.

However, it is FLAC's submission that the section lacked clarity and suffered from and interpretative ambiguities that deprived those who ostensibly should have been protected by its provisions of any means to resist an eviction or seek a remedy.

Recommendation

FLAC recommends that in the event that similar provisions are required due to a resurgence of covid-19 or in the event of another similar, major occurrence requiring the limitation of movement and a reduction in economic activity, that the State should put in place comprehensive protections from evictions for the entire population and not just those covered by the 2004 Act. Any such protections must be precise, unambiguous and inclusive.

The legislative framework governing evictions in any event needs to be reviewed in the light of the decision of the European Committee of Social Rights

5. Debt

Covid -19 has exposed fault lines in our systems for responding to debt and is unfortunately likely to worsen the problem of over-indebtedness in Ireland. The position of a number of people whose financial difficulties arising from the last recession have never been resolved, may be exacerbated. Persistent mortgage debt from the last recession endures, despite the improved supports and infrastructure put in place by the Abhaile Scheme and the Personal Insolvency regime. Q.1 2020 figures from the Central Bank of Ireland (CBI) on 'Principal Dwelling House' or family home mortgages suggest that over 26,421 accounts were in arrears for over two years at end Q.1 2020. We know that many of these have been in arrears for over five years, but no specific figure is provided.

Data on persistent or unmanageable unsecured debt, as ever, is much harder to find.¹ To add further context to these concerns, it is clear that even before the beginning of the Covid crisis, payment arrangements put in place on a significant number of restructures were not being maintained. For example, in the area of family home mortgage arrears alone, the CBI suggests in its latest available Q.1 2020 report that 81,255 such mortgages are classified as restructured, with 17,492 being classified as still being in arrears. Approximately 90% of these restructures are long term in nature.

To these may be added others who may now find themselves in a position of personal insolvency following loss of employment or business failure, particularly when payment breaks, moratoria on evictions, income support measures and associated strategies are being reduced or even phased out.

Payment breaks

Recent research conducted by the Central Bank provides some helpful detail on payment breaks.² Notably, this research loosely defines a payment break as follows:

'Payment breaks are a postponement of some or all of a borrower's loan repayments. Such a payment break, when approved by a financial services firm, offers immediate cash flow relief for a defined period. The Bank for International Settlements highlights such payment break programmes need to achieve the provision of "credit to solvent, but cash-strapped borrowers, while keeping in mind the longer-term implications of these measures for the health of banks and national banking systems."³

¹ Of note here, nonetheless, are figures provided by MABS nationally that of the 4,672 new clients that came to the service in Q.1 2020, 1684 (36%) are described as having 'personal loans with financial institutions' which are presumably in difficulty. A further 712 have credit card debt; 186 have Hire Purchase loans; 185 have loans with (licensed) moneylenders; 199 have difficulties relating to overdrafts and 65 have catalogue debts (which are also likely to be with licensed moneylenders)

² COVID-19 Payment Breaks – who has needed them? Allan Kearns, Andrew Campbell, David Duignan, Darren Greaney and Grace McDonnell, Central Bank, July 2020.

³ Payment holidays in the age of Covid: Implications for loan valuations, market trust and financial stability.

The paper goes on to outline in terms of breaks for households that as of late June 2020: 191,555 payment breaks have been approved for household borrowers, representing €16 billion of loans. Almost all of household loans fall into either mortgages or consumer loans. In this context, the number of household payment breaks are split almost evenly across mortgage and consumer lending.

Covid financial supports

The Temporary Covid 19 Wage Subsidy Scheme was replaced with the Employment Wage Subsidy Scheme (EWSS) at the end of August 2020, which is (currently) due to run until April 2021. Under this scheme, employers and new firms in sectors impacted by COVID-19 whose turnover has fallen by 30% will get a flat-rate subsidy of up to €203 per week per employee, including seasonal staff and new employees. Thus, it is in principle substantially less favourable than the current scheme. Insofar as it concerns the PUP payment, new applications will not be accepted after September 2020, and the rates will be further adjusted on February 1st and April 1st 2021 respectively.

By that point, many difficult decisions related to the ceasing of the operation of businesses or making employees compulsorily redundant will likely be made, in addition to cases where the decision will have already taken place.

The key question here is, quite apart from determining therefore who has developed a new debt problem arising from the Covid 19 crisis, whose debt problems have worsened as a result of it, and to what degree? Many borrowers will fall victim for a second time to recessionary events beyond their control and will have financial obligations in train that they simply will not be able to meet. Thus, many payment breaks will not be capable of being repaired and many existing payment arrangements short of the original contractual obligation are also likely to fail. The implications for the legal system and the personal insolvency regime are considerable.

The last major consumer debt crisis in this country eventually led to the adoption of the Central Bank's Code of Conduct on Mortgage Arrears (CCMA), effective from January 1st 2011 (and updated in 2013), with its introduction of a compulsory Mortgage Arrears Resolution Process (MARP) that was in our view procedurally flawed. This was eventually followed by a much delayed Personal Insolvency Act 2012 (effective from autumn 2013) which required significant amendment in late 2015 to try to boost arrangement numbers, and whose review is overdue since 2017.

Two key lessons may be learned in our recent history of handling over-indebtedness in Ireland. We have a tendency to be indecisive and act too slowly and we sometimes fail to understand that all the debts of the person in difficulty – secured and unsecured - must be considered together in the search for a resolution. The framework of information, advocacy, legal advice and legal aid for debtors also needs to be reviewed. A Covid debt code to deal with legacy mortgage arrears, new mortgage arrears and unsecured debt needs to be considered.

6. Access to justice, access to legal aid and access to the Courts and tribunals

FLAC's concern throughout this unprecedented pandemic has been to support those who are most vulnerable to access legal advice and information.

Socially excluded groups within the general population are more likely to suffer justiciable problems (meaning problems for which there is a potential legal solution) and the lack of effective and accessible mechanisms for resolving legal disputes prevents individuals from protecting and asserting their rights. Unless the right of access to justice (in all spheres of law) is vindicated, the risk of social and economic exclusion particularly for marginalised or vulnerable communities is greatly increased.

FLAC has long argued that access to justice should be positioned alongside provision of access to healthcare, housing, social welfare supports, debt resolution options, and employment support in government responses. The need for this recognition in the context of COVID-19 is even more acute. Failing to do so further embeds inequalities and there is a need to ensure that individuals are not further disadvantaged as a result of COVID-19.

Prior to the pandemic, the Legal Aid Board Services were overstretched beyond capacity, with waiting lists of over 6 months in some places, according to the most up to date figures available from June 2020. Legal aid is also subject to a very strict means test and there are many exclusions of vital areas of law.

The many complex legal issue that FLAC encounters in its phone line and phone legal advice clinics are largely excluded from the remit of the Legal Aid Board. There is no legal aid available for claims before the Workplace Relations Commission and Social welfare Appeals office no matter how complex the issue may be and how vulnerable the claimant may be. In addition, there is a perception that legal aid is not available for housing issues.

The Legal Aid Board have said that they expect a surge in demand for their services once normal practices resume in the Courts.

The Joint Oireachtas Committee on Justice and Equality in its review of the family law system in 2019 adopted FLAC's recommendations and recommended a review of the legal aid system. Given the impact of COVID-19 such a review is more important now than ever before.

Access to the courts

Access to justice also involves access to the courts and tribunals.

During COVID-19 the Courts remained open for urgent business only, and the majority of claims before the Courts and Workplace Relations commission and Social Welfare Appeals office were adjourned.

While FLAC acknowledges the challenges posed by the restrictions in place in response to the Covid-19 crisis, FLAC submits that the Courts and quasi-judicial bodies should assess whether – and, if so, when – it is possible to continue hearings safely within the existing physical infrastructure. The Courts services will need to be resourced to do so.

While FLAC welcomes the enactments of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 which provides for video links and remote hearings in civil and criminal proceedings, these will only be suitable in certain types of cases. In addition, 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 Courts and quasi-judicial bodies in ensuring equal access to justice and tackling the existing digital divide in these circumstances

The Courts Services and the Legal Aid Board are an essential part of the administration of justice and the rule of law and need to be resourced accordingly and priority needs to be given to ensuring that they continue to function as effectively as possible during Covid 19. The ability to respond flexibly and quickly during the pandemic has been important, however it is clear now that there will be difficulties going forward as we begin to live with the virus and continue to have the same, if not more, needs.

The Courts Service, and quasi-judicial bodies like the Workplace Relations Commission will be faced with very significantly increased waiting lists and workloads as they begin to address the non-emergency cases that were postponed for the duration of the pandemic.

FLAC is very concerned at the difficulties vulnerable claimants will face in accessing legal aid and this will be compounded by the inevitable growing delays in the Courts and Tribunal system.