



FLAC Submission to inform the Department of Justice and Equality's consultation on the National LGBTI Inclusion Strategy

FLAC, December 2018

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(30 December 2018)



About FLAC

FLAC (Free Legal Advice Centres) is a voluntary independent legal rights organisation that exists to promote equal access to justice. Access to justice includes access to legal aid, access to the courts, access to effective remedies and fair, just and socially inclusive laws. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights. We work particularly in the areas of the protection of economic, social and cultural rights. We identify and make policy proposals on laws that impact on marginalised and disadvantaged individuals and groups.

FLAC produces policy papers on relevant issues to ensure that Government, decision-makers and other NGOs are aware of developments that may affect the lives of people in Ireland. These developments may be legislative, Government policy-related or purely practice-oriented. FLAC may make recommendations to a variety of bodies including international human rights bodies, drawing on its legal expertise and providing a social inclusion perspective. We advance the use of law in the public interest and we co-ordinate and support the delivery of basic legal information and advice to the public.

You can download/read FLAC's policy papers at <http://www.flac.ie/publications/policy.html>

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The Department of Justice and Equality is developing a National Strategy to improve the lives of LGBTI people in Ireland.

Introduction

FLAC welcomes the opportunity to contribute to the Department of Justice and Equality's consultation on the **National LGBTI Inclusion Strategy**. We note that the overall aim of this strategy will be to target discrimination, promote inclusion, and improve quality of life and wellbeing for LGBTI people. In this submission, FLAC seeks to identify the issues for which we believe are most important to address over the lifetime of the strategy. FLAC has previously made a submission on the Review of the Gender Recognition Act 2015. The contents of that submission are relevant to this submission and should be read in tandem and may be accessed here <https://www.flac.ie/publications/flac-submission-to-the-review-group-on-the-current/>

Recommendations:

- 1. There are two overarching themes which should be foundational and fully integrated into in the new strategy, namely Access to Justice and the Public Sector Duty.**
- 2. Access to Justice should be a central focus of the National LGBTI Inclusion Strategy and that the strategy should recognise that access to justice addresses social exclusion and should seek to enable access to justice as a tenet of social inclusion.**
- 3. The Public Sector Duty should be a core consideration in the process of developing, implementing and monitoring the Department's strategy and the Strategy should provide a model of best practice for other public bodies more generally and the Department's own bodies in particular.**
- 4. There should be an awareness raising campaign that targets LGBTIQ+ people which increases awareness of the equality legislation and sources of advice and support.**

5. The strategy should provide for targeted legal advice, training, advocacy and representation services for LGBTQI+ people.
6. The Workplace Relations Commission should be designated as a “prescribed” tribunal for the purposes of Section 27(2) (b) of the Civil Legal Aid Act 1995 to ensure that civil legal aid is available in claims of discrimination under the Employment Equality Acts and the Equal Status Acts.
7. Section 14 of the Equal Status Acts 2000 – 2015 should be amended to ensure that an effective remedy is available for discrimination that has a legislative basis.
8. The scope of the Equal Status Acts should be broadened to ensure that it applies to all of the functions of public bodies.
9. The Strategy should, having regard to the on-going review of the Defamation Act, 2009 in tandem with the on-going review of the Incitement to Hatred Act 1989, seek to ensure that a complimentary approach is taken to regulating hate speech, including the provision of accessible civil remedies to those targeted by such speech whether online or otherwise. Consideration should be given to enable the IHREC institute proceedings in relation to hate speech that is not targeted at individuals but at groups that come within the discriminatory grounds under the equality legislation.

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About FLAC's work

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 Citizens Information Services. FLAC in 2017 worked to improve access to justice in particular for Roma and Traveller women as part of the JUSTROM (Joint Programme on Access of Roma and Traveller Women to Justice) programme, a Council of Europe initiative. Within JUSTROM, FLAC supported the running of specialised legal clinics for Travellers and Roma. With the assistance of the Department of Justice and equality it is currently operating a clinic for the Roma community.

More than 25,000 people received free legal information or advice from FLAC in 2017 from the telephone information line and the network of legal advice clinics at 66 locations around the country. It also operates PILA the Public Interest Law Alliance that operates a Pro Bono Referral Scheme for NGOs, community groups and independent law centres. 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.

Two foundational themes:

There are two overarching themes that should be foundational and fully integrated into in the new strategy, namely Access to Justice and the Public Sector Duty.

Access to Justice

Access to justice enables individuals, including LGBTQI+ people, to protect themselves against infringements of their rights, to remedy civil wrongs and to hold executive power accountable. Access to justice is both a process and a goal, and is crucial for individuals seeking to benefit from other procedural and substantive rights. It is inherent in the rule of law.

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

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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 guaranteed. While it has no single precise definition, core elements of access to justice include effective access to information advice, legal aid, access to the courts and access to effective remedies.

Access to justice is one under-recognised and under researched, element of a broader exclusion problem. Analysis suggests that those who may be considered to be 'socially excluded groups' within the general population were more likely to suffer justiciable problems.¹ Therefore, whilst a lack of access to justice was seen to contribute to social exclusion, so access to appropriate and timely good legal advice was seen as an aid to subsequent social inclusion. Agencies within legal systems and structures may fail to recognise the needs of minority groups, leading to negative experiences that are likely to impact upon future advice seeking behaviour in the pursuit of justice

There has been a growing focus nationally on internationally on access to justice which reflects a growing consensus of the need for urgent change. FLAC welcomed the commitment of the Chief Justice to make access to Justice a central focus of his tenure and his call for the reform of the civil justice system. We also agree with the comments of the Chief Justice that there is little point in having a good court system if a great many people find it difficult or even impossible to access that system for practical reasons.²

The programme for government contains a commitment to commission an annual study on court efficiency and sitting times, benchmarked against international standards, to provide accurate measurements for improving access to justice. The review of the

¹ Buck *et al.* (2005, p302)

² Statement for New Legal Year 2017, The Hon. Mr Justice Frank Clarke Chief Justice of Ireland. Other initiatives include the recommendation of the Council of Europe on improving access to justice for Roma and Travellers in Europe, (www.roma-alliance.org/.../223-the-committee-of-ministers-of-the-council-of-europe-a). Key recommendations given by the Committee of Ministers included facilitating equal access to legal aid or other free legal services for Roma and Travellers; and facilitating equal access to court and ensure the effectiveness of judicial remedies for Roma and Travellers.) Publications. The Fundamental Rights Agency have produced a handbook on European law relating to access to justice. (Fra.europa.eu › Home › Publications & resources) Member countries of the United Nations have adopted "Global Goal 16," which recognizes that access to justice is a critical part of sustainable development of peaceful and inclusive societies.

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Administration of Civil Justice is underway; one of its aims is to improve access to justice. It is noted that access to justice is an objective of the Department of Justice and Equality. Policy makers should recognise the importance of access to justice within strategies to address social exclusion and seek to enable access to justice as a tenet of social inclusion. The implementation of a progressive **National LGBTI Inclusion Strategy** which has access to justice as a central focus would be timely and complement other social inclusion initiatives and would assist in strengthening our Constitution, the rule of law and our justice system for the benefit of everyone and for LGBTQI+ people in particular.

Recommendation

Access to Justice should be a central focus of the National LGBTI Inclusion Strategy and the strategy should recognise that access to justice addresses social exclusion and should seek to enable access to justice as a tenet of social inclusion

Legislative Developments

The Equal Status Acts 2000-2016 and the Employment Equality Acts prohibit discrimination on nine grounds including gender, sexual orientation and civil status in a range of areas including employment, the provision of goods and services, education and housing.³ The Equality Tribunal which was established to investigate hear and decide claims of discrimination under the Equality legislation has been subsumed into the Workplace Relations Commission. Although there is little data available in the area, it would seem that comparatively few cases are taken on the sexual orientation ground under equality legislation and in relation to transgender issues.

FLAC for some time have been asked by representatives of LGBTQI+ people to establish a legal clinic for LGBTQI+ people. Part of FLAC's new strategic plan is to devise and provide legal services that are targeted at vulnerable, disadvantaged and isolated groups and individuals. During 2018 FLAC ran a pop up legal clinic in Outhouse to celebrate

³ The gender ground is defined "that one is a male and the other is a female" and a person has been discriminated where they were not treated the same as a person of the same gender. However the prohibition on discrimination on the gender ground has been by the CJEU held to apply to discrimination based on gender reassignment.

PRIDE. There is a significant demand for the continuation of such a service which to date we have been unable to provide.

Recommendation:

There should be an awareness raising campaign that targets LGBTQI+ people which increases awareness of the equality legislation and sources of advice and support.

The strategy should provide for targeted legal advice, training advocacy and representation services provided for LGBTQI+ people.

Civil legal aid scheme

The Legal Aid Board is precluded from providing representation before quasi-judicial tribunals including the Workplace Relations Commission dealing with employment and anti-discrimination claims under the Employment Equality Acts and the Equal Status Acts. FLAC is concerned that lack of availability of legal representation in these types of cases means that many LGBTQI+ people cannot present their cases in the manner that fairness demands, depriving them of access to justice.

In July 2015, the UN Committee on Economic, Social and Cultural Rights expressed concern regarding the exclusion of certain areas of law from the civil legal aid scheme “which prevents especially disadvantaged and marginalised individuals and groups from claiming their rights and obtaining appropriate remedies, particularly in the areas of employment, housing and forced evictions, and social welfare benefits”.⁴ Thereafter, the UN Committee recommended that the remit of the Legal Aid Board be expanded and that civil legal aid services be made available in a wider range of areas.⁵

Finally, it is relevant to note that the European Court of Human Rights has ruled that the blanket exclusion of any area of law from a civil legal aid scheme breaches Article 6(1) of the Convention.⁶ Therefore, there is a high degree of likelihood that the exclusion of the

⁴ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.8.

⁵ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.8.

⁶ In *Steel & Morris v the United Kingdom*, the European Court of Human Rights held that, “[t]he question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the

Workplace Relations Commission from the scope of the civil legal aid system in a blanket manner, without allowing for any examination of the particular facts of a case, may breach the right to a fair hearing guaranteed by Article 6 of the ECHR and may deny access to an effective remedy pursuant to Article 13.

Recommendation:

The Workplace Relations Commission should be a “prescribed” tribunals for the purposes of Section 27(2) (b) of the Civil Legal Aid Act 1995, to ensure that civil legal aid is available in claims of discrimination under the Employment Equality Acts and the Equal Status Acts

Access to Justice: Effective remedies

The Equal Status Acts 2000 – 2015 prohibit discrimination on the basis of sexual orientation, gender and civil status in the provision of goods and services, the provision of accommodation and access to education. However, Section 14 of the Equal Status Acts precludes legal actions against legislative provisions. In practical terms, this means that any legislation that discriminates on these grounds, or has a disproportionately negative impact on LGBTQI+ people, falls outside the scope of the Equal Status Acts and cannot be challenged under domestic equality legislation.

In February 2017, the UN Committee on the Elimination of all forms of Discrimination against Women expressed concern that section 14 of the Equal Status Acts 2000 – 2015 precludes the use of the equality framework to challenge other discriminatory laws.⁷ Thereafter, the Committee recommended that Ireland amend section 14 of the Equal Status Acts to ensure that an effective remedy is available for discrimination that has a legislative basis.

While the definition of “services” in section 2 of the Equal Status Acts is broad enough to include the services provided by public bodies it does not extend to the performance of

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 him or herself effectively.” *Steel & Morris v UK* (2005) 41 EHRR 22, para.61.

⁷ UN Committee on the Elimination of all forms of Discrimination against Women (2017) *Concluding observations on the combined sixth and seventh periodic reports of Ireland*, Geneva: CEDAW, p.3.

the functions of public bodies generally not within the definition of “services” under the Equal Status Acts, Therefore, it is unclear to what extent the prohibition on discrimination including on the ground of sexual orientation/transgender apply to public authorities for example in performing functions in the areas of immigration and citizenship which may not come within the definition of “services”. This denies LGBTQI+ persons whose rights are infringed access to an effective remedy.

The definition of “services” in the Act should, with only necessary and proportionate exceptions, include functions of the State.

Recommendations

Section 14 of the Equal Status Acts 2000 – 2015 should be amended to ensure that an effective remedy is available for discrimination that has a legislative basis;

The scope of the Equal Status Acts should be broadened to ensure that it applies to all of the functions of public bodies

The Public Sector Duty

The Public Sector Duty has been introduced pursuant to section 42 of the Irish Human Rights and Equality Act 2014. The Public Sector Duty provides one of the most important national mechanisms for mainstreaming equality and protecting the human rights of LGBTQI + people. The new National Strategy is a key instance of strategic planning by the Department to which the Public Sector Duty applies. The new strategy is therefore a very welcome and important measure by the Department of Justice and Equality in terms of meeting its obligations under the duty, in particular its obligations towards LGBTQI+ people.

The strategy should show how the Public Sector Duty has influenced the process for developing the strategy and be reflected in the outcome. Compliance with the Public Sector Duty must therefore be evident from the published strategy and should articulate how the requirements of the Public Sector Duty are to be met on an on-going basis. FLAC urges the Department of Justice & Equality to make the Public Sector Duty a core consideration in the process of developing, implementing and monitoring the

Department's strategy and to provide a model of best practice for other public bodies more generally and the bodies that come within the remit of the Department in particular.

The Public Sector Duty specifically requires public bodies to carry out an assessment of the human rights and equality issues relevant to its functions and the policies, plans and actions in place or proposed to be put in place to address those issues. In fulfilling their duties under the 2014 legislation, public bodies must consider the human rights and equality impact, including the impact on LGBTQI+ people of their policies, services, budgets, procedures and practices. The Public Sector Duty requires public bodies to take a proactive approach to tackling institutional discrimination and promote the mainstreaming of an equality perspective in all their functions. Such an approach, which should be progressed through the new strategy, has the potential to ensure that LGBTQI+ people in all their diversity are at the heart of all public action, policy and procedure, and will complement actions that are required under European Union law.

Recommendations

Make the Public Sector Duty a core consideration in the process of developing, implementing and monitoring the Department's strategy and to provide a model of best practice for other public bodies more generally and the Department's own bodies in particular.

Group defamation and combating hate speech

Section 10 of the Defamation Act, as presently framed, provides for the possibility of an individual taking defamation proceedings on the basis of a defamatory statement being made against a group or class of persons of which they are a member. The section provides as follows:

"Where a person publishes a defamatory statement concerning a class of persons, a member of that class shall have a cause of action under this Act against that person if—

(a) by reason of the number of persons who are members of that class, or

(b) by virtue of the circumstances in which the statement is published, the statement could reasonably be understood to refer, in particular, to the member concerned."

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There are two observations regarding this formulation. First, although a defamatory statement may be directed to a group, there must be some element of the statement that is targeted at an individual member of that group, before it may ground a cause of action. Secondly, it follows that the number of persons in the class must be so confined that the individuals within the group are identifiable. This would appear to exclude members of a social class or group, howsoever defined, from the potential protection provided by the Act.

This approach in the Act fails to have regard to whether a social group, and the individuals that make up that group, are entitled to the protections of the Constitution or other international human rights standards insofar as the good name of the individuals in the group may be damaged by reference to disparaging statements that are directed to the group to which they belong. An example would be statements that are homophobic in nature, but where the group concerned are too great in numbers for the statement to be considered to disparage any one member of the group over another. Nonetheless such statements may injure the reputation of the group in general within society, but at present no effective remedy is available to the individuals concerned.⁸

In addition the domestic measure that is designed to deter and punish homophobic and other forms of hate speech, namely the Prohibition on Incitement to Hatred Act, 1989 has been found to be limited in relation to the forms of behaviour it addresses and has in any event has resulted in very few prosecutions and fewer convictions.⁹ It is understood that there has been an on-going review of this legislation that has remained inconclusive.

The public sector duty imposes that a duty on the Department, in the context of drafting the strategy, to consider the elimination of discrimination, the promotion of equality of opportunity and the protection of human rights, the Department is urged to consider how

⁸ It may be observed in passing that this would appear to elevate the rights of individuals who come together as a corporate sole, above individuals who share a common social trait, such as their ethnicity, race or gender.

⁹ *Combating Racism and Xenophobia through the Criminal Law*, 2008, Walsh and Scheppe, See also *A Life Free from Fear: Legislating for Hate Crime in Ireland: An NGO Perspective*, 2014, Scheppe, Haynes and Carr.

hate speech, that may damage the reputation and standing of a social group or otherwise incite hatred and discrimination, may be addressed.¹⁰

Recommendation

FLAC recommends that the Strategy should, having regard to the review of the Defamation Act, 2009 in tandem with the on-going review of the Incitement to Hatred Act 1989, seek to ensure that a complimentary approach is taken to regulating hate speech, including the provision of accessible civil remedies to those targeted by such speech whether online or otherwise. Consideration should be given to enable the IHREC institute proceedings in relation to hate speech that is not targeted at individuals

¹⁰ Consideration of the nine protected groups under domestic equality legislation would appear an appropriate reference point for such a review and indeed an examination of possible amendments to the Equal Status Acts 200-2015 might also provide an appropriate legislative framework and forum for furthering the State's obligations to combat hate speech in addition to the ongoing review of the Incitement to Hatred Act, 1989.