



FLAC Submission to the Seanad Public Consultation Committee on Travellers; ‘Towards a more equitable Ireland post-recognition’

June 2019

About FLAC

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. 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 people, with a particular focus on social welfare law, personal debt & credit law and civil legal aid.

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.

You can download/read FLAC's policy papers at

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Summary of Recommendations:

PUBLIC SECTOR DUTY:

- 1. FLAC recommends that the Public Sector duty be a core consideration in the work undertaken by Government bodies and statutory agencies in relation to the recommendations of this report.**
- 2. As part of the strategy, ensure that all public bodies carry out an assessment of the human rights and equality issues relevant to their functions, including an assessment of the human rights and equality issues that impact on Travellers and Roma relevant to their functions, and the policies, plans and actions being taken or proposed to be taken to address those issues.**
- 3. FLAC requests that the Seanad Committee recommend Government departments, agencies and statutory bodies that come within the scope of the Public Sector Duty should report annually on their work to meet their section 42 obligations, beyond just providing cultural and awareness training to their staff.**

ACCESS TO JUSTICE:

- 4. FLAC recommends that the Seanad Consultation Committee examine access to justice and addressing unmet legal need as a distinct area that is integral to meeting social inclusion goals.**
- 5. Further, FLAC proposes that the Committee recommend that Access to Justice is considered as a core concept underpinning social inclusion policies developed by government departments.**
- 6. FLAC recommends that bodies that are representative of the Traveller Community should in appropriate cases be given standing to initiate proceedings on behalf of victims of discrimination.**
- 7. Traveller organisations should be adequately resourced to carry out advocacy and representation in claims of discrimination.**

EQUAL STATUS ACTS:

- 8. FLAC recommends that the Committee propose an Amendment of Section 14 of the Equal Status Acts 2000 – 2015 to ensure that an effective remedy is available for discrimination that has a legislative basis.**
- 9. FLAC further recommends a broadening of the scope of the Equal Status Acts 2000 – 2015 to include (with only necessary exemptions) the functions of public bodies.**

10. FLAC recommends that section 19 of the Intoxicating Liquor Act 2003 be repealed such that all complaints of discrimination, including those that concern licensed premises would be dealt with by a single expert body, in an informal environment, such as in the WRC where there is no charge.

11. FLAC recommends that a targeted information campaign about the important provisions in the Equal Status Acts should be carried out. This should involve a coordinated campaign by the Workplace Relations Commission, the Citizens Information Board and IHREC and Traveller NGOs.

ACCOMMODATION:

12. FLAC Recommends that the Seanad Committee seek a commitment from the Minister for Housing, Planning and Local Government that when the report of the Expert Review Group on Traveller Accommodation is published he will take steps to implement the recommendations without delay through legislation and any other measures necessary.

13. FLAC asks the Seanad Committee to recommend that the Minister for Housing, Environment and Local Government immediately review the Guidelines published in 1998 in relation to Traveller Accommodation to update guidance in relation to the design and delivery of Traveller Accommodation standards and in addition to amend the Housing (Standards for Rented Houses) Regulations 2019 to include halting sites, including transient, temporary and permanent halting sites.

14. FLAC recommends that the Seanad Committee in its recommendations call on the Minister for Justice and Equality to review the legislation allowing for summary evictions without judicial oversight and bring forward reforming legislation in relation to evictions. This legislation should ensure that except in the most exceptional of circumstances a family home can never be interfered with in the absence of a merits based determination by a Court accompanied with a requirement to offer alternative appropriate accommodation to homeless families.

LEGAL AID:

15. FLAC recommends that the Committee include in its report a recommendation that the scope of Legal Aid be expanded to include provision of legal aid where legal advice and representation is required in quasi-judicial tribunals and other areas currently not covered by the Civil Legal Aid Act 1995.

16. FLAC recommends that The Legal Aid Board would engage in an information campaign in relation to the availability of legal aid in cases concerning the

responsibilities of the State and local authorities in the areas of housing and homelessness and in claims of discrimination against licensed premises.

17. FLAC further recommends that its draft amendment to the Legal Aid Board Act 1995 be enacted to ensure that legal aid be available in eviction cases.

18. FLAC recommends that the Committee propose that civil legal aid is made available on the same basis as criminal legal aid in relation to the means test and obligation to pay contributions in order to vindicate the right of a person to representation where it is needed for a fair hearing.

ICERD:

19. FLAC requests the Committee propose the Government provides information outlining the manner in which the State complies with article 4 of the Convention specifically dealing with the State's objectives regarding the review of the Prohibition of Incitement to Hatred Act 1989, and that the Government takes the opportunity to determine whether any purpose is served by the interpretive reservation to article 4, and consider withdrawing same.

20. FLAC recommends that the Committee propose the Government consider the CERD Committees comments on the need to incorporate the Convention into the Irish legal system, and further conduct an analysis of public knowledge on the possibility of complaints being submitted by individuals and groups of individuals under Article 14 of CERD.

21. Further, the Committee should urge the Government to a detailed account of how, in the absence of direct incorporation, the protections under ICERD are mirrored in domestic legislation, also addressing the accessibility of any such remedies and any gaps in protection.

RACIAL PROFILING:

22. FLAC requests that the Committee recommend the Government engage in periodic reporting outlining the monitoring of racial profiling in practice, including through the public sector duty under Section 42 of the Irish Human Rights and Equality Commission Act 2014 and in relation to any proposals to address deficits in the area, and that consideration is given to the legislative measures that would allow individuals, or groups representing their interests to make complaints through GSOC and the WRC in relation to discrimination including discriminatory profiling that would allow for such allegations to be investigated and remedied independently.

HATE SPEECH:

23. FLAC recommends that the Committee examines defamation issues in relation to prejudice and stigma faced by Travellers and further examines the need to bring civil legal aid provisions in line with Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights, and that the exclusion of defamation from the Civil Legal Aid Act, 1995 be removed.

24. FLAC recommends that the Committee consider the Defamation Act, 2009 in tandem with the ongoing review of the Incitement to Hatred Act 1989, 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.

Introduction

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 works to improve access to justice for marginalised communities.¹ It also operates PILA, the Public Interest Law Alliance, which operates a Pro Bono Referral Scheme for NGOs, community groups and independent law centres. FLAC is also an independent law centres and engages in litigation in the public interest and strategic litigation, seeking to achieve outcomes which will have benefit beyond the individual, and which may test and possibly bring about change in law and practice.

FLAC has recently 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. The pilot programme aimed to increase Roma and Traveller women's awareness of their rights and existing complaint mechanisms, with a particular focus on anti-discrimination and equality of opportunity. Within JUSTROM, FLAC supported the running of legal clinics for Travellers² and Roma. The experience of those clinics is drawn on in this submission to highlight specific matters of importance to achieving equality for those communities. FLAC with the financial assistance of the Department of Justice currently operates a legal clinic for the ROMA community. It also within its limited resources continues to engage in legal representation for members of the Traveller community, primarily in the

¹ FLAC Annual Report 2017

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%).

area of accommodation provision.

FLAC welcomes the opportunity to make a submission to the Seanad Public Consultation Committee on Travellers; *'Towards a more equitable Ireland post-recognition.'* FLAC is happy to meet with members of the Seanad Consultation Committee or the individual members on any of the issues contained in this submission or other matters relevant to our work.

Public Sector Duty

Section 42 of the Irish Human Rights and Equality Act 2014, introduced the Public Sector Duty, providing one of the most important national mechanisms for mainstreaming equality and human rights for Travellers. It imposes a positive obligation on a broad range of statutory and public bodies to have regard to in the performance of their functions, the need to eliminate discrimination, promote equality of opportunity and protect the human rights of its members, staff and persons to whom it provides services.

FLAC welcomed the publication of the National Traveller and Roma Inclusion Strategy 2017-2021 in which it states that relevant public services staff should be trained in anti-racism and cultural awareness and understand their obligations under section 42 in the Irish Human Rights and Equality Commission Act 2014, resulting in a commitment that all departments and relevant agencies would ensure their staff receive the relevant training. It further stated that the Irish Human Rights and Equality Commission, in consultation with representative organisations, will develop training for Government Departments, statutory agencies and Local Authorities on implementing the Public Sector Duty as a means of systematically pre-empting and addressing equality and human rights issues in their daily work in relation to Travellers.³

FLAC believes that the comprehensive roll out of the public sector duty is relevant to a number of the Committee's objectives including promoting and supporting increased involvement of Travellers in decision making processes within the public sphere but also increasing inclusion of Travellers within civil structures, governmental agencies and Departments. It would also have an impact on addressing the stigma, prejudice,

³ National Traveller and Roma Inclusion Strategy 2017-2021, Department of Justice and Equality, 2017.

discrimination, racism, social exclusion and identity erosion as experienced by Travellers.

Any consultation that contains the goal of supporting increased involvement of Travellers in decision making processes within the public sphere, and increasing the inclusion of Travellers within civil structures, governmental agencies and Departments will be a key instance in which the Public Sector Duty will apply. Any initiatives designed to do this should be underpinned by the Public Sector Duty and be reflected in the subsequent recommendations, including requirements that bodies covered by section 42 articulate how the statutory obligations arising from the duty are to be met on an ongoing basis. Further they must be required to take a proactive approach to tackling institutional discrimination against Travellers, and promote the mainstreaming of an equality perspective in all their functions. Such an approach, has the potential to ensure that Travellers are at the heart of public policy and procedure and would complement actions already required under EU law and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Recommendations:

FLAC recommends that the Public Sector duty be a core consideration in the work undertaken by Government bodies and statutory agencies in relation to the recommendations of this report.

As part of the strategy, ensure that all public bodies carry out an assessment of the human rights and equality issues relevant to their functions, including an assessment of the human rights and equality issues that impact on Travellers and Roma relevant to their functions, and the policies, plans and actions being taken or proposed to be taken to address those issues.

FLAC requests that the Seanad Committee recommend Government departments, agencies and statutory bodies that come within the scope of the Public Sector Duty should report annually on their work to meet their section 42 obligations, beyond the provision of cultural and awareness training to their staff.

Access to justice:

Access to justice is a fundamental human right and is recognised as such under a range of regional and international instruments.⁴

While it has no single precise definition, access to justice includes knowledge of and access to the legal system as well as whatever legal services are necessary to achieve a just outcome. Access to Justice also includes access to legal aid. It encompasses access to fair systems of redress and states' obligations to vindicate and protect human rights. In the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers and executive power accountable.⁵

However, the effectiveness of redress procedures is undermined where victims are reluctant or unable to use them. Several factors have been noted that act as a disincentive to using complaints procedures, including failure by racial and ethnic minorities to recognise discrimination.⁶ Research conducted by the Fundamental Rights Agency across the European Union has highlighted that awareness of the national legislative and procedural framework giving effect to the prohibition on discrimination appears to be low among racial minorities.⁷ This, in turn, affects the degree to which victims pursue their rights and reduces the frequency with which the prohibition of discrimination is enforced and remedies are obtained.

In Ireland, Travellers face deeply embedded and structural discrimination, including as regards their access to education, health care, social welfare, employment and housing.⁸ Additionally, Traveller women are exposed to multiple and intersectional

⁴ 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 guaranteed. Article 7 of the Racial Equality Directive obliges EU Member States to ensure that judicial and/or administrative procedures are available to victims of racial discrimination to enforce their right to equal treatment.

⁵ See United Nations Development Programme website at: <http://bit.ly/204OeWJI> and European Union Agency for Fundamental Rights and Council of Europe (2016) Handbook on European law relating to access to justice, Luxembourg: FRA and CoE, p.16

⁶ European Union Agency for Fundamental Rights (2012) The Racial Equality Directive: application and challenges, Luxembourg: FRA, p.25.

⁷ European Union Agency for Fundamental Rights (2012) The Racial Equality Directive: application and challenges, Luxembourg: FRA, p.25.

⁸ In January 2016, the UN Committee on the Rights of the Child expressed concern about the structural

forms of discrimination on grounds of gender and ethnicity and can be subjected to various forms of violence against women and discrimination. Research published by the ESRI and IHREC showed that Travellers report very high rates of discrimination in seeking work, where they are ten times more likely than White Irish to experience discrimination. They also report extremely high rates of discrimination in private services, where they were over 22 times more likely to report discrimination, particularly in shops, pubs and restaurants.⁹

The difficulty of Travellers, and others from historically disadvantaged backgrounds to pursue remedies through existing systems increases their vulnerability to poverty and violations of their rights. In turn, their increased vulnerability and exclusion further hamper their ability to use justice systems. A UN Special Rapporteur on extreme poverty and human rights has noted that certain groups that suffer from structural discrimination and exclusion and are disproportionately represented among the poor, particularly ethnic minorities such as Travellers encounter additional barriers to accessing justice. Those difficulties are multiplied for women living in poverty, who experience compounded discrimination and disempowerment, not to mention financial constraints.

Research in the area of social exclusion has suggested that those who may be considered socially excluded groups within the general population are more likely to suffer justiciable problems (meaning problems for which there is a potential legal remedy within a civil and/or criminal justice framework).¹⁰

People who are socially disadvantaged very often experience legal problems in accessing social welfare, housing and addressing unemployment, many of which might occur at the same time. There is a clear association between levels of disadvantage and difficulties in resolving legal issues, and assistance in resolving those legal problems would assist individuals in addressing difficulties in debt, housing, employment etc. if it were provided, thereby positively impacting in reducing social exclusion and disadvantage.

discrimination against Traveller and Roma children, including as regards their access to education, health and an adequate standard of living. UN Committee on the Rights of the Child (2016) Concluding observations on the combined third and fourth reports of Ireland, Geneva: OHCHR, p.16.

⁹ Frances McGinnity, Raffaele Grotti, Oona Kenny and Helen Russell, *Who experiences discrimination in Ireland* Evidence from the QNHS Equality Modules (Dublin: IHREC and ESRI, 2017),

¹⁰ A Buck, NJ Balmer and P Pleasence, 'Social Exclusion and Civil Law: Experience of Civil Justice problems among Vulnerable Groups' (2005) 39 *Journal of Social Policy and Administration*, 302- 320.

Unless the right of access to justice is vindicated, the risk of social and economic exclusion, particularly for marginalised or vulnerable communities is greatly increased. Indeed, previous action plans on social inclusion issued by the UK government gave access to justice a similar priority to health and education, thereby recognising access to justice as a basic right and a vital element in social inclusion policies.¹¹ The objective of protecting and promoting the right of access to justice should be included in all appropriate National Action Plans, crucially, in those being prepared against Poverty and Social Exclusion and FLAC has called on the government to do the same in the new National Action Plan on Social Inclusion.¹²

Knowledge of legal rights, entitlements and services and access to legal information, advice and representation would empower Travellers to enforce their rights, challenge inequalities and discrimination and combat social exclusion. Substantial unmet legal need continues to exist and the objective of protecting and promoting the right of access to justice should be at the centre of reforms seeking to increase social inclusion of Travellers in Ireland. While the Committee has not specifically flagged access to justice, as one of its objectives, FLAC recommends that the committee in its report names access to justice as a key theme of its proposals.

It is relevant to note that Article 7 of the Racial Equality Directive¹³ obliges EU Member States to ensure, in accordance with national law that associations, organisations or other legal entities may engage in judicial or administrative proceedings on behalf of, or in support of victims, with the victim's permission. The role of NGOs is particularly valuable in facilitating the enforcement of antidiscrimination law, however their ability to provide assistance or engage in litigation is dependent upon expertise and resources. The EU's Fundamental Rights Agency has stated that one of the ways by which the existing frameworks to combat discrimination on the grounds of racial and ethnic origin could be strengthened is to widen access to complaints mechanisms, including by increasing funding for voluntary organisations in a position to assist victims.¹⁴

Recommendations:

FLAC recommends that the Seanad Consultation Committee examine access to justice and addressing unmet legal need as a distinct area that is integral to meeting social inclusion goals.

¹¹ *ibid*

¹² FLAC Submission to the Public Consultation Review of the Implementation of the National Action Plan for Social Inclusion, 2019.

¹³ Directive 2000/43/EC.

¹⁴ European Union Agency for Fundamental Rights (2012) The Racial Equality Directive: application and challenges, Luxembourg: FRA, p.25.

Further, FLAC proposes that the Committee recommend that Access to Justice is considered as a core concept underpinning social inclusion policies developed by government departments.

FLAC recommends that bodies that are representative of the Traveller Community should in appropriate cases be given standing to initiate proceedings on behalf of victims of discrimination.

Traveller organisations should be adequately resourced to carry out advocacy and representation in claims of discrimination.

The Equal Status Acts

The Equal Status Acts 2000 – 2015 contains significant legislative protection against discrimination for Travellers as it prohibits discrimination, including indirect discrimination against Travellers in the provision of goods and services, the provision of accommodation and access to education.

FLAC notes the current controversy in relation to allegations that some Traveller children only have access to reduced timetable/curriculum in school. While FLAC has not encountered such allegations in its legal work with Travellers, we note that the Ombudsman for Children has expressed concern to the Joint Oireachtas Committee on Education and Skills about the inappropriate use of reduced timetables as an informal suspension to deal with difficult behaviour in the classroom, with Traveller, Roma and young people with disabilities being disproportionately affected.¹⁵ The Ombudsman for Children called for a statutory framework on the use of reduced timetables and the practice should be monitored nationally to gather data as the prolonged use of reduced timetables as an exclusionary measure on children can have a serious and long-lasting impact.¹⁶ Maria Joyce, co-ordinator of the National Traveller Women's Forum, stated during a debate in the Joint Oireachtas Committee on Education and Skills, that reduced timetabling was another form of segregated provision, albeit by a different

¹⁵ Ombudsman for Children's Office comment on debate in joint Oireachtas Committee on Education and Skills https://twitter.com/OCO_ireland/status/1139136526200295424

¹⁶ Ombudsman for Children's Office comment on debate in joint Oireachtas Committee on Education and Skills https://twitter.com/OCO_ireland/status/1139136527471173632

name whereby Travellers appear to be placed in this situation disproportionately to the wider community.¹⁷

FLAC considers that the provisions of section 7 of the Equal Status Acts, which prohibit direct and indirect discrimination, and discrimination by association in access to any course facility or benefit, or any term or condition of participation, would have particular relevance to any such practice in relation to reduced timetables. The provision of the Equal Status Acts in this regard has to be interpreted in such a way as to give effect to the prohibition against discrimination in education contained in Article 3 (g) of the Race Directive.¹⁸ The obligations imposed by section 42 of the Irish Human Rights and Equality Commission Act 2014 on all public bodies, including bodies involved in the provision of education, to promote equality of opportunity, and eliminate discrimination may also be pertinent.

More generally in relation to accessing State services, the potential impact of the Equal Status Acts is relation to discrimination against Travellers is limited in two respects. Firstly, Section 14 of the Equal Status Acts precludes legal actions against legislative provisions. In practical terms, this means that any action that is required on foot of legislation which discriminates against Travellers, or has a disproportionately negative impact on Travellers, for example the Criminal Trespass legislation 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.¹⁹ 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.

Further, the definition of “services” in section 2 of the Equal Status Acts is broad enough to include the services provided by public bodies. However, the scope of the Acts does not extend to the performance of the functions of public bodies generally. Therefore, it is unclear to what extent the Equal Status Acts apply to public authorities performing

¹⁷ Maria Joyce speaking in Joint Committee on Education and Skills Thursday 30 May 2019 <http://debatesarchive.oireachtas.ie/debates%20authoring/debateswebpack.nsf/committeetakes/ESJ2019053000002#C00400>

¹⁸ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

¹⁹ 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.

public functions which may not come within the definition of “services” but which may nonetheless have a great impact on lives, including the lives of Travellers for example police and prisons.²⁰

It is noted that the number of complaints of discrimination under the Equal Status Acts to the Workplace Relations Commission is reducing.²¹ This is surprising given the level of allegations of discrimination against Travellers, and is a worrying trend that needs to be addressed. In particular FLAC is mindful that the State transferred the jurisdiction in claims of discrimination against licensed premises to the District Court, and this has largely reduced the number of such complaints taken by Travellers. Although legal aid is available for such complaints, in practice Travellers are not being granted legal aid for such, making the benefit of the change of jurisdiction largely illusory.

Recommendations

FLAC recommends that the Committee propose an Amendment of Section 14 of the Equal Status Acts 2000 – 2015 to ensure that an effective remedy is available for discrimination that has a legislative basis.

FLAC further recommends a broadening of the scope of the Equal Status Acts 2000 – 2015 to include (with only necessary exemptions) the functions of public bodies.

FLAC recommends that section 19 of the Intoxicating Liquor Act 2003 be repealed such that all complaints of discrimination, including those that concern licensed premises would be dealt with by a single expert body, in an informal environment, such as in the WRC where there is no charge.

FLAC recommends that a targeted information campaign about the important provisions in the Equal Status Acts should be carried out. This should involve a coordinated campaign by the Workplace Relations Commission, the Citizens Information Board, IHREC and Traveller NGOs.

²⁰ E. Barry (2015) ‘Non-Discrimination and equality’ in Making Rights Real: A Children’s Rights Audit of Irish Law, Dublin: Children’s Rights Alliance and Law Centre for Children and Young People, pp.20-21.

²¹ The Workplace Relations Commission Annual Report 2016 states that 658 Equal Status complaints were lodged for that period. According to the Workplace Relation Commission Annual Report 2017, 668 such complaints were lodged in 2017, with just 595 such complaints being lodged in 2018.

Travellers and Civil Legal Aid

Some of the most prevalent legal issues affecting Travellers are excluded from the remit of the Legal Aid Board. The Legal Aid Board is precluded from providing representation before quasi-judicial tribunals. Quasi-judicial tribunals, which make legally binding decisions outside of the court process, are a common route for many Travellers seeking access to justice in relation to equality, anti-discrimination, social-welfare and employment related matters.

Travellers cannot obtain legal aid in relation to claims of discrimination under the Equal Status Acts, in relation to access to services, housing, accommodation and education. There is also no legal aid available for social welfare appeals, appeals in relation to supplementary welfare allowance, as well as in employment cases.

The lack of legal representation in these types of cases means that many Travellers cannot present their cases in the manner that fairness demands, depriving them of access to justice. In 2011, the former UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, during a fact-finding mission to Ireland, noted her concern that “several areas of law that are particularly relevant for people living in poverty” are excluded from the scope of the Legal Aid Board.²² The complete exclusion of entire categories from legal aid, such as representation in quasi-judicial tribunals such as the WRC and Social Welfare Appeals Office is a form of discrimination against the poor. The legal processes and evidentiary requirements of these fora are complex and are not navigable for many people without the assistance of a lawyer. Further, the State is never without access to legal representation in these areas. Where a Traveller alleging discrimination does not have such financial means and is faced with an experienced legal team on the other side, this can give rise to an inequality of arms in practice and undermines the effectiveness of the redress mechanism concerned.²³

Additionally, while employers and businesses can often afford to pay for private legal representation before the Workplace Relations Commission, Travellers making complaints under the Employment Equality Acts and the Equal Status Acts often

²² Office of the High Commissioner for Human Rights (2011) Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona to the Human Rights Council, Geneva: OHCHR, p.4.

²³ UN Special Rapporteur on extreme poverty and human rights (2012) Report of the Special Rapporteur on extreme poverty and human rights – obstacles to access to justice for persons living in poverty, Geneva: OHCHR, p.14.

cannot. Given the complexity of the law in this area, FLAC is concerned that Travellers are significantly disadvantaged by lack of legal representation.

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.²⁴ Therefore, there is a high degree of likelihood that the exclusion of the Workplace Relations Commission and the Social Welfare Appeals Office 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.

Where a Traveller may access legal aid for some actions through the Legal Aid Board, in particular in relation to a family law matter, there are often lengthy waiting lists before a first consultation with a Legal Aid Board solicitor. We recognise that the lawyers who work at the Legal Aid Board Law Centres operate under substantial pressure on both their time and other resources as they deal with large client lists. FLAC further recognises the dedication and high quality of the advice and services of these lawyers and the committed nature of the staff. Therefore the Legal Aid Board must also be allocated additional state funding in order to operate in a more efficient manner as justice requires, but further it must be allocated additional appropriate funding in order to provide legal representation in quasi-judicial tribunals.²⁵

Licensed premises

Civil legal aid is notably available for applications to the District Court for redress under section 19(2) of the Intoxicating Liquor Act 2003, where the applicant claims that discrimination against, or sexual harassment or harassment of, or permitting the sexual harassment or harassment of a person in contravention of Part II (Discrimination and Related Activities) of the Equal Status Act 2000 has been directed towards himself or herself on, or at the point of entry to, licensed premises. However, all applicants for civil legal aid must still satisfy the financial eligibility criteria under the Civil Legal Aid Act and

²⁴ 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 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.

²⁵ FLAC notes the government’s intent to continue to support the Legal Aid Board in their work. We also recognise that funding allocated to the Board has been increased annually since 2015 with €40.275m being allocated in 2018. However the number of applications for legal aid has increased from 16,433 in 2014 to 17,103 in 2017 according to the latest available figures. 8,659 of these applications in 2017 pertained to general family law matters, 3,832 concerned divorce separation or nullity and 774 related to cases involving possible State care of children.

accompanying regulations.²⁶ The applicant must also show that they would be reasonably likely to be successful in the proceedings, assuming the facts put forward by them are proven by a court or tribunal.

FLAC notes that according to ESRI research Irish Travellers are 38 times more likely to report discrimination in shops, pubs and restaurants than white Irish people.²⁷ However, as noted already, the availability of legal aid in relation to discrimination in licensed premises has not had an impact in this regard. In reply to a parliamentary question in November 2018, the Minister for Justice and Equality, Charlie Flanagan stated that no case in the prior three years had been granted legal aid pursuant to an application under section 19(2) of the 2003 Act.²⁸ A further update on this has been requested by FLAC from the Legal Aid Board, including information on the number of applications for legal aid in relation to discrimination in licensed premises and the number of those applications that were refused.²⁹

Traveller Accommodation and Evictions

The passing of the Housing (Traveller Accommodation) Act 1998 signified a significant shift in Government policy towards the provision of accommodation to Travellers. The legislation was intended to address the range of accommodation needs of Travellers, from standard housing to transient halting sites, and to require a programmatic process of planning, funding and delivery by local authorities and central government on a multi annual basis.

However, the 1998 Act also increased the controlling and punitive powers of local authorities in dealing with unofficial encampments by extending the scope of the circumstances in which a local authority could require to be moved a temporary dwelling when placed within proximity to a halting site or other Traveller accommodation.³⁰ Clearly the legislation twinned better accommodation provision with the elimination of unofficial encampments, and now twenty years later it is timely to consider the impact of

²⁶ Financial eligibility criteria are set out in Section 29 of the Civil Legal Aid Act 1995 and the Civil Legal Aid Regulations 1996 to 2017. The application must meet the merits criteria in sections 24 and 28(2) of the 1995 Act.

²⁷ *“Irish Travellers are over 22 times as likely to say they experience discrimination in Ireland in private services (shops, pubs, restaurants, banks and housing) than White Irish in 2014. This difference is relevant to all private services, but particularly shops, pubs and restaurants, where Travellers are 38 times more likely to report discrimination than White Irish, even after controlling for education, employment status and housing tenure (not shown).”* p36 Frances McGinnity, Raffaele Grotti, Oona Kenny and Helen Russell, *Who experiences discrimination in Ireland Evidence from the QNHS Equality Modules* (Dublin: IHREC and ESRI, 2017),

²⁸ Reply to Parliamentary Question tabled by Deputy Clare Daly [49935/18] 29 November 2018

²⁹ Meeting of Legal Aid Board External Consultative Panel 21st March, 2019

³⁰ Section 32, Housing (Traveller Accommodation) Act 1998.

that legislation and whether the twinning of accommodation provision with increased powers of eviction was justified.

Accommodation provision

The most recent statistics published by the Department of Housing, Planning and Local Government indicate that in the last three years for which figures are available there was a very sizable number of families living on unauthorised sites.³¹ In 2015 the official figure was 534 families, in 2016, the number was 536 and in 2017 there were 585 Traveller families living on the roadside.³² The number is therefore rising year on year. While these figures relate to an overall undersupply of housing nationally, and particularly social housing, nonetheless the rising number of roadside families is also linked to the failure of local authorities to provide adequate accommodation to Travellers, including temporary halting sites, since the passing of the 1998 Act.³³

Recent Parliamentary Questions to the Minister for Housing, Planning and Local Government documented an increasing disparity between the allocation of capital funding from the Department and actual drawdown by local authorities, with central funding increasing and drawdown decreasing.³⁴ The result being that accommodation provision to Travellers is diminishing, which coupled to cuts in capital funding during the period 2008 to 2013, has resulted in a particularly acute shortage of accommodation being available to Travellers with the consequent increase in homelessness documented above.³⁵

In a report commissioned by the Housing Agency in 2017, independent research noted a number of challenges facing local authorities in relation to the provision of accommodation to Travellers, and notably the primary difficulty was identified as emanating from the local authorities themselves coupled with antipathy from the settled community to the development of Traveller accommodation.³⁶ In that regard the report stated:

³¹ See <https://www.housing.gov.ie/housing/special-housing-needs/traveller-accommodation/2017-annual-estimate-traveller-families-la-and>, accessed on 12 June 2019.

³² There is presently no reliable means by which to count how many of these families may be nomadic rather than homeless, but it is assumed in the context of this submission that most of these families, being known to the local authority and included in their returns to the Department of Housing, Planning and Local Government are on local authority housing lists.

³³ See further below.

³⁴ See for example PQ [47746/18], answered 20 November 2018. See also PQ [37634/18] answered on 18 September 2018

³⁵ See also *Travelling with Austerity*, Pavee Point, April 2013 at pp 24 to 26.

³⁶ *Review of the Funding for Traveller-Specific Accommodation and the Implementation of Traveller Accommodation Programmes*, RSM, June 2017.

“Through the findings of the consultation conducted in this research, it was identified that the key challenges facing local authorities in implementing their TAPs are:

- Planning issues, specifically in relation to opposition to planning applications by settled residents and Elected Representatives, as identified by Traveller and local authority representatives;*
- Providing an effective assessment of need process, as the consultation highlighted that the current process underestimates need; and*
- Delivery of effective monitoring and reporting processes.*

Consultees highlighted that the planning process is the most significant issue limiting the delivery of capital output under TAPs. It was reported by Traveller representatives and local authority representatives that objections from local “settled” residents and political pressure exerted by Elected Representatives tend to delay the planning process. It was suggested that this can have a direct impact on the achievement of targets, as developments may face extensive delays, hence, the opportunity to utilise funding is lost.”³⁷

It is a serious flaw in the 1998 Act that elected representatives may adopt a Traveller Accommodation Programme which the local authority is legally bound to implement³⁸, but then block the delivery of the objectives of the programme through the planning process. However, the above referred research indicates that this is precisely what happens and local authorities are ignoring their own legal obligations, largely with impunity. In recognition of this reality the Minister of State for Housing and Urban Renewal, Damien English, T.D. appointed an Expert Review Group on Traveller Accommodation in 2018 to review the Traveller Accommodation Act 1998 and other legislation that impacts the provision and delivery of accommodation for Travellers.³⁹ The report of that Group is yet awaited but it is expected that it will recommend some form of mechanism or mechanisms to make local authorities more accountable in relation to the delivery of Traveller accommodation, and indeed may recommend that some of the statutory role in relation to the delivery of Traveller accommodation be removed from local authorities altogether. That remains to be seen. However, the core issue is that leaving the delivery of Traveller accommodation as the sole responsibility of local authorities, fails to address the deep seated prejudice that lies within most

³⁷ Ibid. at p. 43.

³⁸ Section 16 of the Housing (Traveller Accommodation) Act 1998 provides: “A housing authority shall, in securing the implementation of an accommodation programme, or an amendment to or replacement of an accommodation programme, take any reasonable steps as are necessary for the purpose of such implementation.”

³⁹ See presentation to the Oireachtas Joint Committee on Housing, Planning and Local Government at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_housing_planning_and_local_government/submissions/2018/2018-11-06_opening-statement-david-joyce-the-traveller-accommodation-expert-group_en.pdf (accessed 13 June 2019).

communities against the development of specific accommodation for Travellers. One of the intangible effects of this is that individual families may have their choice of accommodation between standard local authority housing and Traveller specific accommodation influenced by the factors above and so will not pursue the option of Traveller specific accommodation if they consider that delivery of same will become stymied by local opposition and political intransigence.

FLAC is aware through its present case files⁴⁰ of one extended family that has been seeking Traveller specific accommodation since 2008 or so, but which housing need was wholly omitted from the assessment of need carried out to prepare the relevant local authority's Traveller Accommodation Programme for the period 2014 to 2018. This was apparently because the family was receiving rent supplement at the time in private rented housing. The family subsequently became homeless due to rising rents, and are now living on an unauthorised site with no services. It appears to have only been on foot of the intervention of FLAC that the Council has now assessed them for the purpose of their new Traveller Accommodation Programme for a Traveller specific group housing scheme, but in the meantime the family will be left for several years on an unauthorised site with no basic services.

Another case file that FLAC is presently dealing with concerns a proposal by the local authority to build houses for three Traveller families who are presently living on a severely overcrowded halting site, in mobile homes that have long outlived their useful life span, and with limited access to services. While the planning process had commenced to develop the three houses, it has now stalled because of local residents objecting to the development. While the planning process allows for objections to a development, it is evident that the objections relate to the ethnicity of the occupants of the proposed houses rather than proper matters of planning and development. In the meantime the families with their young children continue to live in substandard conditions, without any clarity as to when they will be properly housed. It cannot be doubted that these experiences are replicated all over the country.

Recommendation:

FLAC Recommends that the Seanad Committee seek a commitment from the Minister for Housing, Planning and Local Government that when the report of the Expert Review Group on Traveller Accommodation is published, he will take steps to implement the recommendations without delay through legislation and any other measures necessary.

⁴⁰ FLAC will not name the local authority concerned as there is ongoing correspondence in relation to these cases, and naming the local authority might also reveal the identity of our clients.

Standards in Traveller Specific Accommodation

In addition to the flaws in the legislation that frustrate the delivery of Traveller accommodation, even where such accommodation is delivered there are no statutory minimum standards in relation to halting site accommodation, whether temporary, permanent or transient. While the Minister of the Environment (as he then was) introduced Guidelines in relation to the design and specification of Traveller Accommodation in tandem with the passing of the Housing (Traveller Accommodation) Act 1998, these guidelines have never been updated and have never been placed on a statutory footing. While the Guidelines are no doubt useful in informing local authorities in relation to the minimum requirements for sites in order to qualify for capital funding, they are of no benefit in ensuring that standards on halting sites meet a minimum standard for residents, or indeed in relation to health and safety, on an ongoing basis. It is notable that the fire that claimed the lives of ten people at a temporary halting site in Carrickmines, Dublin, occurred in a context where the relevant Council had no specific legal standards to meet in relation to halting sites. In contrast, there are detailed statutory regulation in place in relation to rented accommodation in housing, and such regulations extend, with relevant modification, to social housing provided by local authorities.⁴¹ The inadequacy of conditions on a significant proportion of halting sites was also a basis on which the European Social Committee found Ireland in breach of the Revised European Social Charter.⁴²

Recommendation:

FLAC asks the Seanad Committee to recommend that the Minister for Housing, Environment and Local Government immediately review the Guidelines published in 1998 in relation to Traveller Accommodation to update guidance in relation to the design and delivery of Traveller Accommodation standards and in addition to amend the Housing (Standards for Rented Houses) Regulations 2019 to include halting sites, including transient, temporary and permanent halting sites.

Noting the submission above in relation to the underperformance of local authorities in the delivery of Traveller Accommodation, and in particular having regard to the significant numbers of Traveller families now living on the roadside without alternative

⁴¹ Housing (Standards for Rented Houses) Regulations 2019. While the standards for rented accommodation are elaborated in some detail, it is questionable how effective they are in relation to local authority housing, when it is the local authority that is responsible for inspection and enforcement, and this is also a matter that should be addressed.

⁴² *ERRC v Ireland*, Complaint No. 100/2013, Decision on the Merits, 1 December 2015, at paras 85 to 92.

accommodation, the extensive powers available to local authorities and the State, including An Garda Síochána to forcibly evict Travellers should require a very high level of justification to be legally defensible. This is so because the forcible removal of a temporary dwelling may interfere with a number of constitutionally protected rights, such as the inviolability of the dwelling, the right to fair procedures, the right to privacy and the right to education.

The collective complaint submitted by the ERRC against Ireland listed a number of mechanisms that are available to local authorities, either directly or indirectly to address and deter unauthorised encampments by Travellers, by essentially allowing the forcible removal of temporary dwellings, backed up by criminal sanctions for non-cooperation. Those provisions are as follows:

- Section 19C, Criminal Justice (Public Order) Act 1994;
- Section 10 of the Housing (Miscellaneous Provisions) Act 1992;
- The Roads Act 1993;
- Planning and Development Act 2000, and
- Local Government (Sanitary Services) Act 1948

As the effect of these provisions is set out in detail in the decision of the European Social Committee above they will not be set out here, other than to note that aside from the Planning and Development Act 2000, all have common features in terms of coercive enforcement on short notice without any form of judicial review or sanction resulting in forced evictions and sometimes seizure of the family home.

FLAC can identify in the last three years that it has dealt with the legal consequences of the use of some of this legislation, namely; section 19C, Criminal Justice (Public Order) Act 1994 (one file); section 10 of the Housing (Miscellaneous Provisions) Act 1992 (three files) and the Planning and Development Act 2000 (three files). In all those cases, unless FLAC acted on behalf of the families concerned, the evictions would have gone ahead unimpeded and unfortunately in one case it did. In two of the cases concerning the service of a section 10 Notice the local authority agreed not to enforce same in light of representations made concerning technical compliance with the legislation and the homeless situation of the families. In the third case concerning section 10, an interim injunction was granted by the High Court to stop the eviction, and the case was settled in favour of the clients thereafter. In the cases concerning the Planning and Development Act, 2000, in one case the Council agreed not to enforce the Notice served as the procedure followed was flawed, and in another case concerning the same legislation the local authority agreed not to pursue enforcement when representations

were made by FLAC.⁴³ In the one file where the so called criminal trespass legislation was engaged, despite extensive submissions made to the relevant local authority and An Garda Síochána the eviction went ahead without adequate time to bring proceedings in the High Court to seek injunctive relief.⁴⁴

The common feature of all these provisions is the absence of judicial oversight or sanction and the requirement of a review of the proportionality of any intended eviction. There is no merits based hearing in relation to any evictions under the above legislation. Seeking urgent injunctive relief in the High Court to stop an eviction is a completely illusory safeguard in the majority of cases. Although none of this legislation has been determined to be unconstitutional, this of course does not mean that the legislation is immune from such challenge. Taking the test set out in the *Heaney* case, even if the State can put forward a rationale for the various legislative measures, it is still very questionable whether the rights of Travellers, and the circumstances of homeless families, have been taken into account in the legislation such that it could be shown to impair the constitutional rights concerned to the least degree possible, or be a proportionate interference with those rights in light of the objective sought to be achieved.

It is noted that the European Social Committee found a breach of Article 16 of the Revised European Social Charter in relation to section 10 of the Housing (Miscellaneous Provisions) Act 1992, and also section 19C, Criminal Justice (Public Order) Act 1994 because of the lack of safeguards incorporated into the legislation, including an absence of legal aid, the constrained time limits for compliance with the requirements of the legislation and the lack of any requirement to engage in prior consultation before the eviction takes place. However, to date, all this legislation remains in place, and as noted above, is still being used against Traveller families to date.

In addition to the European Social Committee, the European Court of Human Rights has considered the situation of Travellers and evictions in a number of cases, which establish some useful legal principles as to when evictions from an unauthorised site will be in compliance with the Convention or not.⁴⁵ Therefore, in the case of *Winterstein*

⁴³ In the third file the client was subject to criminal prosecution and was referred to

⁴⁴ The family concerned were shortly thereafter re-housed by the local authority, but not without the family having to go through the trauma of the forced eviction at the hands of An Garda Síochána on foot of a complaint from the local authority.

⁴⁵ See also *Chapman v The United Kingdom*, Grand Chamber, 18 January 2001, *Connors v The United Kingdom*, Judgment, 27 May 2004 and *Yardonova & Ors v Bulgaria*, Judgment, 17 October 2013.

v France,⁴⁶ which concerned eviction proceedings through local courts against a large number of Traveller families who had been camped on the relevant land for a considerable number of years, the Court had regard to the following factors in determining whether there had been a breach of the Convention:

- The Traveller applicants had a sufficiently close connection to the caravans, huts and bungalows located on the land for these to be considered as their homes, irrespective of whether the occupation of the land was lawful.
- The Court considered that the case pertained to the applicants' right to respect for their private and family lives, in so far as living in caravans formed an integral part of Travellers' identity and the case concerned the eviction of a community of close to one hundred individuals with repercussions for their social and family ties.
- The Court accepted that the interference with the applicants' rights had been in accordance with the law and pursued the legitimate aim of protecting the environment, however, the Court found that the evictions still required to be a proportionate measure and this was not the case as the municipal authorities had not taken into account the applicants' Convention rights, their long occupation of the land and the right to housing.
- In relation to the proportionality of the measure the Court was not satisfied that it met a pressing social need, nor had there been any particular consideration of the consequences of the eviction and the risk of the applicants becoming homeless. The Court found that the national authorities had to take account of the fact that the applicants were part of a vulnerable minority, which implied giving special consideration to their needs and their different lifestyle when it came to devising solutions to the unlawful occupation of land, or the provision of alternative accommodation.
- In addition the Court found that there had been an absence of a review of the proportionality of the interference in the context of the eviction proceedings against them, taking into account the consequences of the eviction and the risk of homelessness.
- The Court accepted that the State had subsequently met the needs of those Traveller families who were seeking social housing, but not those families who were seeking family sites indicating the authorities had not given sufficient consideration to their needs.

Taking the above factors into account the Court found that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

⁴⁶ *Winterstein v France*, Chamber Judgment, 17 October 2013. The judgment is only available in French, but extracts from the judgment have been published in English at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-127539%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-127539%22]})

Recommendation:

FLAC recommends that the Seanad Committee in its recommendations call on the Minister for Justice and Equality to review the above referenced legislation allowing for summary evictions without judicial oversight and bring forward reforming legislation in relation to evictions that ensures that except in the most exceptional of circumstances a family home can never be interfered with in the absence of a merits based determination by a Court accompanied with a requirement to offer alternative appropriate accommodation to homeless families.

Legal aid and evictions.

Civil legal aid is not available for “*disputes concerning rights and interests in or over land*”, which means that there may be difficulties in obtaining legal aid for evictions.⁴⁷ The Legal Aid Board takes the general view that eviction proceedings constitute “a dispute concerning rights or interests over land” and are therefore excluded from the remit of the civil legal aid scheme. While there is an extremely limited exception to this rule,⁴⁸ the exclusion of this area of law means Travellers encounter difficulties accessing civil legal aid for forced evictions. Another barrier faced by Travellers seeking access to the civil legal aid scheme is that the time frames under the legislation are not long enough to allow those facing eviction to seek legal advice or representation from the Legal Aid Board. Under Section 10 of the Housing (Miscellaneous Provisions) Act 1992 as amended, if a “temporary dwelling” such as a caravan is situated on public land without permission, the owner may receive a notice giving them 24 hours to move it, otherwise the local authority may seize it and either move it or impound it. Given the long waiting times which exist in most Law Centres, it is not possible for Travellers facing imminent eviction to access a consultation with a Legal Aid Board solicitor, or indeed any solicitor, within 24 hours, even if the matter is prioritised.⁴⁹

FLAC has drafted an amendment to the Civil Legal Aid Act, which if enacted would ensure that legal aid would be available in eviction cases. This draft amendment has

⁴⁷ Section 28(9)(a)(ii) of the Civil Legal Aid Act 1995

⁴⁸ Legal aid may be granted where a subject matter of the dispute is the applicant's home (or what would be the applicant's home but for the dispute) and the Board considers that the applicant suffers from “an infirmity of mind or body due to old age or to other circumstances”, or may have been subjected to duress, undue influence or fraud in the matter, and that a refusal to grant legal aid would cause hardship to the applicant. See Section 28(9)(c)(iii) of the Civil Legal Aid Act 1995.

⁴⁹ The latest available statistics providing waiting times for appointments at the legal aid centres are here: https://www.legalaidboard.ie/en/our-services/legal-aid-services/waiting-times/april-2019_.pdf

been tabled as an amendment to the Land and Conveyancing Law Reform Amendment Bill 2019.

Recommendations:

FLAC recommends that the Committee include in its report a recommendation that the scope of Legal Aid be expanded to include provision of legal aid where legal advice and representation is required in quasi-judicial tribunals and other areas currently not covered by the Civil Legal Aid Act 1995.

FLAC recommends that The Legal Aid Board would engage in an information campaign in relation to the availability of legal aid in cases concerning the responsibilities of the State and local authorities in the areas of housing and homelessness and in claims of discrimination against licensed premises.

FLAC further recommends that its draft amendment to the Legal Aid Board Act 1995 be enacted to ensure that legal aid be available in eviction cases.

FLAC recommends that the Committee propose that civil legal aid is made available on the same basis as criminal legal aid in relation to the means test and obligation to pay contributions in order to vindicate the right of a person to representation where it is needed for a fair hearing.

Hate Crime legislation and incorporation of the International Convention on the Elimination of All Forms of Racial Discrimination into domestic law

The UN Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties. FLAC notes that the CERD Committee reiterated its regret that Ireland has not incorporated the Convention into Irish law and restated its position from previous concluding observations that the State party should incorporate the Convention into its legal system to ensure its application before Irish courts in order to afford all individuals its full protection.⁵⁰

⁵⁰ Concluding Comments of the Committee on the Elimination of All Forms of Racial Discrimination on Ireland's Third and Fourth Periodic Reports, CERD/C/IRL/CO/3-4 , para.16

Ireland signed ICERD in 1968 and ratified it in December, 2000 whereupon it became binding on Ireland in international law. At the time of ratification of the Convention, a reservation/interpretative declaration was entered in relation to Article 4 of the Convention.⁵¹

The declaration (i) notes that the measures described in Article 4(a), (b) and (c) shall be undertaken with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights set forth in Article 5 of the Convention and (ii) states that Ireland considers that through the measures described in Article 4, the right to freedom of opinion and expression and the right to peaceful assembly and association may not be jeopardised. The CERD Committee recalled its previous concluding observations (CERD/C/IRL/CO/2) and noted that the State party's reservation/interpretative declaration on article 4 of the Convention and stated that the Government has not provided compelling reasons for its retention.⁵² It further reiterated its recommendation to the State that it should reconsider its position and withdraw the reservation/interpretative declaration made to article 4 of the Convention. The continued retention of the reservation weakens Ireland's commitment to remove all reservations to international human rights treaties. In relation to the specific protections provided under Article 4, and the obligations of the State in that regard, FLAC notes the current status of the Criminal Justice (Aggravation by Prejudice) Bill 2016 and the limited scope of that legislative proposal, and regrets the lack of progress made in relation to further legislative initiatives relevant to article 4 of the Convention.⁵³

⁵¹ ICERD Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

⁵² Concluding Comments of the Committee on the Elimination of All Forms of Racial Discrimination on Ireland's

Third and Fourth Periodic Reports, CERD/C/IRL/CO/3-4 , para.17

⁵³ In its submission in relation to the review of the Defamation Act 2009, FLAC recommended that the Department conduct the present review of the Defamation Act, 2009 in tandem with the ongoing review of the Incitement to Hatred Act 1989, 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. See

Recommendations:

FLAC requests the Committee propose the Government provides information outlining the manner in which the State complies with article 4 of the Convention specifically dealing with the State's objectives regarding the review of the Prohibition of Incitement to Hatred Act 1989, and that the Government takes the opportunity to determine whether any purpose is served by the interpretive reservation to article 4, and consider withdrawing same.

FLAC recommends that the Committee propose the Government consider the CERD Committee's comments on the need to incorporate the Convention into the Irish legal system, and further conduct an analysis of public knowledge on the possibility of complaints being submitted by individuals and groups of individuals under Article 14 of CERD.

Further, the Committee should urge the Government to a detailed account of how, in the absence of direct incorporation, the protections under ICERD are mirrored in domestic legislation, also addressing the accessibility of any such remedies and any gaps in protection.

Racial Profiling

FLAC notes the lack of legislation proscribing racial profiling by An Garda Síochána and other law enforcement officers and further notes that the CERD Committee recommended the adoption of legislation preventing racial profiling and requested the State strengthen its efforts to promote the humane treatment of migrants and people of non-Irish origin by An Garda Síochána in accordance with international human rights law. As noted above the functions of the Gardaí and the immigration functions of the State are largely excluded from the prohibition of discrimination in the Equal Status legislation.

FLAC notes that An Garda Síochána does not, as an institution, engage in discriminatory profiling. We note that the Code of Ethics for the Garda Síochána contains a number of commitments in relation to equality and respect, opposing and challenging behaviour or language that demonstrates discrimination or disrespect.⁵⁴

Submission to the Department of Justice to inform its review of the Defamation Act 2009 p8, at <http://flac.ie>

⁵⁴ Policing Authority (2017) Code of Ethics for the Garda Síochána (available at

However, FLAC is concerned by institutional discrimination against Travellers within the scope of some Garda operations. The experience of the Justrom programme operated by FLAC revealed that many Roma and Travellers perceive that their communities are disproportionately targeted by An Garda Síochána. However, as noted earlier in relation to the scope of the Equal Status Acts, there is no specific mechanism for ethnic or racial minorities to make a complaint if they consider that they have experienced racial profiling.

Recommendation:

FLAC requests that the Committee recommend the Government engage in periodic reporting outlining the monitoring of racial profiling in practice, including through the public sector duty under Section 42 of the Irish Human Rights and Equality Commission Act 2014 and in relation to any proposals to address deficits in the area, and that consideration is given to the legislative measures that would allow individuals, or groups representing their interests to make complaints through GSOC and the WRC in relation to discrimination including discriminatory profiling that would allow for such allegations to be investigated and remedied independently.

Fair and Accurate Treatment in the Media

The Defamation Act, 2009 was an important codification of the law relating to the protection of reputational rights in Irish law. While the law in relation to defamation has largely evolved as an aspect of wider tort law, in the Irish context it also serves an important role in protecting the constitutional right to a good name, a right that is also encompassed within the right to respect for private life under Article 8 of the European Convention on Human Rights.⁵⁵ However, actions in defamation are expensive to pursue and the parties bear considerable risk in terms of outcome, which ultimately leads to the perception that it is a remedy at the behest of those with the means to pursue it, but not otherwise.⁵⁶

The legislation, in terms of the type of statement that is considered defamatory, is quite narrow, as it only protects an individual or a corporate entity targeted by the impugned

<http://www.policingauthority.ie/website/PA/PolicingAuthorityWeb.nsf/page/Publications-en>). The Commission engaged with the Policing Authority on the proposed Code of Ethics during its consultation process.

⁵⁵ See for example *Axel Springer AG v Germany*, Judgment (Grand Chamber), 7 February 2012.

⁵⁶ Proceedings under the Defamation Act 2009 can only be commenced in the Circuit or High Court, but not the District Court. See Courts (Supplemental Provisions) Act 1961.

statement, but other forms of more generalised speech, such as for example racist hate speech, that nonetheless has the potential to damage the individual's reputation and standing in society, is not caught within its terms. FLAC believes that these are matters that should be considered in the context of the present review as they undermine the overall effectiveness of the legislation as a means of vindicating human rights and promoting equality of opportunity.

While there is no absolute right to legal aid in respect of defamation proceedings, and legal aid in this area may be subjected to a merits test, however designed, there is a blanket exclusion of such proceedings from the Civil Legal Aid Act, 1995 that is unlikely to meet the requirements of Article 6(1) of the ECHR. Reputational rights have been interpreted as falling within the scope of the right to respect for private life under Article 8 of the ECHR, and a similar interpretation must be applied to Article 7 of the Charter which contains the identical right. The absence of legal aid to prosecute or defend such cases will impact on the nature of the cases brought and the overall effectiveness of the legislation. In light of the exclusion under the Civil Legal Aid Act, the protections of the Defamation Act are essentially elitist and distort the fact that the legislation not only regulates the private sphere, but is also intended to vindicate fundamental rights whether protected by the constitution or aspects of the individual's private life under the ECHR.

Recommendation:

FLAC recommends that the Committee examines defamation issues in relation to prejudice and stigma faced by Travellers and further examines the need to bring civil legal aid provisions in line with Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights, and that the exclusion of defamation from the Civil Legal Aid Act, 1995 be removed.

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.”

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, however 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 racist 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.⁵⁷

While defamation and hate speech have a broader scope in terms of the type of communication that may be targeted and the means of remedying same, the requirements of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to which Ireland is a party, does place a specific imperative on the State to combat racist hate speech.⁵⁸ The domestic measure that is designed to deter and punish racist 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 in any event has resulted in very few prosecutions and fewer convictions. It is understood that there has been an ongoing review of this legislation that has remained inconclusive. Taken together, and in the absence of more

⁵⁷ 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.

⁵⁸ The reservation/ interpretative declaration in relation to Article 4 entered by Ireland refers to the right to free speech and freedom of assembly, and does not as such exclude the obligations under Article 4.

effective legislation to combat hate speech, the State is unlikely to be in compliance with Article 4 of ICERD, or to be in line with the requirements of EU law and the ECHR.

Recommendation:

FLAC recommends that the Committee consider the Defamation Act, 2009 in tandem with the ongoing review of the Incitement to Hatred Act 1989, 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.