Submission by

Free Legal Advice Centres (FLAC)

13 Lower Dorset Street

Dublin 1

To

The Legal Costs Working Group

Department of Justice, Equality and Law Reform

14 January 2005

Legal Costs Review- Submission to the Working Group

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all and it campaigns through advocacy, strategic litigation and authoritative analysis for the eradication of social and economic exclusion.

FLAC welcomes the commencement of the work of the Legal Costs Working Group and is hopeful that following its review the group will be in a position to make a number of recommendations that will improve access to justice. FLAC has a number of observations relevant to the work of the Group.

FLAC has provided free legal advice for the past 35 years. In the course of providing this service and campaigning for greater access to justice, FLAC has conducted research into the provision of legal advice and representation. FLAC has extensive contact with those members of the public for whom Legal Aid is either unavailable or inadequate, and private legal services are unaffordable. As indicated by the demand for our services, a significant number of people fall into this lacuna. Thus the perspective which FLAC brings to the issue of legal costs in this State is based upon

i) experience of working with and for people who cannot afford private legal services;
ii) a working model for the low-cost provision of legal advice; and
iii) involvement in public interest litigation and test cases.

In this submission it is intended to apply this perspective to the issues set out by the Working Group in its Legal Costs Review and to draw attention to particular deficiencies within the current system which the Group may duly consider. It is not intended to be a comprehensive review of the issue of legal costs in this country, but to focus on the areas in which the cost barriers to adequate legal services are most severe and consider how these may be overcome. It is proposed to highlight these areas by considering the cost issues which currently affect the Civil Legal Aid system and public interest litigation.
This submission focuses on:

i) Civil Legal Aid
ii) Public Interest Litigation
iii) Contingency Fee and *Pro Bono* arrangements

FLAC has long promoted public interest litigation as a vehicle for widening access to justice. It is an area in which the high legal costs in this State have had a particularly adverse effect on the range and volume of cases taken. In this regard the model adopted in the UK by the Legal Services Commission in setting up the Public Interest Advisory Panel (PIAP) will be considered.

In order to limit the costs associated with public interest litigation and other types of cases in which the plaintiffs have limited financial resources, the role of contingency fee arrangements and *pro bono* work, to which legislative barriers currently exist in the Irish

system, will be explored. Reforms to the Rules of the Superior Courts which would facilitate the greater use of these arrangements have the potential to reduce the deterrent effect of high legal costs which is a major barrier to access to justice at present.

i) Civil Legal Aid

Statistics produced by the Legal Aid Board (LAB), for the end of September 2004, are instructive in relation to waiting times at the Board's centres. The Board operates 30 centres throughout the country. Statistics provided by the Board to the end of September show that in 15 of the Board's 30 centres, clients are forced to wait six months or more for a first appointment with a solicitor. In 5 of these centres clients are waiting a year or more for an appointment. The longest waiting times at Newbridge (17 months) Portlaoise (15 months) South Mall in Cork (13 months), Navan (13 months) and Blanchardstown (12.75 months).

The goals set out in the Board's Corporate Plan 2003-2005 for an enhanced service are to be commended. However, in the interim there are certain changes which could be made by the Board to allow for the more efficient allocation of its resources in order to improve the provision of legal aid.

For example the Board could re-introduce a panel of private solicitors to assume some of the workload currently handled by the Law Centres. This would relieve the Board of some of its casework, particularly in terms of District Court appearances and would be a welcome structural innovation which would serve to reduce costs. Although in the past the Law Society opposed the creation of such a panel, due to remuneration issues, and this in turn limited participation rates, it would be hoped that a new working model for such a panel could be developed in conjunction with the Law Society, which could serve a wider role in reducing the workload of the existing Law Centres.

The introduction in 2001 of a pilot scheme, whereby persons on a waiting list for more than three months who were seeking a judicial separation/divorce in the Circuit Court, were referred to the private practitioner's scheme was a welcome development. Over the period of the pilot project (May 2001-July 2002), a total of 402 certificates were issued – 191 in respect of divorce, 206 in respect of judicial separation and five in respect of District Court appeals. In view of the success of the pilot scheme the Board has proposed to recommence it in 2005. Both the restricted scope of legal aid eligibility and the extensive waiting periods, as seen recently in the case of *O'Donoghue v. Legal Aid Board*[1] may give rise to challenges based on the right of access to the courts enshrined in both the Irish Constitution and the European Convention on Human Rights.

Recommendations

- **The Legal Aid Board should receive a level of funding which would allow it to meet the current level of demand for legal aid services and**

[1] Unreported High Court decision, 21 December 2004

extend the eligibility to both a broader range of cases and a larger proportion of low income individuals and families.

- **The present model for Civil Legal Aid should be reassessed in order to reduce waiting periods and increase the efficiency of the legal services provided and the re-introduction of the private practitioners' scheme.**
- **The cost of providing a comprehensive, fair and efficient Civil Legal Aid Service should be weighted against the potential cost to the Board and to the Government of successful legal challenges arising out of the current waiting periods at Legal Aid Board centres throughout the country.**

ii) Public Interest Litigation

Public interest litigation may be broadly defined as litigation which has a potential outcome significant for the public at large, and not only the parties involved directly. This type of outcome may arise in both substantive and procedural law matters and, in the context of FLAC's strategy, holds particular potential for the realisation of minority rights and the reduction of social exclusion/disadvantage. The issue of costs within public interest litigation has continually and negatively affected its development, which is why it is proposed to examine the approach to costs and merits adopted in the UK following the establishment of a Public Interest Advisory Panel (PIAP). While the problem of high legal costs within public interest litigation does not create the immediate, tangible deficit in access to the courts which the cost barriers within family law present, it nonetheless has the potential to deter indigent individuals from seeking to vindicate their rights through the courts. Several measures which could assist in the reduction of the costs deterrent to public interest litigation in Ireland will be evaluated here in the light of the strategies adopted in other jurisdictions.

The PIAP was set up in 1999 in order to assess those cases which merited funding by the UK Legal Services Commission due to their public interest nature. Its reports are taken into consideration by the Commission in deciding which cases are of significant wider public interest and thus merit funding under the Funding Code. The Panel has reviewed a broad range of cases relating, *inter alia*, to prisoners' rights, welfare benefits, landlord and tenant and environmental law.[2] In 2002/2003 the Panel met nine times and reviewed 83 cases, of which 35 were determined to have significant wider public interest.[3] In the absence of a similar assessment and funding system for public interest cases in Ireland, it has fallen to a number of private and non-governmental organisations to take on public-interest litigation in their respective areas of concern. While FLAC and other organisations have had some success in bringing public interest cases in areas such as the entitlement to civil legal aid, a comprehensive system for reviewing cases of potential public interest could increase the frequency and level of success with which such cases are brought.

[2] Thomas, "Costs in Public Interest Cases" *Legal Action* (October 2001) at p. 21
[3] Legal Services Commission Annual Report 2002/03 at p. 31

In relation to costs, one of the features of public interest litigation is the potential for the court to make a pre-emptive costs order at a preliminary stage, thus relieving a litigant of liability in respect of the costs of other parties to the proceedings. The ability of courts to make such orders was considered by Dyson J. in the English case of *R. v. Lord Chancellor, ex p. Child Poverty Action Group*[4]. It was held that a pre-emptive costs order could be made where a case "… raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case"[5]. The applicability of this test in Irish law was confirmed by Laffoy J. in *Village Residents Association v. An Bord Pleanála (No. 2)*[6] where she held that the superior courts had the discretion to grant pre-emptive costs orders where "the issues raised on the challenge [are] of general public importance"[7]. However the application for a pre-emptive costs order in both cases was rejected, reflecting the difficulty of establishing that public interest cases exclude all private interests. Given this difficulty, the possibility of an adverse costs ruling continues to act as a great disincentive in public interest litigation.

Recommendations

- **The potential for cases of broader public interest to extend the benefits of individual litigation should be recognised and a fund created to support litigation of significant public interest.**
- **An advisory panel similar to the UK's Public Interest Advisory Panel should be considered as a means of assessing the public interest merits of cases. This body should be independent of government and interest-groups and rely upon independent legal assessment in determining whether to recommend individual cases for funding.**
- **FLAC does not believe that the muted idea of scheduling costs will, necessarily, assist in the development of Public Interest Litigation.**

iii) Conditional Fee Arrangements and *Pro Bono* Work

Conditional fee arrangements are associated particularly with the American legal system, where they are often perceived as being the preserve of unscrupulous solicitors, particularly in the area of personal-injury claims. The common-law doctrines of maintenance and champerty (the practice whereby solicitors agree to represent. indigent clients in return for a percentage of any award made in favour of the client) were developed in response to legitimate concerns about the ability of legal representatives to abuse the process of litigation where they stood to gain personally from doing so, and have to date prevented the regulation of conditional fees in Ireland, although their *de facto* use is not in doubt[8]. While s.68(2) of the Solicitors (Amendment) Act 1994 prohibits the payment by a client of a proportion of damages awarded in litigation to a

[4] [1999] 1 WLR 347
[5] *Ibid*., at p. 762
[6] [2000] 4 IR 321
[7] *Ibid*., at p. 330
[8] Whyte, *op cit.* at p. 118

solicitor, it does not make any such prohibition in relation to 'no win, no fee' arrangements. The role of such arrangements in reducing the cost disincentive to public interest and other forms of litigation is evident, and the Irish Supreme Court has acknowledged that, where the constitutional right of access to the courts is at issue due to legal costs, the doctrines of champerty and maintenance should not serve to interfere with that right[9].

In the case of indigent clients and particularly in cases which raise questions of considerable public interest, solicitors and barristers often act on a *pro bono* basis. In the absence of statistics or other information about the extent and nature of this practise, it is difficult to assess the role which *pro bono* work plays within the current costs environment. Legal services provided on a *pro bono* or conditional fee arrangement are currently subject to some uncertainty arising out of the case of *Mainwaring v. Goldtech Investments Ltd.*[10] in which the English Court of Appeal suggested that a solicitor providing representation under either of these arrangements could be held personally liable for the costs of the opposing side if his or her client was unsuccessful. This potential liability arose under Order 62, Rule 11 of the English Rules of the Supreme Court, which has its equivalent in Order 99, Rule 7 of the Irish Rules of the Superior Courts 1986. This possibility of personal liability being incurred would act as a disincentive to *pro bono* and conditional fee arrangements which might otherwise serve to promote access to justice, and should be removed.

Recommendations

- **In order to assess the role which conditional fee arrangements and *pro bono* work play in promoting access to justice, further statistical and qualitative research should be conducted into the use of these arrangements in Ireland and other jurisdictions.**
- **Order 99, Rule 7 of the Rules of the Superior Courts 1986 should be redrafted to exclude the possibility of solicitors acting for indigent litigants or in cases of public interest facing personal liability for the costs of the opposing side.**

[9] *O'Keefe v. Scales* [1998] ILRM 393
[10] *The Times*, 19 February 1991.