

FLAC. free legal advice centres

Submission to the Office of Social Inclusion On a review of the Poverty Proofing Process

Introduction:

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

FLAC welcomes the opportunity to submit comments to the Office for Social Inclusion on the review of the poverty proofing process. Given the very limited period permitted for consultations, our comments are of necessity truncated. We suggest that the Office should consider all initial comments, prepare its reactions and then permit a second round of consultation based on those comments and your response. We also suggest that all initial comments, and all responses, be published to make the consultation process a transparent and inclusive one.

FLAC's core aim as a campaigning organisation is to seek equal access to justice for all. This includes as a basic building block access to lawyers, legal advice and representation. For many in our society, that will only be achieved through the expansion of the scope and funding available for an adequate civil legal aid scheme. That in turn will make a very significant contribution to the eradication of social and economic exclusion.

In this context, FLAC wishes to highlight where the poverty proofing process must recognise and include the right of equal access to justice for all.

It is noted that one of the objectives adopted by the European Council at Nice in December 2002, as revised in 2002, in the fight against poverty and social exclusion is:

“To facilitate participation in employment and access by all to resources, rights, goods and services” (Objective 1)

Within this, at 1.2(d) is the objective:

“To develop, for the benefit of people at risk of exclusion, services and accompanying measures which will allow them effective access to justice”

Access to justice is a fundamental human right which is recognized in various international human rights law treaties such as the European Convention on Human Rights, and in the Irish constitution. Following the incorporation of the European Convention on Human Rights into Irish law in 2003, every organ of the State, including all government departments, is obliged to perform its functions in a manner compatible with the State’s obligations under the provisions of that Convention, subject to any law to the contrary. The State also recognises, as a matter of law, that all of the rights contained in the Universal Declaration of Human Rights are universal and indivisible. Similarly, Irish constitutional law and international human rights law recognise the doctrines of equality before the law and of non-discrimination as core principles. It is also well established that 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.

The review of a poverty proofing process is part of the realisation of EU Council objectives agreed in December 2000 and confirmed in 2002. In addition, the State is obliged to respect, protect and promote the right to equal access to justice for all. Thus FLAC is concerned to note that the current guidelines (circulated by the OSI in April 2005) do not at any stage refer to the need to “proof” law, policy and procedures in the context of human rights entitlements. This will include a need to check all laws, policies and procedures to ensure that they respect, protect and promote human rights.

A process which aims to achieve social inclusion – including poverty proofing – must be grounded in the underlying rationale for the process. In this case the need for the process derives from:

- the obligation of the State through its domestic, EU and international human rights commitments to realise fundamental human rights;
- the universality and indivisibility of all human rights;
- the right to equality and non-discrimination.

These principles should be specifically named as overarching principles within the construction of a poverty proofing process, and in its implementation, monitoring and evaluation. This recommendation is consistent with the recommendation of the European Commission 2002 and 2004 Joint Reports on Social inclusion.

From this will flow specific emanations of the over-all principles including a key principle for social inclusion – the right of access to justice. This right of access must be included as a specific criterion within the poverty proofing process.

In this regard it is noted that the issue of legal aid was addressed in the National Action Plan 2003-2005 under the heading “legal assistance” (Ch.1.8.5). The policy task undertaken by the State in that area was “to monitor and improve the effectiveness of services, especially for the most vulnerable”. In discussing legal assistance, the Plan states that the Legal Aid Board provides advice and representation on many areas of civil law to those requiring such information and assistance. That is not the case. From the Board’s Annual Report 2003, the last year for which figures are available, it can be seen that 98.18% of legal representation and 80% of legal advice supplied by the Board related to family law. In the last 10 years of the service, the percentage of non-family law cases has never risen above 3.72%. The range of legal need is far wider than family law. That wider need is not being met. This was clearly not picked up by poverty proofing and, as far as FLAC is aware, has not been noted or addressed by any monitoring which took place between 2003 and 2005. This suggests that there is a need for a thorough basic assessment and audit of the current service in the context of social exclusion. There must

be robust processes to set specific goals, and to monitor and to evaluate them, to achieve social inclusion.

Further, no account at all is taken in the NAP 2003-2005 of the harsh limits to the means test. The income limits for means have only once been increased in ten years; in 2002. On that occasion, the overall adjustments led more towards social exclusion than inclusion by abolishing allowances which previously existed for hire purchase and loan interest payments, for life insurance and for work travel expenses. This was not mentioned in the NAP, nor was there any concern expressed at the abolition of valuable allowances in low-income households. Such abolition was clearly regressive and could not possibly improve the effectiveness of services, especially for the most vulnerable. Other deficiencies in the civil legal aid service, noted by FLAC and to be addressed in its imminent report on legal aid also remain unaddressed.

The government department with primary responsibility for delivery of the civil legal aid scheme is the Department of Justice, Equality and Law Reform. In a subsection of its Implementation Report dated 30 June 2005 to the European Commission on the NAP/incl. 2003-2005, it deals with Civil Legal Aid. It highlights one problem which has gravely affected the right to civil legal aid and which has been the subject of a recent constitutional court action – waiting lists. The other issues mentioned above are not raised at all. This underscores a deficiency in the poverty proofing process where that Department does not have to assess all of the implications of the right of access to justice when it prepares its report. Any assessment which had to examine the human rights implications of the right of access to justice would have uncovered the issues raised above. The poverty proofing process does not provide a facility or mechanism for checking such reports against State standards. FLAC recommends that this report be used as an example to analyse how the poverty proofing process can be improved to reveal the relevant information as a prerequisite to action to remedy the defects.

The failure to note or even notice these very pressing concerns fails to accord with the statement made in the NAP that a key determinant of social inclusion is the further

development of quality public services (Ch.3.3.1). The service for civil legal aid recipients remains seriously under-funded and under-resourced and is not moving towards including vulnerable people more effectively. The poverty proofing process should also make clear that in many instances, such as the delivery of legal services to those who need them to access justice, such a quality public service is a human right.

Law can be delivered through legislation, government policy and State policy but also through administrative procedures. Guidelines and processes should be constructed to ensure fair procedures. The poverty proofing process should be able to check that in both concept and delivery, every decision of a State body should be made in a transparent and fair way and should be open to scrutiny by an independent agency. Decisions of bodies such as the Legal Aid Board, which has only an internal appeal procedure, are not subject to the scrutiny of the Office of the Ombudsman or any other agency. A poverty proofing analysis should be capable of identifying lack of justice in procedural matters, so that such lacks may be remedied.

FLAC assumes that the OSI will obtain expert input from various bodies and recommends that it take into account the views of such bodies such as the Human Rights Commission prior to finalising any revised poverty proofing process.

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