

FLAC
Submission to NESF
On NESF's Project Improving the Delivery of Quality Public Services

Introduction

FLAC is an independent human rights organisation dedicated to the realisation 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 was originally established to campaign for the introduction of a State-funded system of comprehensive civil legal aid. After 25 years of state civil legal aid, FLAC contends that the scheme failed to achieve its stated goal “to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases” as significant gaps have remained in the provision of that public service. “*Civil legal aid and advice is not available to every person of insufficient means, given that many on very modest incomes fail to qualify,*” concluded FLAC in its latest report *Access to Justice: a Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland*¹ There is an urgent need for change and reform to achieve an adequate scheme that guarantees access to legal services for all.

FLAC welcomes the opportunity to contribute to the NEFS in its project on Improving the Delivery of Quality Public Services as it believes that an adequate provision of civil legal aid will make a significant contribution in achieving greater equality and social inclusion.

Background

The right of access to justice as an element of social cohesion

Equal access to justice is a fundamental human right which is recognised in various international human rights law treaties such as the European Convention on Human Rights, and in the Irish constitution. Pursuant to the decision of the European Court of Human Rights in *Airey v. Ireland*², the Scheme of Civil Legal Aid and Advice was finally introduced in 1980 and the Legal Aid Board was established. The service was put on a statutory footing in 1995 with the enactment of the Civil Legal Aid Act.

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. 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. In this regard, the European Union has situated the right of access to justice as a key element of social inclusion and the eradication of poverty. Pursuant to the Lisbon and Santa Maria da Feira European Councils, the Council adopted in October 2000 a set of “appropriate objectives” for the fight against poverty and social exclusion which were endorsed by the Nice European Council in December 2000 and later revised in 2002³. In the introductory note to those objectives the Council stated the following:

¹ *Access to Justice: a Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland*, page 4 - FLAC, July 2005

² *Airey v Ireland* [1979] 2 EHRR 305

³ Fight against poverty and social exclusion: common objectives for the second round of National Action Plans- Endorsement; Social Protection Committee- Brussels, 25 November 2002 (14164/102 REV 1)

“Poverty and social exclusion take complex and multi-dimensional forms which require the mobilization of a wide range of policies under that overall strategy. Alongside employment policy, social protection has a pre-eminent role to play, while the importance of other factors such as housing, education, health, information and communication, mobility, security and *justice*, leisure and culture should also be acknowledged”⁴

Objective 1 of the “appropriate objectives” adopted by the Council⁵ is:

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

In addressing the issue of access by all to rights, this objective goes further by stating:

“1.2.d. To develop, for the benefit of people at risk of exclusion, services and *justice*⁶ accompanying measures which will allow them effective access to education, and other public and private services, such as culture, sport and leisure.”

The issue of “Access to legal services” was also addressed at the consultation process that the Office of Social Inclusion (OSI) organised for the development of the Irish National Plan against Poverty and Social Exclusion for 2006-2008. The report on that consultation process highlights that “among the modifications and improvement to existing policy measures proposed in relation to *facilitating access to legal services* were: more resources to support the Civil Legal Aid System, a review of the eligibility criteria governing access to free legal aid and financial support for community legal services”⁷.

The need of an effective and accessible state civil legal aid provision to achieve greater equality and social inclusion

A crucial element of access to justice is the effective availability of the services of a lawyer for information, for advice and if necessary to pursue a complaint to remedy a wrong. It is in the pursuit of an agenda of equality that the question of legal aid becomes relevant. For people who cannot afford the services of private practitioners, legal aid is the only mechanism possible to ensure that their rights are effective and not just theoretical.

The lack of effective and accessible mechanisms for resolving legal disputes prevents citizens from protecting and asserting their rights. 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. Access to justice on a truly equal basis, facilitating social inclusion, will be signified by equality of outcome regardless of resources.

Equal access to justice means, among other things, that everyone should have equal access to the court as a matter of fact, and as an element of social inclusion and cohesion. Those who have rights must have a meaningful and effective way of enforcing them. It is a necessary corollary to this right that there be a right to legal aid to implement the fundamental right of access to justice and to an effective remedy.

It is in this context that FLAC wishes to highlight the need to improve the delivery of state provision of civil legal aid, as it is a public service which relates to the pursue of greater equality and to the main themes in the National Anti-Poverty Strategy/National Action Plan on poverty and social exclusion. We now turn to the specific themes given for the present submission. Our responses below should be read in the overall context set out above.

⁴ Ibid, Annex II – Introductory note - Emphasis added

⁵ Ibid, Annex to Annex II – Objectives 1 the Fight against Poverty and Social Exclusion

⁶ Emphasis added

⁷ Report on the Consultation for the National Action Plan against Poverty and Social Exclusion 2006-2008, Office for Social Inclusion - February 2006, page 69

a. Good points and bad points in the present delivery of public services at the local level: the present delivery of civil legal aid - FLAC's main concerns.

Good points. There is a structure in place which is dedicated to the provision of civil legal aid and which, if properly resourced, could provide a comprehensive civil legal aid service. There is a network of 30 Law Centres around the country.

The situation regarding the accessibility of civil legal aid and access to the legal system for socially and economically disadvantaged individuals and groups remains a serious issue. The service for civil legal aid recipients remains seriously under-funded and under-resourced and is not moving towards including vulnerable people more effectively.

FLAC contends that the civil legal aid scheme does not address unmet legal need. Instead of doing so, the present system provides a service which is focused almost exclusively on family law, does not engage with communities in relation to their priority needs, and is one where delay and lack of resources introduce significant barriers to the right of access to civil legal aid.⁸

Following are FLAC's major concerns in relation to the delivery of the state funded civil legal aid. Those concerns have been explained in detail in our major report on this area *Access to Justice: a Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland* that we attach to this submission for further illustration.

1. The restrictive scope of the state scheme

The scope of the civil legal aid in Ireland is defined by the Civil Legal Aid Act 1995 and the regulations that have been made by the Minister for Justice, Equality and Law Reform. It is also defined by the policies set down for the service by the Legal Aid Board, the governing body for the Law Centres.

The provision of civil legal aid is narrow. Some areas of law are entirely excluded and in practice the legal aid service is almost exclusively a family law one.

Figures from the Legal Aid Board's Annual Report 2004 indicate that 91.72% of litigation services and 80.68% of the cases involving legal advice provided by the Board to its clients were in the area of family law⁹. The narrow focus of the Legal Aid Board (LAB) in terms of both legal representation and advice on the specific area of family law contrasts with FLAC's findings from its Statistical Report for Year 2004 which shows that only 35.3% of clients who sought legal advice at its network of centres during that year queried family law. The remaining 64.7% indicates that unmet legal need is far broader than family law. Employment law accounted for slightly over 10 percent indicating a considerable need for legal advice in this complex area. Housing was another area of considerable need for legal advice and information with seven percent of the total number of queries. Other significant areas of civil law include consumer/debt, succession/probate, social welfare and civil litigation matters, such as medical negligence and personal injuries¹⁰.

At present, Legal Aid is not provided for representations at tribunals. Section 27 (2) (b) of the Civil Legal Aid Act, 1995 which allows for the scope of the legal aid scheme to be extended to tribunal representation has never been implemented. Effectively this means that people pursuing social welfare appeals or those appearing before the Employment Appeals Tribunal or Equality Tribunal are very often unable to secure legal representation where they are likely

⁸ *Access to Justice: a Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland*, page 23 - FLAC, July 2005

⁹ Legal Aid Board Annual Report 2004, page 9

¹⁰ FLAC Statistical Report for 2004, page 1

to be unable to afford a private solicitor. In addition, Section 28 (9)(a) of the Act excludes nine “designated matters”¹¹ from the scope of the Legal Aid Scheme, some of which, such as housing law, may impact particularly heavily on low income families and lead to homelessness.

Matters concerning an interest in land are specifically excluded by law from the legal aid scheme. This impacts on older couples who may want to transfer a family home into joint names for the security of the survivors.

The range of legal need is far wider than family law. That wider need is not being met, therefore falling short of State anti-poverty and social inclusion goals, and, as far as FLAC is aware, this has not been noted or addressed by any poverty proofing 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.

2. Eligibility for civil legal aid: the merits and means

Entitlement to civil legal aid and advice depends on satisfying a merits test and a means test.

Merits test

The merits test is based on reasonableness, as assessed by the Legal Aid Board and, in most of cases, on the chances of winning the case. The LAB does not take the client’s need for legal service as a first priority and effectively restricts its ability to deliver access to justice.

The test of merit eligibility is not straightforward, and as a result, applicants may find it very difficult to know whether they will qualify. In addition, there are no available statistics on the number of cases refused on the grounds of merit.

The income limits and means test

The financial criteria that limit the service make it extraordinarily restrictive. When the statutory scheme was introduced in 1996 a means test was devised by regulation. The scheme does not provide for a periodic review of the financial limits on eligibility. Since then it has been revised just once, in 2002. The amount of allowances is not linked to a variable such as Consumer Price Index, resulting in the exclusion of many needy potential litigants. Except for separated or separating spouses, whose incomes are individually assessed, the “disposable” family income of a legal aid applicant must be €250 a week or less to qualify for legal aid. From that amount the family must pay its food and utility bills, its child care costs over €1.15 per child and accommodation or mortgage costs over €94.50 per week. Small allowances which used to be given on other loan repayments, hire purchase and travel expenses were all abolished in 2002. Clearly, the income limit used in the current means test is outdated.

There is also a “capital” test which even those on very low incomes must pass. Unless the family home is in dispute in a case, this “capital” will even include a person’s house. This can impact particularly hard on older people who may have paid off their mortgages, but have very limited income. Where the value of the person’s house exceeds €320,000, they may not

¹¹ Section 28 (9)(a) of the Civil Legal Aid Act, 1995 excludes nine “designated matters”, which are “... (i) defamation; (ii) disputes concerning rights and interests in or over land; (iii) civil matters within the jurisdiction of the District Court (Small Claims Procedures) Rules, 1993; (iv) licensing; (v) conveyancing; (vi) election petitions; (vii) a matter as respects which the application for legal aid is made in a representative, fiduciary or official capacity and the Board, having regard to any source from which the applicant is or may be entitled to be indemnified in respect of the costs of the proceedings concerned and any resources of the persons who would be likely to benefit from a successful outcome of the proceedings for the applicant, is of opinion that legal aid should not be granted; (viii) a matter the proceedings as respects which, in the opinion of the Board, are brought or to be brought by the applicant as a member of and by arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest; (ix) any other matter as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned...”

have legal aid. As FLAC's report notes, "For instance, an applicant for legal aid with a property worth €280,000 and a disposable income of €13,000 is liable to pay a maximum contribution of €2,105 for representation by a Law Centre in any court proceedings, in any court, on any matter¹²."

Further, no account at all has been taken in the NAPs/inclusion 2003-2005 of the harsh limits of the means test. The income limits for the means test have only been increased once, 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 NAPs/inclusion, 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 or accessibility of services, especially for the most vulnerable.

3. Civil legal aid is not free

Despite the popular misconception that civil legal aid is free, an applicant who succeeds in obtaining legal aid may face large bill for the service. Those granted legal aid must pay at least a minimum contribution towards the service. While the minimum sums of €6 and €35 are clearly advertised, there is little or no information about the fact that some clients may end up paying for the full cost of the legal service. In those cases, legal aid is of no financial value at all.

4. Lack of awareness of the service

Another deficiency in the provision of the state funded civil legal aid that also remains unaddressed is the lack of public awareness of the legal services provided by the Legal Aid Board. While recognising that the LAB has produced a range of leaflets and developed a website, the scheme has not been adequately publicised. This conclusion is supported by FLAC's statistical report for 2004 which found that more than half of FLAC's clients were not aware of the existence of the LAB services¹³.

There is no reason in law why the Legal Aid Board Law Centres should not act for older people who need to draw or update their wills or execute General or Enduring Powers of Attorney. The cost of such a service from a private lawyer may exceed the means of older people on limited means. However, traditionally, this work has not been done by Law Centres, who promote their expertise in family law and, for the specialised Refugee Legal Service, refugee law. The service does not address its publications to the needs of older people nor does it advertise its services. Thus even though those entitled may not know.

5. Lack of accountability for refusal of legal service

Also worrying is the lack of accountability when legal services are refused. Section 7 of the Civil Legal Aid Regulation, 1996 states that where a legal aid certificate is refused the Board must convey its decision in writing and state the reasons for refusal. However, current statistics from the Legal Aid Board do not record reasons for refusals and it is not clear to what extent clients are informed of such reasons. FLAC found that almost one in three of the clients who visited its network of centres during 2004 did not know the reasons why their application for legal aid was refused¹⁴.

6. Lack of relevant data on appeal decisions and of independent scrutiny

Any decision of any official of the Legal Aid Board may be appealed under an internal procedure. The result of any appeal is notified in writing to the applicant to whom reasons are given. However, no details of appeals upheld or refused or decisions altered are published by the Legal Aid Board. This is not consistent with the right of every person to fair procedures,

¹² *Access to Justice: a Right or a Privilege? A Blueprint for Civil Legal Aid in Ireland*, page 48 - FLAC, July 2005

¹³ FLAC Statistical Report for 2004, page 3

¹⁴ FLAC Statistical Report for 2004, page 3

which extends to the right to have relevant information, documents and matters which may be used in evidence.

While there is an internal appeal to the Appeals Committee, the Board is not subject to the inspection by the Office of the Ombudsman and therefore no independent scrutiny is available from that office.

In circumstances where appeals are internal, and there is no published information on decisions made on appeal, the process cannot be considered as an open one, and therefore it is hard to judge whether such process is fair or timely. Based on the legal principle that no one should be a judge in his or her own case, the impartiality of the decision-making process cannot accord with good practice either.

7. Waiting lists

The waiting times at Legal Aid Board Law Centres have been of concern for FLAC. In recent years, waiting lists for civil legal aid in many centres have been extremely long, leaving people without any legal assistance for as long as two years in some locations. Article 6 of the European Convention on Human Rights is intended to guarantee the right of effective access to the courts. Persons who cannot afford their own solicitor and meet the criteria for Civil Legal Aid have been, as a result of long delays, effectively being denied this fundamental right of access to the courts. This was recently considered by the Irish courts in the decision of *O'Donoghue v Legal Aid Board*¹⁵, where the High Court concluded that the plaintiff's constitutional right to civil legal aid had been infringed by the very long delay in granting her a certificate for legal aid. Following on this decision, waiting times in all Legal Aid Board Law Centres have fallen to less than four months.

Although the issue of waiting lists was recognised by the Department of Justice, Equality and Law Reform¹⁶ in its submission to the Implementation Report dated 30 June 2005 to the European Commission on the NAPs/inclusion 2003-2005 in relation to Civil Legal Aid, the other issues mentioned above were not raised at all. The failure to note or, even to notice these very pressing concerns, fails to accord with the statement made in the NAP that a key determinant in social inclusion is the further development of quality public services (Ch.3.3.1).

8. Model of delivery of civil legal aid – Structure of the service

The model of delivery of civil legal aid is of a centralist nature, with firm control of its funding and development vesting in the Minister for Justice, Equality and Law Reform and the Board that s/he has the power to appoint. There is no involvement with the community that it is intended to serve in the planning and delivery of the service.

The current structure of civil legal aid is not inclusive. It does not place the needs of the client at the heart of its decision and policy-making. It does not engage with communities in relation to their priority needs, nor does it undertake public or community legal education. In its major report on civil legal aid FLAC concluded that many of the problems of the civil legal aid system stems from the lack of involvement with the community that it is intended to serve. The delivery of community law is a different model to the central service model delivered by the LAB. The community law model is a driver for social inclusion in the key area of access to justice.

Lastly, the legislation specifically precludes the bringing of test cases and legal actions involving groups of plaintiffs (class actions), what shows the unique focus of the scheme on service delivery to the exclusion of potential law reform.

¹⁵ *O'Donoghue v Legal Aid Board, the Minister for Justice Equality and Law Reform, Ireland and the Attorney General*. [2004] IEHC 413 (High Court, 21 December 2004)

¹⁶ The DJER is the government department with primary responsibility for delivery of the civil legal aid scheme.

Drawing on the concerns described above, we propose the following recommendations as practical measures for the improvement of the delivery of state civil legal aid in Ireland, making it more equitable and inclusive. We have organised our set of recommendations in accordance with the three remaining themes required for the present submission.

b. The scope for more coordinated and personalised services giving people more choice over the supports that best meet their needs

- The Legal Aid Board should review the current operation of Law Centres as primarily a family law service. It should endeavour to ensure that its staff is fully conversant with the full statutory scope of the Board's services and it should publicise the extent of those services.
- Advertise service particularly required by older people.
- Sufficient funds should be provided to allow the Board to employ sufficient staff to deliver effective civil legal aid and legal advice to persons of insufficient means.
- Legal aid should be available in matters of great importance to an applicant where a failure to grant representation may deny an applicant the right to access his/her rights. Such matters should include housing, disputes concerning rights and interest over land, immigration, wills and probate, and matters before the employment appeals tribunal and the social welfare appeals tribunal.
- Section 28 (9)(a) of the Civil Legal Aid Act, 1995 which prohibits civil legal aid for designated areas of law should be repealed.
- The Law Reform Commission has recently noted that no legislative changes are required to permit class actions in the Irish courts, although some court regulations will need change. The Commission also noted that class actions were excluded under the current civil legal aid scheme. This exclusion should be repealed to advance the use of law in the public interest.
- Pending a thorough review of the means test, the disposable income and capital limits and the amount of all allowances should be immediately adjusted to realistic levels to take account of increases in the cost of living.
- The family home should be excluded from any capital review.
- Eligibility criteria should be reviewed annually against national poverty proofing standards and the Department of Justice, Equality and Law Reform should publish the underlying analysis.
- Allowances provided for in the Civil Legal Aid Regulations 1996, but removed in the Civil Legal Aid Regulations 2002 for hire purchase, loan interest payments, health, insurance, life assurance and for travel to and from work should be reinstated at realistic levels. The cost of common household utilities should be recognised and an appropriate allowance made.
- The Civil Legal Aid Regulations 1996 and 2002 should be amended immediately so that the value of the family home is excluded from any calculation relating to the contribution that the applicant has to pay and no contribution or costs should be deducted from the proceeds of sale of the family home towards the cost of delivering legal aid services
- Every person should be assessed on his or her own income and assets only and in particular, the income and assets of spouses or co-habiting partners should not be aggregated in assessing the financial eligibility of one of them.
- The State should enact amending legislation to ensure that legal aid is always available where required to vindicate human rights. There should be a system for assessing complex cases outside of normal financial and merit limits. This assessment should aim to vindicate rights, rather than just to alleviate hardship.
- The Legal Aid Board should make its calculations of costs public and available to all clients.
- The Legal Aid Board should publish the guidelines that it uses to assess hardship cases, or cases where conditions or contributions are waived.
- The Legal Aid Board should disseminate widely information about the Board's services, effectively and consistently.

c. Involving the user/customer (particularly vulnerable groups) in the design and delivery of quality public services

- The Legal Aid Board should establish a dedicated service to assess how the law impacts on the communities that it serves, including specifically older people. The information and analysis should be available to the Board staff for use in their work. The analysis should be made available to the public.
- The State should provide resources to allow interested groups to provide public and community legal education to improve knowledge of legal rights and entitlements.
- The State should provide resources to communities to encourage legislative and policy advocacy and community group representation.
- The State should provide resources to communities to establish community and specialist law centres which aim to promote the rights of the socially and economically excluded and facilitate equal access to justice.
- The State and the Legal Aid Board should promote partnership between Community Law Centres and the Board. The State should encourage and facilitate new and innovative approaches to stable partnerships in the delivery of high quality legal services which meet the needs of the clients served.
- The Board should encourage the direct participation of its clients and of groups acting for marginalised or disadvantaged communities in the preparation of their plans and procedures and delivery of their services. The State should make statutory provision for participation by clients of the legal aid service, and of the communities most dependent on such legal services. Pending statutory amendment, the State should appoint representatives of communities which are heavily dependent on legal aid as members of the Legal Aid Board.

d. How the present Quality Customer Service initiatives are improving services and providing redress if standards are not met

- The Legal Aid Board should be subject to the scrutiny of the Office of the Ombudsman.
- Decisions to refuse or revoke legal aid should be in writing, with reasons furnished. There should be an independent appeals mechanism.
- All relevant government Departments should commission independent audits and impact assessment studies to ensure that all legislation, regulations, procedures and policies comply with State's human rights obligations and the requirements of constitutional and international human rights law.