

# Submission to inform the proposals of the Commission on the Future of Policing in Ireland

## FLAC, February 2018

### About FLAC

FLAC (Free Legal Advice Centres) is a non-governmental, voluntary organisation which exists to promote the fundamental human right of access to justice. FLAC focuses on the use of law as a tool for social change and on the protection of economic, social and cultural rights. FLAC is an affiliate member of the FIDH.

In our work, we identify and make policy proposals on how the law excludes marginalised and disadvantaged people, principally around social welfare law, personal debt & credit law and civil legal aid. We advance the use of law in the public interest and we co-ordinate and support the delivery of basic legal information and advice to the public for free and in confidence. FLAC is also a partner of the JUSTROM programme.

You can download/read FLAC's policy papers at

<http://www.flac.ie/publications/policy.html>

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#### Overview of Recommendations:

- *FLAC recommends that the Commission inquire into the extent to which An Garda Síochána has put in place structures to implement in practice the requirements of the public sector duty, and whether these structures or systems (if any) are effective in this regard, and to make any proposals for reform based on such inquiry.*
- *FLAC requests that the Commission inquire into the mechanisms in place to detect, prevent and address potential racial profiling by An Garda Síochána, including through the public sector duty under Section 42 of the Irish Human Rights and Equality Commission Act 2014, and make proposals to address any deficits in this area.*
- *FLAC recommends that the Commission propose legislative measures that would allow individuals or groups representing their interests, to make complaints through GSOC in relation to racial profiling to allow such allegation to be investigated independently including through placing the current Code of Ethics on a statutory footing.*
- *FLAC recommends that the Commission propose amendments to the Equal Status Acts 2000-2015 to bring the functions of an Garda Síochána within the*

*remit of the prohibition on discrimination, harassment and victimisation and the obligation to provide reasonable accommodation for people with disabilities and to enable individuals seek redress if they consider that they have been discriminated against by An Garda Síochána.<sup>1</sup>*

- *FLAC recommends that the Commission have regard in its work to the desirability that proposals concerning policing reform in Ireland respect and adhere to the principles of equality and equivalence of human rights set out in the Belfast/Good Friday Agreement.*

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<sup>1</sup> FLAC notes in this regard that the Equal Status Acts 2000 to 2015 may be narrower in scope than the EU Race Directive which it is intended to transpose into domestic law. While the Race Directive brings the public sector within the scope of the Directive and then relates this to a broad range of services, the Equal Status Acts takes a narrower approach in the manner in which it defines prohibited conduct. See Equal Status Acts 2000-2011, Discrimination in the Provision of Goods and Services, Judy Walsh, 2012, pp 49-50.

## **Introduction**

FLAC welcomes the opportunity to make a short contribution to the work of the Commission on the Future of Policing in Ireland. It is not proposed to address all of the issues that arise under the terms of the Commission but rather to focus on the matters that are most relevant to FLAC's work on access to justice.

## **Background to FLAC's submission**

FLAC operates a telephone information and referral line. It also runs a nationwide network of legal advice clinics where volunteer lawyers provide free legal advice to members of the public on an open access basis. In 2016, there were 12,229 calls to the FLAC telephone information and referral line, and FLAC legal advice clinics served another 13,481 callers with legal queries. While criminal law is not the most significant area of queries, with the focus of most callers being in the area of civil law, nonetheless 7% of calls to the information line related to criminal law. A further 5.5% of visitors to FLAC legal advice clinics in 2016 sought information relating to criminal law issues. In 2017, 1,503 queries related to criminal law matters. Of these 282 concerned complaints against An Garda Síochána, 70 of which were referred to GSOC. The number of queries being referred to GSOC has risen from 55 in 2016 and 17 in 2015.

While FLAC currently concentrates its policy/advocacy work on four priority areas of law (civil legal aid, social welfare law reform, debt law reform and consumer credit law reform), FLAC has recently been working to improve access to justice for Roma and Traveller women as part of the JUSTROM programme (Joint Programme on Access of Roma and Traveller Women to Justice), 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 Travellers<sup>2</sup> and Roma.<sup>3</sup> The background experience of the queries to the FLAC telephone line and FLAC clinics and the specific work with Justrom is drawn on to highlight specific matters that may be relevant to the work of the Commission on the Future of Policing.

## **The Terms of Reference of the Commission on the Future of Policing**

FLAC notes that the Terms of Reference for the Commission on the Future of Policing ('the Commission') do not explicitly mention human rights or equality obligations, however, it does request proposals that ensure the culture of policing is aligned with a clearly articulated ethos that promotes the values and behaviours that should be expected of a modern police service including in relation to the rights of those affected by crime, and have regard to international benchmarks and best practices in policing, and also that policing operates within a clear framework of governance and accountability to the law and the community, that is supported by coherent structures.<sup>4</sup>

FLAC wishes to draw the specific attention of the Commission to the Public Sector Duty contained within Section 42 of the Irish Human Rights and Equality Act 2014. This public sector obligation to promote equality, eliminate discrimination and protect human rights applies not only to An Garda Síochána but to a whole range of bodies including those that may have a role in providing oversight and accountability for policing activities, including, the Police Authority, the Garda Inspectorate, the Garda Síochána

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<sup>2</sup> In relation to Travellers 40 casefiles were opened with accommodation and housing constituting 75% of them, in addition a number of queries were received in relation to Garda powers, particularly in relation to the scope of search warrants in relation to halting sites and group housing schemes. Once case files remains open.

<sup>3</sup> Arising from the Roma clinic, FLAC opened 39 cases: (Social Welfare Cases: 13 (33.3%); Accommodation/Housing Cases: 11 (28.2%); Citizenship Cases: 7 (17.9%); Civil Cases: 3 (7.7%); Discrimination Cases: 3 (7.7%); Criminal Cases: 1 (2.6%); Administrative Cases: 1 (2.6%). Of the Citizenship cases concerns were raised in relation to the impact of minor criminal charges on such applications, particularly where offences were committed when the applicant was a minor. A significant number of queries related to the stop and search powers of An Garda Síochána, as well as the powers of An Garda Síochána at the airport.

<sup>4</sup> Commission on the future of Policing in Ireland: Terms of Reference, 2017.

Ombudsman Commission, Joint Policing Committees and the Department of Justice and Equality.

This Duty provides a statutory mechanism for mainstreaming equality and human rights. The Public Sector duty requires public bodies in the context of strategic planning to carry out an assessment of the human rights and equality issues relevant to its functions and to devise policies, plans and actions proposed to address those issues.

In the context of the 2014 Act, “functions” has a very wide meaning, including any activities undertaken pursuant to a power or duty and also many of the operational aspects of the work of the relevant public body. The human rights and equality standards referred to in the public sector duty include the fundamental rights provisions of the Constitution, rights protected under the European Convention on Human Rights and also those enshrined in the EU Charter of Fundamental Rights. The right to equality and freedom from discrimination is central to all these instruments, and is also given practical effect at a legislative level by the Equal Status Acts 2000 – 2015 and the Employment Equality Acts 1998 – 2015, which in turn are underpinned by various EU Directives.<sup>5</sup>

FLAC notes An Garda Síochána’s acknowledgment of the legal duties on public sector bodies introduced by the Irish Human Rights and Equality Act 2014 that requires them when performing their duties to have regard to the need, to eliminate discrimination, promote equality of opportunity and treatment of staff and protect the human rights of its members, staff and the persons to whom it provides services within the Garda Modernisation and Renewal Programme.<sup>6</sup>

FLAC also note that An Garda Síochána have been in the process of developing a Diversity and Inclusion Strategy and a comprehensive Workplace Equality, Diversity and

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<sup>5</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. There are a number of other Directives dealing with pregnancy and maternity entitlements of women that also supplement these broader Directives.

<sup>6</sup>An Garda Síochána Modernisation and Renewal Programme 2016-2021 , p86

Inclusion proofing tool to ensure policies and practices will not only comply with legislation but also serve as an example of international best practice in promoting diversity and equality and protecting human rights.<sup>7</sup>

FLAC submits that a comprehensive roll out and implementation of the public sector duty by An Garda Síochána and relevant Garda oversight and accountability bodies would assist in seeking to ensure that the culture of policing in Ireland is aligned with a clearly articulated ethos that promotes the values and behaviours that should be expected of a modern police service. It is submitted that this legislative context should also be taken into account by the Commission and integrated into its final report and recommendations to ensure that the requirements of the public sector duty are mainstreamed into all further reforms of policing in Ireland.

#### RECOMMENDATION:

- *FLAC recommends that the Commission inquire into the extent to which An Garda Síochána has put in place structures to implement in practice the requirements of the public sector duty, and whether these structures or systems (if any) are effective in this regard, and to make any proposals for reform based on such inquiry.*

#### INTERNATIONAL BEST PRACTICE AND ICERD

In the context of the JUSTROM programme, policing issues were a considerable concern for both Travellers and Roma, although the interaction of both communities with the Gardaí often arose in different circumstances.<sup>8</sup>

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<sup>7</sup> *Ibid.*

<sup>8</sup> For the Roma community, there appeared to be a high level of instances of being stopped and questioned as suspects in relation to criminal incidents, where the person was ultimately never charged or convicted of the incident concerned. For Travellers the interaction with Gardaí was often connected to issues around accommodation. For instance there were a number of queries in relation to the extent of Garda powers in the context of search warrants and halting sites and group housing schemes. In addition, a number of files concerned forced evictions by or on foot of a complaint from a local authority and where Gardaí were involved either to maintain the peace, or indeed the Gardaí themselves were carrying out the eviction further to their powers under Part IIA of the Housing (Miscellaneous Convictions Act) 2002, or the so called criminal trespass legislation.



FLAC recalls in this regard the 2011 Concluding observations of the Committee on the Elimination of Racial Discrimination (CERD) concerning policing. The Observation concerned the lack of legislation proscribing racial profiling by An Garda Síochána and other law enforcement officers. The Committee also noted with regret that many non-Irish people are subjected to police stops and asked to produce identity cards which has the potential to perpetuate racist incidents and the profiling of individuals on the basis of their race and colour (arts 2, 3 and 6).<sup>9</sup> The Committee further recommended the adoption of legislation preventing racial profiling and requested that 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.

However, this recommendation has not been implemented and the functions of the Gardaí and the immigration functions of the State are largely excluded from the prohibition of discrimination in the Equal Status Acts, and issues of discrimination in policing do not come explicitly within the remit of the Garda Síochána Ombudsman Commission (GSOC).

FLAC notes the statement in the Government draft joint Fifth, Sixth, and Seventh State report to the United Nations Committee for the Elimination of Racial Discrimination in 2018 that An Garda Síochána does not, as an institution, engage in discriminatory profiling. However, a high profile instance of such profiling was revealed in the report of the Ombudsman for Children into the removal of two Roma Children from their families by An Garda Síochána in 2013.<sup>10</sup>

In addition in the recently published *Roma in Ireland: A National Needs Assessment*, 53.9% of respondents reported feeling discriminated against by An Garda Síochána and the Courts. They reported incidents where Big Issue sellers have been searched by members of An Garda Síochána and charged with begging. 77.5% of respondents reported being stopped by An Garda Síochána for Identification and of those, 55.9%

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<sup>9</sup> 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.18.

<sup>10</sup> Garda Síochána Act 2005 (section 42) (Special Inquiries relating to Garda Síochána) Order 2013, Report of Ms Emily Logan, July 2014.

reported being stopped four times or more. The concerns outlined in the report regarding such a high rate of people of a particular ethnicity being stopped for identity checks is consistent with the experience of the JUSTROM programme.<sup>11</sup> The report further refers to the need to be cognisant of unwitting discrimination at an organisational level within police manifesting in a subtle way. This is extremely important given the findings which uncovered a fear of, and a lack of trust in the Gardaí by some participants and a recommendation that support must be given to support intercultural and anti-racism training (which includes a focus on Roma) for service providers at all levels.

Therefore the current assertion in the draft report is not a comprehensive response to the issue. FLAC is of the view that at a minimum to ensure that An Garda Síochána does not engage in discriminatory profiling, it is necessary for specific training to be provided to each member of the Gardaí in relation to profiling; to have monitoring mechanisms in place that will highlight when discriminatory profiling may be occurring, and where it does occur it should be addressed and individuals should have access to a remedy in respect of same.

Specifically, while the Equal Status Acts 2000 to 2015 prohibit discrimination in the provision of goods and services, the provision of accommodation and access to education on nine grounds including the ground of race and membership of the Traveller community, the scope of the Acts is not comprehensive. The definition of “services” in section 2 of the Equal Status Acts include public services, but has been interpreted as not extending to the performance of all functions of a public body particularly the controlling or regulatory functions of the State.<sup>12</sup> Therefore, it is clear that the prohibition on discrimination on the ground of race and the Traveller community ground do not always apply to public authorities such as An Garda Síochána and immigration services in performing functions which are not considered to be “services” for the purpose of the Equal Status Acts.

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<sup>11</sup> Pavee Point Traveller and Roma Centre & Department of Justice and Equality (2018) Roma in Ireland – A National Needs Assessment at p.54.

<sup>12</sup> See *Donovan v Garda Donnellan*, Dec-S2001-011.

FLAC considers that to address this lacuna and meet the recommendation of the CERD Committee, the definition of “services” in the Act should, with only necessary and proportionate exceptions, include functions of the State most relevant to discrimination on grounds of race and membership of the Traveller community such as immigration, citizenship and police powers.

Further, the Policing Authority Code of Ethics for An Garda Síochána (2017) includes a section on respect and equality, however, the Code is not on a statutory footing, and a breach of the Code alone cannot form the basis of a complaint to GSOC, even where non-compliance is at a systemic level. This is also a significant weakness in the accountability of An Garda Síochána, and it is submitted that putting the Code of Ethics on a statutory footing, subject to any necessary amendments is a modest extension to accountability circumstances where the Code has been widely consulted on and should now in any event be part of the operational requirements of An Garda Síochána.

#### RECOMMENDATIONS:

- *FLAC requests that the Commission inquire into the mechanisms in place to detect, prevent and address potential racial profiling by An Garda Síochána, including through the public sector duty under Section 42 of the Irish Human Rights and Equality Commission Act 2014, and make proposals to address any deficits in this area.*
- *FLAC recommends that the Commission propose legislative measures that would allow individuals or groups representing their interests, to make complaints through GSOC in relation to racial profiling to allow such allegation to be investigated independently including through placing the current Code of Ethics on a statutory footing.*
- *FLAC recommends that the Commission propose amendments to the Equal Status Acts 2000-2015 to bring the functions of an Garda Síochána within the remit of the prohibition on discrimination, harassment and victimisation and the obligation to provide reasonable accommodation for people with disabilities*

*and to enable individuals seek redress if they consider that they have been discriminated against by An Garda Síochána.<sup>13</sup>*

## BREXIT

In 2017, FLAC signed a joint letter with other human rights organisations addressed to Simon Coveney TD, Tánaiste and Minister for Foreign Affairs and Trade, calling on all parties to the Brexit negotiations to give written guarantees that the core principles of rights and equality set out in the Belfast/Good Friday Agreement of 1998 are respected in the context of the Brexit negotiations.<sup>14</sup>

The guarantee was sought to ensure that there must be no diminution of existing human rights and equality guarantees between both jurisdictions on the island. Further, Ireland should honour the provision of the Belfast/Good Friday Agreement whereby it has committed itself to provide at least an equivalent level of human rights protection in the Republic as is the case in Northern Ireland.<sup>15</sup> It is our view that these core principles must be reflected in any developments or recommendations for policing reform within Ireland.

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<sup>13</sup> FLAC notes in this regard that the Equal Status Acts 2000 to 2015 may be narrower in scope than the EU Race Directive which it is intended to transpose into domestic law. While the Race Directive brings the public sector within the scope of the Directive and then relates this to a broad range of services, the Equal Status Acts takes a narrower approach in the manner in which it defines prohibited conduct. See Equal Status Acts 2000-2011, *Discrimination in the Provision of Goods and Services*, Judy Walsh, 2012, pp 49-50.

<sup>14</sup> Joint Letter to Simon Coveney TD, Tánaiste and Minister for Foreign Affairs and Trade from Liam Herrick, Executive Director, Irish Council for Civil Liberties; Brian Gormally, Director, Committee on the Administration of Justice; Eilis Barry, Chief Executive, The Free Legal Advice Centres; Kevin Hanratty, Human Rights Consortium; Paddy Kelly, Director, Children's Law Centre; Patricia King, General Secretary, The Irish Congress of Trade Unions; Justin Kouame, Chairperson, Northern Ireland Community of Refugees and Asylum Seekers; Tanya Ward, Chief Executive, Children's Rights Alliance; Seamus McAleavey, Chief Executive, Northern Ireland Council for Voluntary Action; Dr Anna Bryson, School of Law, Queen's University Belfast; Michael Farrell, Solicitor; Colin Harvey, Professor of Human Rights Law, Queen's University Belfast; Dr Amanda Kramer, Research Fellow, School of Law, Queen's University Belfast; Professor Siobhán Mullally, Established Professor of Human Rights Law and Director of the Irish Centre for Human Rights, NUI Galway; Rory O'Connell, Professor of Human Rights and Constitutional Law, Ulster University

<sup>15</sup> Northern Ireland Peace Agreement (The Good Friday Agreement) | UN Peacemaker. [online] Available at: <http://peacemaker.un.org/uk-ireland-good-friday98> [Accessed 23 Jan 2018].

In addition, it is essential the ongoing and fundamental protections provided by the European Convention on Human Rights and the EU Charter of Fundamental Rights must be retained.

*Recommendations:*

- *FLAC recommends that the Commission have regard in its work to the desirability that proposals concerning policing reform in Ireland respect and adhere to the principles of equality and equivalence of human rights set out in the Belfast/Good Friday Agreement.*