

FLAC's Submission on the Consultation Paper: Legal Structures for Charities LRC CP 38-2005

FLAC Mission Statement:

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.

Recommendation 5.01

FLAC endorses the LRC's recommendation for the introduction of a new form of legal structure for charities to be called Charitable Incorporated Organisation as an effective way of reviewing the conflicts that have to date operated in the field of charity law and approves of the proposed CIO form as a means of introducing an effective regulation and registration process for the charitable sector.

FLAC's current charitable structure is that of a company limited by guarantee. The presumption of a financial interest by directors and the obligation of filing audited financial statements with the Companies Registration office means that this corporate form does not provide a functional and effective model for the best administration of a charitable body.

FLAC finds that the proposed CIO structure represents an improvement for charities involved in trading activities, and would provide clarity in the area of tax exemption and the matter of liability for trustees/directors. The provision of a statutory definition of a duty of care for charity trustees is welcome.

FLAC recommends the separation of development/support and registration/regulatory functions of any charitable supervisory structure so as there is no conflict or dilution of purpose between these two areas.

The legislative overhaul of legal structures for charities is also essential and timely for a dovetailing of domestic law with EU provisions that effect the operation of EU based charities on a cross border basis such as the Code of Conduct for Non-profit Organisations to promote Transparency and Accountability Best Practices.

Currently 25 EU charities are under investigation by the EU fraud investigation body. This enquiry centres around the practice of the setting up of subsidiary companies by NGOs for the procurement of goods and services and the abuses that have ensued from this and further examines cases where an NGO applies for funding for an overseas project and seeks funds from more than one donor while not declaring a donation from one donor to another; this results in the organisation in question receiving double funding for the same project. In

view of this, it is essential that accounting practices and transparency requirements of Irish based charities are updated.

Recommendation 5.02

FLAC is in agreement with the LRC's recommendation that the need for a separate legal vehicle for community interests groups in Ireland requires further consideration.

This is for the following reasons: it is necessary first of all to develop and define the legal limitations on bodies that may apply for CIO status; and this would probably engender a debate with regard to the legal cut-off point where a body ceases to be a charity and becomes a Designated Activity Company - would the trigger for this be the content or subsequent modification of its objects or constitution?

Further, would this DAC form be based on the U.K's Community Interest Company? This would be a concern, as the U.K's CICs will "report to an independent regulator on how they are delivering for the community and how they are involving their stakeholders in their activities." This could be counterproductive as the declared object of the creation of a CIO structure and Charities Regulator is to legally streamline diverse forms of charitable entities in Ireland (some of which would conceptually fall to some extent within the definition of 'community/social enterprise groups' or not-for-profit organisations).

It is arguable that the more regulatory bodies and legal structures for 'third sector bodies' are created, the more the purpose of the proposed reform of the Charities sector might be weakened when the charitable/voluntary sector could end up referring to and being monitored by: the Revenue Commissioners, the CRO/DCE, the proposed Regulatory Authority and possibly a DAC regulatory body.

The LRC notes "even if a DAC were to be introduced, it would form part of company law and would be subject to regulation under the *Companies Acts*." p 47 LRC CP 38-2005. Therefore, FLAC would agree and recommend that the question of a DAC structure be dealt with in tandem with the draft charities legislation to avoid the creation of a grey area.

FLAC endorses the requirement of a community benefit test for DACs as provided for in the Companies Bill 2006. An abuse prevention mechanism requiring generated profits in the company to be locked in for the furtherance of its declared purposes or objects is also of the essence.

FLAC asks that the LRC recommend that there should be a reporting obligation to a common regulator for CIOs, charities that decide to remain as companies limited by guarantee and charities that opt for Designated Activity Company Status. Ideally DACs should have a sole reporting obligation to the Charities Regulator, this could be facilitated via protocols between the CRO and the Regulatory Authority.

Recommendation 5.03: features for CIOs

- ★ **That a CIO should provide separate legal entity for its members:** FLAC supports this recommendation as it would provide legal continuity for charities operating as companies limited by guarantee and would ideally operate to protect charity property and donations by preserving the advantages of incorporation. It would afford protection for the important voluntary nature of the role of charity trustees/members and should act to balance and define the concept of a statutory definition of a duty of care for charitable trustees/members.
- ★ FLAC agrees with the recommendation for a model constitution to be drawn up in consultation with the charities sector.
- ★ **Recommendation of a minimum number of three charity trustees:** FLAC endorses this recommendation as the current requirement in equity for two trustees is not conducive to best regulatory practice above all where one trustee might abdicate from his/her duties and specifically because the new administrative requirements of filing annual reports and accounts with the new Charities Regulator would reasonably require the cooperation of more than two trustees. FLAC would ask the LRC to recommend that trustees cannot be related to each other and that a majority of them must be Irish residents.
- ★ **Option of one-tier or two-tier format for CIOs:** FLAC agrees with the flexibility of this recommendation but as a safeguard would recommend a specific proviso that members of CIOs have the same duty of care as trustees in ensuring that a CIO acts in a manner that is consistent with its purposes.

Recommendation 5.04

FLAC asks that the conversion mechanism for charities that change over to a CIO be simple and inexpensive. For this purpose FLAC would recommend that the introduction of the Regulatory Authority and the new CIO structure be contemporaneous so as to avoid any overlap or temporary dual reporting obligation.

Recommendation 5.05

FLAC agrees with this recommendation in view of the more stringent reporting and accounting duties for charities involved in commercial and trading activities outlined in the Heads of Bill/General Scheme.

Recommendation 5.06

FLAC considers that at the outset existing trusts and unincorporated associations should have the option of converting to the CIO structure or remaining with the same form with an obligation to register with the Register of Charities. The Commission proposes a 5 years review and this should be a sufficient time lapse in which to decide whether to continue with

the option of other forms such as trusts and unincorporated associations as against conversion to the CIO.

Recommendation 5.07

FLAC supports this recommendation inasmuch as there will be a 5 year review whereby the continuation of other forms of charitable structure as opposed to that of the CIO will be examined as an option.

In the interim period a dual reporting obligation for organizations that choose not to convert will presumably arise; this could be mitigated by an agreement between the CRO and the Charities Regulator for a standard reporting format.

Recommendation 5.08

With regard to the recommendation of a 5 year review of the CIO structure and the continuing availability of other structures:

- ★ FLAC considers that this review should involve consultation with charities as well as taking into account the views of the Regulatory Authority.
- ★ FLAC recommends that there should be an interim review after 24 months to correct any teething problems at an early a stage as possible

FLAC Analysis of the General Scheme of the Charities Regulation Bill 2006

Definition of Charitable Purposes

FLAC agrees with the fact that, within the definition of charitable purposes under Head 3(i), the advancement of community welfare and social inclusion is listed, and further specifically endorses the new proposed ground 3(v) for the advancement of human rights, social justice and agrees with the flexibility of ground 3(vi) for the advancement of the natural environment. With regard to the general purpose of ground 3(xi) whereby any 'purpose ...analogous or within the spirit of the other stated subparagraphs above' is seen as a charitable purpose, FLAC concurs with the Wheel's draft submission in finding that this subsection might be seen to be limited to the "other purposes limited to the community" section and may be found not to refer to the other definitions. FLAC recommends that this item (d)xi should be re-designated as a new point (e) so as to have it apply to points (a) through (d).

However, while FLAC is satisfied with the inclusion of these new grounds it wishes to make clear that unless the restriction on campaigning and advocacy in head 3(3)(only permitted as an ancillary activity – to be determined by the Regulatory Authority) is altered to allow for a charity to pursue these activities wherever they are related to a charity's primary purposes, the inclusion of the new grounds will be a futile and empty exercise as charitable human

rights groups, environmental and heritage groups and groups involved in the promotion of health are, by having these objects as the basis for their charitable activity, required to carry out campaigning and advocacy on a more than ancillary level (see below).

Advocacy, lobbying and campaigning activities of charities

With regard to Head 3(3) which excludes an organisation 'which is established for the primary purpose of advocacy, campaigning or lobbying to achieve political ends' FLAC disagrees with this provision and finds it unnecessarily restrictive and open to abuse.

It is in conflict with the *realpolitik* of Ireland's social, political and economic situation and would undermine one of the main purposes of our voluntary and community sector: giving an effective and balanced voice to the people and causes they seek to help, and represent in the forums where they most need to be heard. Almost all charities are involved in the alleviation of social and economic disadvantage and find that this is most effectively achieved through the exercise of a rights based approach, where the positive rights of individuals and groups are promoted through advocacy work and campaigning for the State to uphold its positive duty towards such individuals and groups.

It is a fact that volunteers are drawn to working in the voluntary/charitable sector by the very reason of their campaigning and advocacy work: there is a sense that by lending skills and time to charitable bodies whose causes they support, they also help to incide in a positive manner on the table of law-making and politics in a way they could not do as individuals.

FLAC is concerned that this provision in the General Scheme perpetuates the anachronistic concept of charities as being remissive, non-interventionist in and non-critical of policy formation.

This is the ethos behind such groups as FLAC: skilled professionals, students and others lend their time to FLAC because they know that their contribution will not only positively affect the clients they come into individual contact with, but, as a whole, will help to change the face of socio-economic exclusion and disadvantage via law and policy, by voicing informed concern about the factors that produce these problems.

Charities were indeed once perceived as bodies that dealt unquestioningly with the symptoms of societal malaise or political inefficacy; their function was accepted to be one of 'mopping up'.

However, current day Irish charities that wish to pursue their goals in the most economic and effective way find that this is brought about, in their provision of charitable services, by also acting as a legitimate voice for the members of public whose interests they seek to promote.

Charities are in an optimal position to research, propose and campaign for changes in the law or policy as their activities positions them at theoretical coalface of society's problems and needs. It follows that advocacy and campaigning are often the most successful way of speedily implementing positive change in chronic situations of disadvantage; campaigning

and advocacy have a beneficial, preventive effect on policy formation beyond the 'band-aid' or curative function traditionally provided by charities.

The modern-day socio-economic environment means that an effective charitable body typically provides and publishes data and research within its areas of expertise (such as the relief of poverty) – this is a concrete expectation of the charitable sector as they have first hand experience in dealing with the run-off from any political or legislative stasis or inefficacy. What is more, charity spokespersons are nowadays required and relied on by the public and media to take a proactive and analytical stance on current events, legislative initiatives and government policy.

For these reasons FLAC emphatically recommends that the function of a charitable body that has an ancillary **or primary** object of advocacy and/or campaigning in the pursuit of their charitable objects (for example the taking of test cases to bring about the assertion of human rights on behalf of disadvantaged persons or the strategic compilation and publishing of research around the effect on their charitable aims of certain legal provisions and the direct lobbying for changes in the law or the taking of public interest litigation to correct unfair and deficient legal provisions), should not operate to exclude such a charity from the CIO structure or from charitable status.

This position has found judicial support in the High Court ruling that the Irish Penal Reform Trust has the right as a body, to sue the State on behalf of prisoners with psychiatric problems with regard to breaches of these prisoners' constitutional rights.

Furthermore, the UK Charities Bill as it stands in July 2006 (and Irish law on charities as it stands relies and is informed by the UK law of equity and common law) contains no such similar provision restricting campaigning and advocacy to an ancillary activity in the operation of a registered charity.

FLAC outlined the significance of the advocacy role for a charitable bodies and NGOs in its 2004 submission:

The promotion of a rights-based approach has become very popular among human rights and related organisations. At the core of this approach is the belief in the positive rights of individuals and groups, which are to be upheld by the State's positive duty towards them. This model inevitably will lead to advocacy by stakeholders and organisations of this nature will require recognition as charities. FLAC concurs with the recommendation of the Law Society in this regard that a charity should be able to advocate a change in the law or public policy which can reasonably be expected to help it achieve its charitable purposes and be allowed to oppose a change in the law or public policy which can reasonably be expected to hinder its ability to do so.

In making this recommendation FLAC wishes to rely on the substantial and widely supported findings of the UK Government strategy unit 'Private Action, Public Benefit' which clearly lays out the fact that charities are optimally placed to play a positive campaigning and advocacy role and outlines the proven benefits of encouraging charities to do so. This report advised that there be a greater emphasis on the campaigning and political activities that charities can undertake and the removal of restrictions thereto.

For these reasons FLAC recommends that any proposed draft charity regulation legislation allow and provide for a charity to have, as one of its **prime or ancillary** activities for the implementation and pursuit of its declared charitable purposes strategic advocacy, campaigning and lobbying for law reform.

FLAC would also alternatively support the proposal of the Wheel on this issue:

“... all that is required to keep the political and charitable domains separate is a clearly stated prohibition on advocating for a political party, as is provided in the legislation establishing the Office of the Scottish Charities Regulator (...)
‘A body which falls within paragraphs (a) [charitable purposes] and (b) [provides public benefit] does not meet the charity test if (c) it is, or one of its purposes is to advance, a political party’”

The provisions of Head 3(4) allow the Regulatory Authority to designate by order any such ancillary activity if satisfied that these are for the furtherance of the charitable objects of the charity notwithstanding that such activities might involve issues relating to politics. FLAC finds that this proviso would reinforce an arbitrary and restrictive approach to legitimate advocacy and campaigning activity; it is, as it stands, open to bias and lack of clarity on the part of the decision maker and would lack transparency and objectivity as an instrument of limitation on charities involved in advocacy and campaigning. If the over restrictive provisions on advocacy are not thus corrected FLAC fears that the concerns raised by CE Fergus Finlay of Barnados in his article *The Voice of the Community and Voluntary Sector Slowly being Stifled?* should be highlighted to the LRC:

“...it is clear already from the draft legislation that a great many organisations that we recognise as pursuing public good would not be able to qualify as charities, assuming they wanted to. Organisations like Amnesty, the Irish Council for Civil Liberties, the Penal Reform Trust, to name just a few that spring readily to mind, devote more of their resources to research and campaigning than they do to service provision. As far as most community and voluntary organisations are concerned, the proportion of resources committed to advocacy will be smaller, but the role that advocacy plays may well be seen as crucial for the achievement of objectives. Any arbitrary curtailment of advocacy activity, in order to fit into ill-defined or subjective criteria, will do immense damage.”

In closing, FLAC wishes to outline the public service that is brought about by its own activities on advocacy and campaigning in the past and present and by doing so hopes to highlight the serious impairment to this public service that the provision might effect upon it as it stands in the General Scheme in the future.

The case of *Airey v Ireland* went to the European Court of Human Rights. FLAC was amicus curiae to Ms Airey. The Court found that Arts 6 and 8 of the European Convention of Human Rights had been breached by Ireland in the case of Ms Airey. The result of this ruling led to the State fulfilling its obligation to provide legal aid in civil cases to persons of restricted means by setting up a Civil Legal Aid Scheme which was put on a statutory footing with the Civil Legal Aid Act 1995. FLAC is currently campaigning for a review of the financial threshold of the means test required in obtaining civil legal aid which it finds to be so low as to constitute an impediment to the proper provision of civil legal aid to people of restricted means.

FLAC is also active in campaigning to update and correct the legal mechanism that still unfairly operates in favour of imprisonment in uncontested debt cases where an individual has defaulted in payments with a lending institution.

FLAC is amicus curiae in the Lydia Foy proceedings, which seem set to proceed to the ECHR. It is hoped that the result of this public interest litigation will in the long term positively inform public acceptance and understanding of transgender individuals.

FLAC is also involved in research about and campaigning for a change in the Habitual Residency Rule and the Direct Provision Rule as a means to achieving equality of rights for all individuals who live in Ireland.

The Public Benefit Test

1. FLAC endorses the Wheel's finding that Head 4 is worded so as to seem to concern itself with the determination of public benefit only with regard to charitable gifts, donations and bequests. The test should also be worded so as to apply to the activities of charities working to achieve charitable purposes.
2. FLAC is in concordance with the Wheel's submission that State agencies or private companies set up by public bodies should not be eligible for inclusion in the Register of Charities. To this end, the content of Head 4 should prevent the possibility of these bodies being able to fall within the definition of charitable status on the grounds that they are working for a charitable purpose and the purpose is "directed to the public or an appreciable section of the public".
3. Currently, companies under the control of a recognized religion (recognized in the Constitution) do **not** have to submit company accounts.

A gift to religion incurs a presumption of public benefit where it advances religion in the General Scheme.

In the current version of the UK proposed Charities Regulation Bill the public benefit test no longer has a presumption of public benefit for certain types of charitable purposes; the Bill provides: "In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit". This is of note for the 'public benefit' definition in the Irish Charities Regulation General Scheme because there is a concern that this presumption can create a lack of scrutiny (to the detriment of donors, tax payers and the Regulator) over the charitable efficacy and purposes of any such institution that benefits from the presumption.

- ★ In the interest of transparency and accountability FLAC recommends that a presumption of public benefit should not be approved for one particular type of charitable purpose (in this case religious) without the imposition of the simple measure of a 'public benefit test' as has been proposed in the UK legislation. This is a test that requires that before any presumption can operate, the institution in question must show a significant benefit to the wider community. This would seem to be a fair proposition and would go a long way to creating a perception of a level playing field for potential and existing charities and would also help to consolidate the object of

rendering all charities fully accountable in the mind of the public.

- ★ FLAC would also recommend that private hospitals/clinics and private schools that benefit from a trading exemption under their charitable status should also be obliged to comply with a simple public benefit requirement/test before being able to avail of tax relief and trading exemptions on the basis of charitable status.
- ★ FLAC recommends that private schools and private hospital clinics which can operate (on a subsidiary or ancillary level) on a profit making basis with regard to trade exemptions should be obliged to comply with a public benefit test as this would ensure that the *significant benefit to the wider community* condition further eliminates the potential for private corporate bodies to unfairly exploit benefits available to charitable structures to the detriment of other groups in the voluntary sector. FLAC feels that this equality of scrutiny is in line with best regulatory practices in the UK and the rest of Europe.
- ★ To this end, FLAC therefore endorses the recommendation of Head 4(5) whereby the imposition of fee charges should not 'exclude a significant proportion of the beneficiary class or limit beneficiaries to the well off.'

Summary Offences under Head 6

FLAC is in accordance with the provision under this heading that allows for the corporate veil to be lifted where any body corporate that has committed an offence with the consent or connivance or wilful neglect of any director, manager, secretary or officer and allows for it to be legally pursued together with any aforesaid agent of such a body corporate. Ideally this should help prevent corporate condonement of its own and of individual agent's potential misbehaviour.

FLAC also approves of the 2 year limit for pursuing such a summary offence from the date of knowledge or of reasonable knowledge of the matter which gave rise to the offence. FLAC also agrees with the specified defence of 'reasonable steps' taken in the General Scheme.

FLAC would again recommend (as per our 2004 submission) that the Regulatory Authority have the statutory right to forward a file to the DPP where a party that the Authority has investigated is suspected of having committed an indictable offence. The legislation which provides for new indictable offences under company law and theft and fraud law is in expansion and this would be an expeditious way for charges to be brought where serious offences have been committed with regard to bodies or individuals operating under charitable status. FLAC feels that this would go some way to fulfilling the public confidence objective of a new Charities Regulator.

Reporting Duties

FLAC finds that there is not enough detail on information that will be required from CIOs re: frequency of reports and content of same, and detail on who will have access to these reports and the penalties/fines for non-compliance and recommends that this be developed and referred for consultation.

Mechanisms to avoid dual reporting

FLAC agrees with the proposal put forward by the Wheel that the Regulator accept annual returns submitted by charitable companies to the CRO with the additional information required by the Regulator being supplied on a 'charities report template'.

FLAC considers that the Wheel's suggestion that "Companies that are charities should have the option of including this charity report template with their regular annual reports to the CRO, who should in turn submit all documentation to the Regulator" would help to diminish dual reporting obligations.

Annual accounts and annual returns from small Charities

FLAC agrees with the Wheel's recommendation on Heads 60, 62 and 73 in saying that all charities should at least be required to make a statement reporting on their activities over the course of the year.

Tax Relief Benefit

FLAC recommends that the tax relief benefit limit for gifts should be reduced to under the current start level of €250.

Power of Regulatory Authority to act for the protection of Charities

FLAC supports the Wheel's recommendation that the Regulator should consult upon the drawing up of transparent evaluation measures to be applied in determining what constitutes 'excessive' where the Regulatory Authority forms a view, in the interest of the protection of charities, that "the remuneration of persons acting in the affairs of a charity is excessive".

The determination of membership of Regulatory Authority – Members of the Board of Charities Regulator to be proposed by Minister

FLAC recommends that the appointment of members to the Board of the Charities Regulator should follow a public appointments process via the Public Appointments Service and endorses the Wheel's recommendation that there be "a minimum of two members who have experience of having worked at senior level for, or have acted in the capacity of Trustee or director of, charities".

The Charity Appeals Board

Further clarification and detail is required about whether the decision to appeal to the Appeals Board means that their decision is binding and an appeal to the High Court would lie only on a point of law.

A majority proportion of members of the Appeals Board should have the same experience as indicated above for membership of the Regulatory Authority.

Fundraising and Telethons

There is no detail as to in accordance with what criteria a Chief Superintendent may refuse approval for a fundraising/telethon application where the Chief Superintendent finds that “the controls proposed, the level of administrative costs....” etc. are not proper. There is no mention of an appeals mechanism and this is necessary for any decision against approval to be found in accordance with fair dealings and due process requirements. FLAC agrees with the Wheel’s recommendation in this regard that the Gardaí should be obliged to partake in consultation with the charities sector in developing applicable criteria and standards.

Possible Loopholes for Foreign Charities

FLAC finds that the issue of foreign charities who do not have to register in Ireland requires that the legislation address the potential loophole that would allow foreign charities to fundraise in Ireland without complying with charities regulation legislation.

Code of Practice for Fundraising

There is a need to specify how a voluntary code of conduct is to be developed and implemented by the charities sector.

Head 131: Obligation to disclose misappropriation, etc. of resources of Charities to Regulatory Authority

FLAC approves of the inclusion of a whistleblower protection provision; this is an issue that has **no proper or effective support in Irish law**.

Transparency International published a 2006 report showing that whistleblower legislation is imperative to prevent corruption in Ireland. The report focuses on “the impact of bribery and embezzlement in global healthcare (and finds) the human rights community is not paying enough attention to corruption”. The Public Interest Disclosure Act was enacted in 1998 in the UK **and charities are within the jurisdiction of the Act**.

In the matter of charities legislation FLAC asks the LRC to make a specific recommendation that general and far reaching whistleblower legislation should now be enacted in view of the steps taken in this General Scheme to accommodate whistleblowing protection provisions in the sphere of charities. This would provide a proper basis for such protective measures having a legislative footing across all areas of activity in the public, private and voluntary sectors; charities after all do not act in a vacuum and often interact with the corporate and business sector and of course the Executive in the implementation of their objectives. A stand-alone piece of legislation on whistleblower protection in Ireland is long overdue.

- ★ FLAC finds that more detail is needed with regard to the obligations of persons to act as whistleblowers and the legal and procedural protections that are subsequently offered them.
- ★ FLAC agrees with the ‘reasonable steps’ defence.
- ★ Head 131 (4) also provides a necessary defence in solicitor/barrister client situations.
- ★ Head 132: this is a further whistleblower protective provision for the general public as well as relevant persons and avoids any liability for such persons and as such this

provision is found by FLAC to be in the best interests of accountability and transparency.

- ★ FLAC further recommends that these whistleblower protective provisions should cover and be referable to all charity organisations not just the new CIO structure.
- ★ Regarding the stipulation that there can be no penalisation from the employer if the employee has acted reasonably and in good faith but making it a criminal offence to make a false statement to this effect: FLAC agrees with this measure because the informant has protection from incurring liability if the false statement is made under Head 132(1) where the employee has no knowledge of falsity of the statement.

Privileged Status of Information Published

FLAC agrees with the privileged status of information provision of Head 133 in the General Scheme regarding any publication by the authority with about the state or conduct of any particular charity.

In reference to this, FLAC would like to point out and recommend that the Regulatory Authority could publish, as per the Ombudsman and Information Commissioner of Ireland, fact files and case profiles on findings and submissions where the identity of the parties are not disclosed. This would be helpful in facilitating public understanding and confidence of the way the Authority works to protect the public and regulate charities.

Head 136: Probate Officer

FLAC approves of the recommendation under Head 136 which allows for the Probate Officer making a monthly return to the Regulatory Authority with details of charitable devises and requests. This provision promotes concordance between regulatory bodies and to some extent will avoid duplication of effort on the part of the Authority in its registration and regulatory capacities.