

# Guide to Social Welfare Overpayments



## Introduction

This guide summarises, in practical terms, the statutory framework that gives the Department of Social Protection the authority to decide that a claimant has been overpaid, and what steps a claimant might take if disputing such a decision. It then examines the Department's debt recovery powers in the event that the claimant is found to owe a debt. In setting out the guide, we have outlined the important procedural steps and actions to be taken by a claimant to either challenge a decision in the first instance, or alternatively, to reach a sustainable debt repayment arrangement if appropriate.

The guide does not address situations where individuals go to court; that is, prosecution in the case of alleged fraud or civil proceedings taken by the Department to recover a debt.

The guide is divided into three sections.

1. Overview of the decision-making process;
  2. Challenging the decision of the Deciding Officer or Designated Officer [formerly known as Community Welfare Officers];
  3. Recovery of the debt.
- References to "the Act" refer to the Social Welfare Consolidation Act 2005 [as amended].
  - References to "the Regulations" or "S.I. 142 of 2007" refer to the Social Welfare [Consolidated, Claims, Payments and Control] Regulations 2007.
  - References to a "Deciding Officer" should be read as including Designated Officers. A Designated Officer refers to officials formerly known as Community Welfare Officers. Designated Officers generally make decisions in respect of claims for payments under the Supplementary Welfare Allowance Scheme.

## Acknowledgements & publication details

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# Part 1: Overview of the decision-making process on overpayments

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## 1. What is an overpayment?

An overpayment is a debt owed to the Department of Social Protection as a consequence of a decision by a Deciding Officer that a claimant, for a specified period, was not entitled to receive, either in whole or in part, a benefit, assistance or supplement.<sup>1</sup> The recovery of this debt is carried out by Authorised Officers in the Department of Social Protection. An official exercising his or her function as an Authorised Officer is not the same as an official exercising his or her function as a Deciding Officer. (The Deciding Officer and Authorised Officer might be the same person, but the functions in either capacity are quite different. A Deciding Officer, or Designated Officer in the case of Supplementary Welfare Allowance payments, determines a person's entitlement to a payment and from what date that entitlement should take effect, whereas an Authorised Officer's role is to recover a debt due to the Department of Social Protection.)

The circumstances in which a person might be overpaid vary:

- It can be as a result of an **error** on the part of the Department or of the claimant.
- A claimant might not have informed the Department of a **change in circumstances** - either intentionally or because the claimant did not believe in good faith that the change had a bearing on his or her entitlement to a payment.
- A person may have knowingly made a **false declaration, or deliberately withheld information**, in order to obtain a social welfare payment; this act invites an accusation of fraud, which may in turn lead to a prosecution.

In all cases, it is important to establish the facts and circumstances that gave rise to the overpayment, as it may be possible to challenge the Department's decision and/or proposed method of recovery.

## 2. Communications from the Department of Social Protection

When dealing with an overpayment, it is important to stress that there are two distinct parts to the proceedings, each involving a letter from the Department to the claimant.

1. **The decision by the Deciding Officer:** The first letter will be a revised decision issued by a Deciding Officer, whereby it will be asserted that the claimant was not entitled to a payment for a particular period for specific reason/s. The effect of the revised decision is that the claimant is found to have been overpaid a social welfare payment. ***This decision may be appealed to the Social Welfare Appeals Office.*** See below Part 2 of this guide, 'Challenging the decision of the Deciding Officer'.

The revised decision by a Deciding Officer is the most important document when deciding if money is owed to the Department, as any subsequent action by the claimant, or the

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<sup>1</sup> Refer to Sections 301, 302, and 335 to 338 of the Social Welfare Consolidation Act 2005 [as amended].

Department, flows from this decision. For this reason a claimant should consider whether he or she has any grounds of appeal before agreeing to repay the stated debt.

2. **The debt recovery letter:** The second letter concerns how the Department proposes to recover the debt. An Authorised Officer issues this letter. Legally, the claimant must be given the opportunity to comment on the proposed method of recovery before any action is taken.<sup>2</sup> The Department Guidelines deal with the issue as follows:

*In all cases, the person must be informed of the Department's intention to make ongoing deductions from a social welfare payment and offered the opportunity to give his/her views on the proposal. Any views offered by the person should be considered before deductions are made from a social welfare payment.*

The claimant may dispute any decision with regard to the proposed method of recovery, but **there is no right of appeal on this issue to the Social Welfare Appeals Office**. See Part 3 of this guide below, 'Recovery of the debt'.

This second letter presumes that the matter of the claimant's liability is settled, that the decision of the Deciding Officer is not being challenged by way of an appeal to the Social Welfare Appeals Office.

Unfortunately, it is common practice for the Department to issue both letters on the same date. This means that a person may respond to the debt recovery proposal rather than seek advice on any potential grounds of appeal on the decision of the Deciding Officer. Also, while it is unusual, it is not unheard of that the Department commences recovery of a debt without first issuing a revised decision by a Deciding Officer. In this case, a claimant should insist **in writing** that a decision by a Deciding Officer be issued in order that the option of an appeal can be considered.

### 3. The revised decision of the Deciding Officer

The assessment of an overpayment is about whether a claimant is entitled to a social welfare payment. Accordingly, this requires a decision from a Deciding Officer in the first instance. This is called a **revised decision**. The Deciding Officer has the power to change a previous decision where new facts come to light and/or where there has been a mistake in the law.<sup>3</sup>

It is the **retrospective effect** of revised decisions – in other words, the fact that the decision applies to events which happened before the decision was made – that can result in overpayment. For example:

- A person is awarded Carers Allowance from a date in 2012. At the time of making the claim, that person satisfied the relevant statutory conditions for the allowance and was working 15 hours per week in addition to providing full-time care. In 2013, the claimant increased her hours of paid work to 20 hours per week, but did not notify the Department. In 2014, the

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<sup>2</sup> See Article 242 of Statutory Instrument 142 of 2007.

<sup>3</sup> Section 301 of the Act gives Deciding Officers the authority to issue revised decisions. Section 302 of the Act authorises Deciding Officers to determine from what date the revised decision should take effect. Sections 324 and 325 of the Act refer to the equivalent powers of Designated Officers.

Department became aware of the claimant's change in circumstances, and issued a revised decision with effect from the date in 2013 when the claimant's circumstances first changed. In issuing the decision, the Deciding Officer would assert that from a date in 2013 the claimant ceased to be entitled to Carers Allowance for the reason that she was working in excess of the hours permitted by the statute. As a result, the person will be found to have incurred an overpayment.

A revised decision might have one of the following statutory references:

*This decision is made in accordance with s. 302 [a] of the Social Welfare Consolidation Act 2005 [as amended]*

or

*This decision is made in accordance with s. 302 [b] of the Social Welfare Consolidation Act 2005 [as amended]*

- If reference is made to **Section 302 [a]** of the Act, the Department is claiming that the overpayment arose due to an act of fraud on the part of the claimant.
- If the reference is to **Section 302[b]**, the Department is asserting that new facts/evidence show the person was not entitled to a payment from a particular date and as a consequence he or she has incurred an overpayment. There is no accusation of wrongdoing in this instance.

Where a decision is made under Section 302 [a], the Department may decide to refer the matter for prosecution. However, not all cases are prosecuted where there is an accusation of fraud – you should refer to the Department guidelines for prosecution (<http://bit.ly/DSPprosec>). Please note that you can proceed with appeals to the Social Welfare Appeals Office separate to any action the Department may or may not take on prosecution.

## Part 2: Challenging the decision of the Deciding Officer

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As mentioned, the decision of a Deciding Officer may be appealed to the Social Welfare Appeals Office, whereas the decision of an Authorised Officer, who is the official responsible for recovering the money owed, may not. The Appeals Office has consistently confirmed that it has the power to decide on whether or not it is reasonable for the Department to issue a retrospective decision in any given case. We advise claimants and advocates to refer to the Appeals Office's Annual Reports for comment and examples of cases concerning overpayments.<sup>4</sup>

### 1. Steps involved in challenging the decision of a Deciding Officer

In many instances, if a claimant has received a decision from a Deciding Officer that he or she has been overpaid, he or she would be well advised to submit a **notice of appeal** to the Social Welfare Appeals Office in order to maintain his or her position. This will grant the time needed to request evidence of the overpayment, make a Freedom of Information request for the claimant's file, and allow him or her to obtain advice. If at a later stage it is deemed advisable to settle the case, an appeal may be withdrawn by submitting written notice to the Social Welfare Appeals Office.

Below is a list of steps involved in challenging the decision of the Deciding Officer:

- You will find FLAC's guide on "How to Make a Social Welfare Appeal" at <http://bit.ly/SWAOguide>.
- In addition to submitting an appeal to the Social Welfare Appeals Office, the claimant should **write to the Authorised Officer**, who is the official who has proposed the method of debt recovery. In this letter, the claimant should request that the Department take no action to recover the debt as the matter is awaiting adjudication by an Appeals Officer.
- An **appeal** should be submitted to the Appeals Office **within 21 days of the date of the Deciding Officer's decision**. In the past, the Appeals Office has been flexible about this timeframe, but accepting late appeals is at the discretion of the Chief Appeals Officer. For this reason, if an appeal is being made after the 21-day deadline, the claimant is advised to write to the Appeals Office and request that the appeal is accepted, giving a written explanation for the delay.
- You can download an **appeals form** from the Appeals Office website or get one from a local Intreo or Social Welfare office.

As well as setting out the grounds of appeal, on this appeals form the claimant (now called the appellant, as he or she is making an appeal) should request **an oral hearing**: This provides the opportunity for the appellant to state his/her case in person and for the Appeals Officer to gauge the credibility of his or her claims. This is particularly relevant in overpayment cases, where it is often difficult to adequately articulate the appellant's circumstances in writing.

- Seek **all records relating to the claim and the decision**: The appellant is entitled to access the evidence/facts/law on which the Department relied when making its decision. Thus he or she can look for all records related to the claim under the **Freedom of Information Act**.

The appellant should contact the Department in writing, specifying the request for records and stating that **the request is being made in accordance with the provisions of the Freedom**

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<sup>4</sup> See in particular the annual reports for 2007, 2011, 2012 & 2013 on the Appeals Office website.

**of Information Act.** The letter should provide all personal details [such as name, address, PPS No], the date, and a heading “Notice of Appeal/Freedom of Information Request”. You can download FLAC’s guide to the Freedom of Information Acts, which contains a template letter for this purpose: <http://bit.ly/FOIguide15>.

- Where possible an appellant should **seek independent advice**. Any advocate assessing the merits of a case should examine the facts [are they in dispute?], any mitigation, potential error or negligent administration, and any risks to the appellant/claimant. Detailed written submissions should be made where possible. Organisations that may be able to provide assistance include: Citizens Information Centres; the Money Advice and Budgeting Service, as the matter relates to a debt; and independent law centres (see end of guide for full list).

An appellant may seek **legal advice on a civil matter** from the State’s network of law centres run by the Legal Aid Board (<http://bit.ly/LABsite>), provided he or she passes a financial means and a merits test. Please note, however, that the Legal Aid Board will not represent appellants as civil legal aid is not available for social welfare appeals. However, if an appellant engages a private solicitor or representative then the Appeals Officer may, at his or her discretion, grant limited costs (up to €50) to cover expenses on the day of the appeal hearing. You can also read more at FLAC’s guide to applying for civil legal advice at [bit.ly/CLAfacsheet](http://bit.ly/CLAfacsheet)

## 2. Grounds of appeal – what will an Appeals Officer examine?

In the first instance, an Appeals Officer will wish to establish **whether the facts in the case are in dispute**. For example, based on new facts/evidence the Department decides that a claimant in receipt of One Parent Family Payment was cohabiting for a specified period and therefore was not entitled to the payment. As a consequence, the Department finds the claimant liable for an overpayment – which is a debt owed to the Department. The claimant rejects the Department’s decision, asserting that she was not cohabiting during the period in question. In this case the facts are in dispute.

If the facts as stated by the Department are not in dispute, the claimant will need to convince the Appeals Officer that he or she acted in good faith and that there was no wilful concealment of fact. Put plainly, the Appeals Officer will need to be satisfied that the evidence does not show that the claimant set out deliberately to conceal information from the Department in order to qualify for a social welfare payment.

If the facts are not in dispute and the Appeals Officer finds that the Appellant acted in good faith, then the Appeals Officer will then consider any mitigating factors, which might include:

- **The Appellant’s story:** There is no ‘one size fits all’ in these cases. The Appeals Officer will quite simply want to hear the claimant’s side of the story.
- **Knowledge:** Being unaware of the rules or the law is not in itself a defence; however, if an Appellant can demonstrate that he or she could not reasonably have been expected to know about the effect of a particular condition/circumstance, this can be used in mitigation.
- **Administration of claim:** Did the Department act properly in continuing to make the payment? In other words, were there adequate control/review mechanisms in place in order to avoid a claimant inadvertently incurring an overpayment? For example, if the Department was informed that a claimant was leaving the country for an extended period but continued to

issue social welfare payment, and on return deemed the person to be overpaid, this was clearly due to the Department's inaction. However, in these circumstances the Appeals Officer may also question the Appellant's inaction; in other words, did the claimant continue to claim a payment in the full knowledge that he or she was not eligible?

- **Appellant's capacity:** Are there any health or education issues that might have had a bearing on the Appellant's position at the time when the overpayment occurred (for example, was he or she too sick to realise s/he was being overpaid or to be able to do anything about it)?
- **Entitlement to another payment:** Would the Appellant have been entitled to another payment during the same period? Legally this is a matter that should be addressed when determining the amount of debt to be recovered, but an Appellant should raise this if relevant on appeal.
- **The size of the overpayment:** Larger overpayments arguably invite greater scrutiny by the Department because of the potentially devastating consequences for the Appellant. An Appeals Officer will seriously consider whether the Department's decision was proportionate and reasonable given all the facts/circumstances of the case.
- **Financial circumstances:** An Appeals Officer may consider the extent to which the appellant will be affected by the consequences of the Deciding Officer's decision; that is, will recovery of the debt cause a degree of financial hardship that is unwarranted or unreasonable. For this reason it is advisable that an appellant prepare detailed evidence of their financial circumstances for submission on appeal (see Part 3 below, under section 2, 'Responding to the Department's proposal to recover the debt').

Appeals Officers have considerable power and discretion with respect to deciding from what date a Deciding Officer's decision should take effect. As well as examining the particular circumstances of an Appellant, the Appeals Officer will wish to consider the degree to which either party should be held to account for failing to meet their respective obligations. This can include the Department's duty to provide adequate information or to maintain a claim, or the Appellant's obligation to disclose a change of circumstances. In summary, the Appeals Officer tries to decide whether it is fair and reasonable that the Deciding Officer made a retrospective decision with the effect that a person is found liable for a debt. The 2013 Appeals Office Annual Report is interesting in this respect:

*Where the Deciding Officer is satisfied that there was no fraudulent intent on the person's part, they have discretion under the law as to the date from which the revised decision takes effect having regard to the circumstances of the case.*

*This has implications for the amount of the overpayment that is assessed against the person. In my 2011 annual report I reported that it was not immediately obvious to Appeals Officers that sufficient consideration was given by Deciding Officers to the circumstances of individuals cases in determining the date from which a revised decision should take effect. This issue continues to present as a problem.*

(Social Welfare Appeals Office Annual Report 2013, page 22)

If an Appellant is successful, the debt is cancelled. If the appeal is unsuccessful, the Department can proceed with recovery of the debt – see the next section.



## Part 3: Recovery of the debt

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If an overpayment must be repaid to the Department, either because the claimant did not appeal the decision of the Deciding Officer or the claimant's appeal did not succeed, the matter will then be handled by a Department official authorised to recover debt known as the Authorised Officer.

The Department has extensive recovery powers, set out in the Social Welfare Consolidation Act and in Regulations issued by the Minister for Social Protection.<sup>5</sup> The Department's *Guidelines on the Recovery of Debt* [February 2013] provides a useful reference, and are available on the Department website at: <http://bit.ly/OPguide> (you should ignore any pop-ups on the website requesting passwords and click 'OK', you should be brought to the Department website).

### 1. The Department's obligations before debt recovery commences

Before a decision is made on how the debt is to be recovered, the Department must:

- Inform the person of the **factors that gave rise** to the overpayment
- Inform the person of the **proposed method of recovery**
- Provide the person with an opportunity to submit a **response** to the recovery proposal, which may include facts/evidence relevant to capacity to pay.
- Consider any views/facts/circumstances put forward by the debtor **before** any deduction is made.

### 2. Responding to the Department's proposal to recover the debt.

When a claimant receives a letter from the Department, he or she may be satisfied with the recovery terms; that is, the amount of the debt and the proposed method of recovery. Alternatively, the claimant might not know what the debt refers to, may query the amount, and may regard the proposal to recover the debt as unsustainable.

If the amount of the overpayment is undisputed, the next matter to be dealt with is how much is to be recovered on a weekly/monthly basis. The Department will generally propose the maximum amount that the law permits [see below under section 3]. If the claimant cannot afford this amount, he or she will need to submit credible evidence that it is unreasonable.

#### Negotiating a repayment plan

- Before entering into any agreement on repayment, the claimant is advised to write to the Department requesting all records that relate to the debt, if this has not already been done during the appeals process.<sup>6</sup> He or she should stipulate that the request is being made in accordance with the provisions of the Freedom of Information Act. He or she should also ask

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<sup>5</sup> Part 11 of the Social Welfare Consolidation Act 2005 [as amended]. Part 9 of the Social Welfare [Consolidated Claims, Payments and Control] Regulations 2007, Statutory Instrument 142 of 2007, as amended by Statutory Instrument 392 of 2011, Statutory Instrument 461 of 2011, Statutory Instrument 498 of 2011, and Statutory Instrument 24 of 2013.

<sup>6</sup> The request for records should include, but not be limited to, the decision of the Deciding Officer setting out the reasons for the overpayment, any relevant reports by a Social Welfare Inspector, any records detailing recovery actions to date if relevant. If the claimant has already unsuccessfully appealed the Deciding Officer's decision, he or she may already have the relevant records.

that any action to recover the stated debt be deferred until such time as these records are made available, allowing him or her to respond to the Department's proposal on an informed basis.

- Before making a proposal to the Department, it is crucial that a person considers **capacity to pay**; that is, the amount can he or she realistically pay on a weekly basis without causing undue hardship. If the amount that the claimant can pay is less than what is being sought by the Department, he or she will have to provide credible evidence that the amount sought is unreasonable in the circumstances. In this regard, the claimant might seek advice from the Money Advice and Budgeting Service (MABS)<sup>7</sup> on budgeting and drawing up a Standard Financial Statement (SFS), which can be submitted as evidence of the claimant's financial circumstances together with relevant supporting documentation.
- In the event that a claimant has already entered into an agreement which is proving unsustainable, he or she should write to the Department proposing an **alternative repayment plan**. Here the claimant should outline precisely why the original proposal is unreasonable, set out the facts and circumstances relevant to his or her capacity to pay, and provide an alternative repayment figure. There must be clear evidence of why he or she is unable to pay. It is worth noting that the Department is obliged not to cause undue financial hardship to the claimant.<sup>8</sup>
- Finally, when making a proposal to the Department, the claimant should request that the Department respond to the proposal, in writing, to:
  - [a] confirm acceptance of the claimant's repayment offer, or if rejecting the offer,
  - [b] to provide written reasons for so doing.

### 3. How much can the Department recover at source without the claimant's consent?

#### 3.1 Deductions from Social Welfare Payments

The Act provides that the amount that the Department can recover at source - in other words, from any benefit or payment the claimant is receiving - shall not "exceed 15 per cent of the weekly rate of benefit or assistance to which the person concerned is or becomes entitled."<sup>9</sup>

This means that the Department **may deduct up to 15% of a claimant's personal rate of social welfare without seeking his or her consent before it is paid out**. However **it should be noted that the Department can actually look to recover more than 15%, but only if the claimant decides to consent in writing**. People should seek advice before signing and consenting to any such agreement.

- The power to deduct at source only applies to the payment to which the claimant concerned is personally entitled. This means that amounts cannot be recovered from increases paid in respect of any dependants. In the case of Child Benefit, **deductions cannot be made unless the debt relates to a Child Benefit overpayment**.

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<sup>7</sup> See resource section at end for contact details for MABS.

<sup>8</sup> Article 245 [1][ii] of Statutory Instrument 142 of 2007 [as amended]. See *DSP Guidelines on Recovery of Debt* (link in resource section at end of guide).

<sup>9</sup> Section 341 [7A] of Social Welfare Consolidation Act 2005.

- There is no minimum amount that the Department must recover on a weekly basis. Therefore, where a person can prove that he or she does not have the capacity to pay 15% of the social welfare payment, the Department should consider this evidence before proceeding to deduct the maximum (amount) at source. See part 3.2 below on 'Insufficient income to meet basic needs' and also the 2007 Regulations, which provide that the Department of Social Protection must have regard to a person's "ability to repay".<sup>10</sup>
- If a person is due to be paid arrears on a social welfare payment, the Department has the authority to withhold any arrears and use them towards paying the outstanding overpayment debt. In circumstances of financial hardship, a claimant may be able to make a case that not all the arrears should be withheld.

### **3.2 Insufficient income to meet basic needs**

If the Department deducts the full 15% from a person's social welfare payment, this will in many cases mean that the person's income falls below the relevant Supplementary Welfare Allowance rate.<sup>11</sup> Ordinarily, a claimant in these circumstances would be regarded as having insufficient means to meet basic needs and would therefore be potentially eligible for assistance under the Supplementary Welfare Allowance scheme. However, if the Department is recovering a debt by reducing a person's social welfare payment, that person will not be entitled to apply for Supplementary Welfare Allowance to 'top-up' his or her income. More specifically, while the law does not dispute that the claimant has insufficient income in these circumstances, the claimant is not allowed to make a claim for Basic Supplementary Welfare Allowance if the shortfall in income is caused by the recovery of an overpayment.<sup>12</sup>

While a claimant in these circumstances is not barred from making a claim for an Exceptional Needs Payment or a Supplement, a simpler course of action would be to renegotiate the repayment terms in order to ensure that the claimant has sufficient income.

### **3.3 Recovering money from a person's earnings and/or accounts in financial institutions**

The Social Welfare and Pensions (Miscellaneous Provisions) Act 2013<sup>13</sup> authorises the Department to recover overpayments by way of "attachment" of a person's earnings and/or of any monies held in a financial institution(s) including banks, building society's, trustee savings banks, credit unions, post office savings accounts or any other body the Department prescribe. This would apply in circumstances where a person failed to enter into an agreement to repay a debt due to the Department. The legislation refers to the Department's power to recover up to 15% of a person's net weekly earnings, providing it shall not cause the person to become eligible for Supplementary Welfare Allowance.

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<sup>10</sup> Article 245 [1][iii] of Statutory Instrument 142 of 2007.

<sup>11</sup> Supplementary Welfare Allowance is payment to persons whose means are insufficient to meet their needs. Section 189 of the Act establishes the legal principle that a person's means shall not fall short of their needs. The minimum means deemed necessary to meet needs is the rate of Supplementary Welfare Allowance for which a particular household would be eligible if it had no other means.

<sup>12</sup> Section 341 [7C] of the Act [as amended by Section 13 of the Social Welfare Act 2012] explicitly precludes a person from making a claim for basic Supplementary Welfare Allowance.

<sup>13</sup> Section 15 of the Social Welfare and Pensions (Miscellaneous Provisions) Act 2013.

Legislation has also been passed to allow the Department to recover debts from a person's statutory redundancy payment<sup>14</sup> and from personal injuries compensation awards.<sup>15</sup>

#### **4. The power to cancel or reduce the debt**

As outlined above, a person may be able to successfully challenge the decision of the Deciding Officer in the first instance. This can be either on the basis of a dispute about the facts and/or where there are sufficient mitigating circumstances to warrant a revised decision which has the effect of cancelling the debt. In all other cases where the debt falls due, the Department may reduce or cancel a debt in certain limited circumstances. Section 342 of the Act explicitly refers to this power and leaves it to be spelled out in Regulations what rules should be applied when considering reducing or cancelling a debt. It is important to state however, that in circumstances where the Department asserts that the debt arose because of wrongdoing on the part of the claimant, certain options to reduce and/or cancel a debt are not available.<sup>16</sup>

##### **4.1 Error or failure to act**

An overpayment may be reduced or cancelled in the following circumstances, explained by Statutory Instrument 142 of 2007:

***Reduction or cancellation of sum to be repaid***

*246. (1) The amount of an overpayment to be repaid may be reduced or cancelled where the overpayment arose because of –*

- (a) a failure by the Department to act within a reasonable period on information which was provided by or on behalf of the person concerned, or*
- (b) an error by the Department,*

*and the person concerned could not reasonably have been expected to be aware that a failure or error had occurred.*<sup>17</sup>

The last part of the above provision is very important as it clearly places an onus on claimants to show that they were acting in good faith when they continued to claim a payment, as opposed to continuing to claim a payment in the full knowledge that they were being overpaid.

##### **4.2 Eligibility for another payment during the period when the overpayment occurred.**

Article 246 [3] of Statutory Instrument 142 of 2007 provides that an overpayment may be reduced by the amount of another social welfare payment that the claimant would otherwise have been entitled to during the period when the overpayment occurred.

*(3) Other than in the case of a person to whom section 342A applies, the amount of an overpayment to be repaid may be reduced by the amount of any other payment referred to in paragraphs (a) to (d) of article 245(1) to which the person would otherwise have been entitled in the period to which the overpayment relates had he or she not been in receipt of the payment which gave rise to the overpayment.*<sup>18</sup>

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<sup>14</sup> Section 16 of the Social Welfare and Pensions Act 2014.

<sup>15</sup> Section 13(d) of the Social Welfare and Pensions Act 2013, commenced with effect from 1 August 2014.

<sup>16</sup> Section 342A of the Social Welfare Consolidation Act 2005 [as amended].

<sup>17</sup> Article 246 [1] of Statutory Instrument 142 of 2007.

<sup>18</sup> Article 246 [3] of Statutory Instrument 142 of 2007.

Please note that this provision cannot be used in cases where the Department claims that there was fraud on the part of the claimant; that is, where a decision has been made by a Deciding Officer or an Appeals Officer in accordance with Sections 302 [a], 319 [a] or 325 [a] of the Act. This restriction applies to decisions made on or after 29 June 2011.<sup>19,20</sup>

#### **4.3 Cancellation of the debt in other circumstances**

The Department may decide to write off a debt where there is no possibility of recovery. An obvious example is when a claimant dies and there are insufficient funds in his/her estate to repay the overpayment. Another example is where the Department is unable to prove that the debt is owed and the claimant disputes the debt. This may arise in circumstances where Department writes to a claimant for the purpose of recovering a debt that was allegedly incurred many years ago but the Department failed to act to recover the debt at the time, and there is neither evidence that the claimant conceded liability nor records to adequately support the Department's assertion.

#### **4.4 Historical overpayments**

It is a fundamental principle of law that where a party delays at length in asserting his or her legal rights and the person or persons against whom those rights are asserted will suffer prejudice, then it may be a breach of fair procedures to allow those legal rights to be enforced. This principle is well established in respect of litigation in Ireland by the Statute of Limitations 1957 (as amended). The Statute of Limitations provides specific time limits in respect of, for example, personal injury claims (two years) and defamation (one year).

Claims for a debt are based in contract law and/or arise under statute; they are subject to a limitation period of six years.<sup>21</sup> There is a specific exception to the Statute of Limitations for certain types of debt owed to the Social insurance Fund (which means overpayments of benefit) and a claim in court can be brought for those debts at any time. However it may be a defence in court for a person to say that he or she has been significantly disadvantaged by the delay. A person will need legal advice if he or she wishes to make this defence.

The Department also has statutory recovery powers which allow deductions from ongoing social welfare payments which do not require it to sue a debtor in court. As such, the Statute of Limitations does not arise. As a result, current social welfare claimants do not have the protection of the legislative time limits that would ordinarily apply for debt recovery.<sup>22</sup> A person may no longer be in a position to generate an income to pay the debt, as his or her circumstances may have changed significantly (due to unemployment, age or illness, for example). In addition, greater recovery powers may be applied now than previously. Specifically, the Department may now recover up to 15% of a person's social welfare payment regardless of the effect on his or her situation, whereas prior to 2012

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<sup>19</sup> These sections of the Act refer to the authority of Deciding Officers, Appeals Officers and Designated Officers [Supplementary Welfare Allowance claims] to determine the effective date of a decision; see Part 2 of Guide.

<sup>20</sup> Section 8 of the Social Welfare (Miscellaneous Provisions) Bill 2015 provides that the limitation on the ability of a fraudulent debtor to seek an 'offset' is restricted to overpayments which arose because of decisions made by Deciding Officers, or Appeals Officers, on or after 29 June 2011.

<sup>21</sup> Section 11(1) (a) of the Statute of Limitations 1957.

<sup>22</sup> Time limits do apply in cases where the Department goes to court to recover a debt.

it could not recover an amount that would have the effect of reducing a person's income to below the applicable basic Supplementary Welfare Allowance rate.

In cases where the Department failed to act within a reasonable timeframe to recover a debt and the claimant did not accept liability, the claimant may have a basis for challenging the overpayment. In order to assess this, they would require independent legal advice.

It is worth referring to a submission to the Department made by the independent law centre, Community Law and Mediation.<sup>23</sup> It discusses the legal issues associated with the recovery of overpayments in the context of the new recovery powers granted to the Department by section 13 of Social Welfare Act 2012 and also includes a case study on historic overpayments.

#### **4.5 Estate cases**

'Estate cases' refer to the recovery of overpayments from the estate of a deceased claimant. In this regard, the personal representative (or executor) responsible for carrying out the dead person's will and acting for the estate may have specific legal obligations to disclose the assets of the deceased to the Department before the estate is distributed. You should consult the Department guidelines, available online at <http://bit.ly/DSPestates>.

### **5. What action can be taken in the event that the Department rejects a claimant's response to a debt recovery proposal?**

Should the Department reject the claimant's response to its proposal, there is no right of appeal to the Social Welfare Appeals Office. Nevertheless, a person might have grounds to make a complaint to the Office of the Ombudsman, or be directed to seek legal advice to investigate if any further legal avenues are available by approaching independent law centres or seeking legal advice from the Legal Aid Board.

#### **5.1 The Office of the Ombudsman<sup>24</sup>**

The role of the Ombudsman is to establish whether a decision by a public body is fair. In considering a complaint, the Ombudsman will investigate the action by the public body in order to establish:

- Did the action of the public body adversely affect the complainant, and
- Was the action or might the action have been:
  - taken without proper authority,
  - taken on irrelevant grounds,
  - the result of negligence or carelessness,
  - based on erroneous or incomplete information,
  - improperly discriminatory,
  - based on an undesirable administrative practice, or
  - otherwise contrary to fair or sound administration.

In all cases, before proceeding to make a complaint to the Ombudsman, the claimant should have first made his or her case to the Department. If the Department rejects the claimant's alternative

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<sup>23</sup> See submission online at <http://bit.ly/CLMNsub>.

<sup>24</sup> Information on the role of the Ombudsman's Office is on its website – see resources section at end of guide.

repayment proposal, or does not respond within a reasonable time, the claimant can proceed to submit a complaint to the Ombudsman's Office.

The following would need to be established in cases where a claimant agrees to repay the debt, but does not agree to the amount to be recovered on a weekly/monthly basis:

- Did the claimant submit credible proofs that they did not have the capacity to meet the repayment arrangement as proposed by the Department? Proof would include a completed Standard Financial Statement, evidence of outgoings such as housing costs and utility bills, prescription costs, other debt liabilities etc.
- In rejecting the claimant's repayment proposal, did the Department provide reasons for refusing it?

## **5.2 Legal proceedings**

In some cases a claimant may require legal representation, particularly if the case raises procedural issues concerning the rights of natural justice and fair procedures. This raises practical challenges in terms of finding a solicitor who is familiar with social welfare law and of legal costs. A social welfare claimant will probably not be able to pay for private legal advice. As there is no state civil legal aid available for cases before the Social Welfare Appeals Office,<sup>25</sup> a claimant will need to consult a private solicitor or an Independent Law Centre. As a first step, a claimant should make contact with relevant frontline organisations such as Citizens Information Centres, the Money Advice and Budgeting Service or an Independent Law Centre (see "Resources" below) which provides advice on social welfare law. These organisations may be able to establish whether legal representation is required and may be in a position to make a referral to a solicitor or other body prepared to deal with the case.

## **6. Key points for Claimants and Advisors where an overpayment is alleged**

In the event of an overpayment, it is important that claimants consider all their options. The key points may be summarised as follows:

- a) If the decision by the Deciding Officer is recent, consider lodging an appeal with the Social Welfare Appeals Office. In this situation the claimant should also write to the Department requesting that no action be taken to recover the debt as the matter is before the Appeals Office.
- b) Always request proof of the debt in writing, and use the Freedom of Information Act to request records/the claimant's file.
- c) If the claimant agrees to repay the overpayment, he or she should not accept an agreement which has the effect of causing him or herself undue hardship. If submitting an alternative repayment plan to the Department, the claimant should submit evidence that credibly supports their proposal.
- d) Make sure that all communication with the Department is in writing.

*FLAC & CLM are grateful to Alan Brady BL, Ciara Murray and Michael Farrell for their input to this guide.*

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<sup>25</sup> Excluded under Civil Legal Aid Act 1995. FLAC's guide to the civil legal aid system is at [bit.ly/CLAguide2014](http://bit.ly/CLAguide2014).

## Resources

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### Department of Social Protection

- Overpayment Recovery – Guidelines on the Recovery of Debt [Feb 2013]: <http://bit.ly/OPguide>
- Prosecution Criteria for Department: <http://bit.ly/DSPprosec>
- Decision Making and Natural Justice: <http://bit.ly/DSPnatjust>
- Estate cases: <http://bit.ly/DSPestates>

### FLAC (Free Legal Advice Centres)

- Making a Social Welfare Appeal: <http://bit.ly/SWAOguide>
- Making a Freedom of Information Request: <http://bit.ly/FOIguide15>

### Community Law & Mediation

- Submission to the Department of Social Protection following on from the Roundtable on Social Welfare Law which examined Section 13 of the Social Welfare Act 2012: <http://bit.ly/CLMNsub>

### Legislation

Acts and Statutory Instruments are available at: [www.irishstatutebook.ie](http://www.irishstatutebook.ie)

In order to see what amendments have been applied to particular sections of the Social Welfare Consolidation Act, or the relevant regulations, reference should be made to the “legislative directory” section of the statute book website: [http://www.irishstatutebook.ie/legislation\\_directory.html](http://www.irishstatutebook.ie/legislation_directory.html)

### Relevant bodies

- **Social Welfare Appeals Office:** Here you will find information on the role of the Appeals Office and the Annual Reports contain some material on overpayment cases. There are also some case summaries on the Appeals Office website: <http://www.socialwelfareappeals.ie/>
- **Office of the Ombudsman:** <http://www.ombudsman.gov.ie/en/>
- **MABS:** Money Advice & Budgeting Service – [www.mabs.ie](http://www.mabs.ie) Helpline: 0761 07 2000
- **Legal Aid Board:** <http://www.legalaidboard.ie/>

### Independent Law Centres:

- **FLAC (Free Legal Advice Centres):** [www.flac.ie](http://www.flac.ie)
- **Community Law and Mediation:** [www.communitylawandmediation.ie](http://www.communitylawandmediation.ie)
- **Ballymun Community Law Centre:** [www.bclc.ie](http://www.bclc.ie)
- **Mercy Law Resource Centre:** [www.mercylaw.ie](http://www.mercylaw.ie)
- **Community Law and Mediation Limerick:** <http://www.communitylawandmediation.ie/family-law/community-law-limerick.243.html>