

Submission on the Social Welfare and Pensions Bill 2015

Joint submission by

FLAC and Community Law & Mediation



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About FLAC

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all.

FLAC Policy

Towards achieving its stated aims, FLAC produces policy papers on relevant issues to ensure that government, decision-makers and other NGOs are aware of developments that may affect the lives of people in Ireland. These developments may be legislative, government policy-related or purely practice-oriented. FLAC may make recommendations to a variety of bodies drawing on its legal expertise and bringing in a social inclusion perspective.

You can download/read FLAC's policy papers at <http://www.flac.ie/publications/policy.html>

About Community Law and Mediation

Established in 1975, Community Law and Mediation (CLM) provides free legal information and advice to the residents of North Dublin (specifically those in the electoral constituencies of Dublin North-Central and Dublin North-East). The CLM aims to protect socio-economic rights, create a more just society and empower the local community through its campaign work, research and education programmes.

CLM Policy

You can download/read CLM's law reform submissions at <http://www.communitylawandmediation.ie/resources/sub-page-1.222.html>

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SUMMARY OF RECOMMENDATIONS

Recommendation 1:

We recommend that any new provisions in the proposed Social Welfare Bill, outside the scope of financial budgetary changes, should be provided with adequate debate time and a sufficient explanation of the consequences of such changes.

Recommendation 2:

We recommend that following the enactment of this bill, the Department of Social Protection should prioritise the consolidation of social welfare legislation into a single text under the Law Reform Commission's programme of Statute Law Restatement and its general publication.

Recommendation 3:

We recommend that section 3 of the Bill is deleted as it does not present as having a purpose other than to make it more difficult for carers to access income supports since it does not alter the actual conditions for eligibility other than introducing a presumption that claimants are ineligible unless they can prove otherwise. If passed, prospective claimants will be presumed to be ineligible for a payment unless they can prove otherwise. This constitutes an unacceptable shift in the burden of proof placed on an applicant.

Recommendation 4

We recommend that the changes to the One Parent Family Payment be reversed. We further recommend that a social impact assessment of the changes to the One Parent Family Payment be carried out in order to determine the extent to which changes to the scheme have had a detrimental impact on one parent households.

Recommendation 5:

We recommend that s. 342A of the Social Welfare Consolidation Act 2005 be repealed. We further recommend that the Social Welfare Consolidation Act 2005 be amended in order that the Department of Social Protection's debt recovery powers be restricted so that a claimant's income does not fall below the relevant Supplementary Welfare Allowance rate.

Introduction and general comment

The Social Welfare (Miscellaneous Provisions) Bill 2015 was published on 16 February 2015, and is due to be debated in the Dáil 3 March 2015. The Bill will enact measures announced in Budget 2015, and proposes several amendments to existing provisions in the social welfare code. Our recommendations relate to the manner in which social welfare bills are presented in the Houses of the Oireachtas as well as to parts of the Bill itself.

Social Welfare Law affects the lives and basic living standards of many of the most vulnerable people in the State and yet, little time is provided to review and debate the potential significance of any amendments to the statute. Thus, the underlying democratic principles of participation and transparency are undermined, and there is an increased risk that the most vulnerable within society will be harmed as politicians pass law in haste.

This Bill proposes to amend the Social Welfare Consolidation Act 2005, an Act which has already been amended by about twenty acts to date, thereby rendering the statute almost impenetrable to all but the most ardent and diligent of lawmakers. For the public, and our elected representatives who must legislate on our behalf, it hardly seems possible that there can be properly informed and reasoned debate if the language and meaning of the statute is not accessible. To remedy the absence of a single body of law, in 2014 the Minister for Social Protection, now Tánaiste, favoured the publishing and dissemination of a consolidated Social Welfare Act. In the debate in June 2014 on the Social Welfare & Pensions Bill 2014, the Minister stated:

Deputy Ó Snodaigh suggested that we make the in-house guide on the various amendments to the Social Welfare (Consolidation) Act available to the public, subject to appropriate disclaimers. I would broadly favour that approach and I recognise it would be useful to Members, social welfare practitioners and the public in general. I will consider the suggestion.

To date this has not been made available to the general public or to public representatives.

Social welfare payments provide income support to 1.5million people directly, and another 750,000 indirectly. Therefore, TDs and Senators, civil society and the interested public should have consolidated primary legislation at their disposal when a new bill is introduced in order that law is made on an informed basis.

Recommendation 1: We recommend that any new provisions in the proposed Social Welfare Bill, outside the scope of financial budgetary changes, should be provided with adequate debate time and a sufficient explanation of the consequences of such changes.

Recommendation 2: We recommend that following the enactment of this Bill, the Department of Social Protection should prioritise the consolidation of social welfare legislation into a single text under the Law Reform Commission's programme of Statute Law Restatement and its general publication.

Section 3. Carer's Benefit, Carer's Allowance and Respite Care Grant- Definition of "Relevant Person"

In order to receive Carer's Benefit, Carer's Allowance and the Respite Care Grant, the person being cared for, "the relevant person", must need full time care and attention. The meaning of full time care and attention for the purpose of qualifying for these schemes is clearly defined in the statute and unambiguous in its meaning. In the case of Carers Allowance, s. 179 (4) of the Social Welfare Consolidation Act 2005 [as amended], provides:

(4) For the purposes of subsection (1), a relevant person shall be regarded as requiring full-time care and attention where—

(a) the person has such a disability that he or she requires from another person—

(i) continual supervision and frequent assistance throughout the day in connection with normal bodily functions, or

(ii) continual supervision in order to avoid danger to himself or herself,

(b) the person has such a disability that he or she is likely to require full-time care and attention for at least 12 consecutive months, and

(c) the nature and extent of the person's disability has been certified in the prescribed manner by a medical practitioner registered medical practitioner

An equivalent definition exists for a "relevant person" in the case of Carers Benefit and the Respite Care Grant.

Section 3 of the Bill proposes to amend the above definition by inserting what amounts to a rebuttable presumption in law; as follows:

For the purposes of the definition of 'relevant person' in this Chapter, a person shall not be regarded as requiring full-time care and attention

unless the person has such a disability that he or she....."

(our emphasis added)

In practice, the proposed amendments to carer's payments will allow decision makers to adopt a presumptive position; that is, it will be presumed that a person is ineligible for a payment, "unless" it can be proven otherwise. This is an unacceptable shift in the burden of proof that falls to a prospective claimant, it is negative law-making. Referring to the existing definition, the conditions for receipt of the relevant payments are clear, a person must need full time care and the applicant must prove this need exists. When determining a person's eligibility decision makers must make a reasoned finding from a position of neutrality and objectivity. The amendments if passed will have the effect of placing a greater

burden of proof on the applicant, as the decision maker will be considering the evidence from the perspective that the applicant is ineligible in the first instance.

We are in no doubt that this will have the effect of increasing the number of legitimate claims that are rejected, and this will in turn lead to a corresponding increase in the number of appeals that will be submitted to the Social Welfare Appeals Office. Notably, according to the Social Welfare Appeals Office Report [2013], an average of 58% of those appealing decisions in respect of carers payments were successful. Lengthy appeal processing time for carer's allowance, benefit and respite care grant currently stand at 22.6, 20.1 and 19.1 weeks respectively as of January 2015. The proposed amendment could increase the rate of appeal and cause further delays in processing appeals also resulting in undue hardship and distress for claimants who are entitled to these payments.

Recommendation 3: We recommend that section 3 of the Bill is deleted as it does not present as having a purpose other than to make it more difficult for carers to access income supports since it does not alter the actual conditions for eligibility other than introducing a presumption that claimants are ineligible unless they can prove otherwise. If passed, prospective claimants will be presumed to be ineligible for a payment unless they can prove otherwise. This constitutes an unacceptable shift in the burden of proof placed on an applicant.

Section 4. Jobseekers Allowance and One Parent Families

Section 4 of the Bill proposes to extend the Jobseekers Allowance transition payment to all one parent families who are claiming Jobseekers Allowance, and whose youngest child is under 14. On its own this amendment recognises a need for consistency in the treatment of these households.

Nevertheless, it is necessary to continue to assert that this change, and others which have been implemented in the last few years, are regressive in effect. There is now inequity in how the social welfare code treats families with dependent children. In the case of two parent households, the spouse of a social welfare claimant is not required to seek work, and may access part time work without restriction on their pattern of employment. The money earned is assessed as means. By contrast, in the case of one parent families who may be working part time over 5 days, they will by definition be ineligible for income support when their youngest child reaches 14, in order to claim Jobseekers Allowance you must be unemployed 4 out of 7 days. It follows, that a person who may have a small number of hours work and additional income will be left with no choice but to cease employment, or hope that their employer will change their hours. It will be argued that Family Income Supplement [FIS] will meet this income deficit. This is not the case, as FIS is only accessible to those who have sustainable employment and regular hours of at least 38 every fortnight.

Furthermore, there is the issue of childcare. Children of 14 years and over require care and supervision, and lone parent job seeking claimants continue to be disadvantaged in trying to access the labour market and address the needs of his or her children when they are not attending school. When the One Parent Family Payment was introduced in 1997 its purpose was to try to remedy this obvious barrier to the labour market, by providing an income disregard to help compensate for the cost of childcare arrangements that a one parent family would incur if working.

Now that this support has been removed, the childcare needs of lone parent families are a hidden disadvantage as they are now regarded as being the same as a jobseeker with a spouse working in the home.

The objective of activation could be achieved in a fairer way by attaching job seeking conditions to a fully restored One Parent Family Payment. The current policy is counterintuitive as it removes the supports that are necessary if those who are parenting alone are to access the the labour market, and furthermore, it creates inequality in the treatment of households with children.

The State has legal obligations in relation to the best interests of children by ensuring equal access to education and in providing for every child's physical, mental spiritual, moral and social development. The introduction of labour activation measures targeting lone parents, without adequate consultation of the affected groups, and without provision of supports to care for children is a policy that is regressive in effect, and incompatible with that state's obligation to treat all children equally. In the Department of Social Protection's own impact assessments of budget 2013 & 2014 employed lone parents experienced a combined loss of 2 per cent of their income and unemployed lone parents saw a combined loss of approximately 1.45 per cent of their income. Taking into consideration the changes in Budget 2015, employed and unemployed lone parents gained only 0.8 and 0.58 per cent of their income respectively, both household types are still at a losses of 1.2 and roughly 0.87% per cent compared to 2013. This directly undermines the Government's labour activation reasoning for introducing the reforms to One Parent Family Payments.

Recommendation 4: We recommend One Parent Family Payment be fully restored. We further recommend that a social impact assessment of the changes to the One Parent Family Payment be carried out in order to determine the extent to which changes to the scheme have had a detrimental impact on one parent households.

Section 8. Repayment of social welfare overpayments

An officer of the Department of Social Protection, charged with the collection of a debt due as a result of an overpayment, may 'offset' the debt by the amount of another social welfare payment a person may have been entitled to during the period when the overpayment occurred. In 2011 the Act was amended, and section s. 342A was inserted restricting this provision by precluding the use of an offset in cases

where the overpayment arose because a person allegedly acted fraudulently. Section 8 of the Bill proposes to amend s. 342A, by limiting the application of the restriction to decisions made by Deciding Officers or Appeals Officers on or after 29th June 2011.

It is our contention that s. 342A should be repealed in its entirety, as it refers to person's debt liability consequent on an allegation by the Department of Social Protection, not a proven fact. Moreover, it is often the case that a person accepting that they owe a debt, may not appeal a decision as they do not realise that they have been accused of fraud. This is the case because a Deciding Officer when issuing a decision to a claimant will generally refer to a section of the Act, not what that section means.

It is our contention that if a person was entitled to another payment when an overpayment occurred, the debt should be reduced accordingly. Any finding with respect to fraud is a criminal matter that falls to be determined by the courts. Therefore, it is unacceptable that the Department of Social Protection should restrict a person's capacity to reduce a debt on the basis of an allegation that has not been proven, and has not been properly communicated to the claimant. Such a position is at odds with fair procedures and is unreasonable in its effect.

We continue to be concerned about other provisions relating to overpayments which risk putting individuals and families in danger of poverty or even destitution in breach of fundamental rights. In 2012 the Act was amended to allow officials to recover up to 15% of a person's social welfare payment without consent. For a single person on Jobseekers Allowance of €188 this equates to €28 per week. The effect of this measure is poverty, as this rate of debt recovery is inconsistent with any measure of income need. The social welfare code itself defines a person as having insufficient means to meet their needs if their income falls below the basic Supplementary Welfare Allowance rate of €186. Those paying 15% of their social welfare payment to the Department of Social Protection will by definition have income below this level.

Recommendation 5: We recommend that s. 342A of the Social Welfare Consolidation Act 2005 be repealed. We further recommend that the Social Welfare Consolidation Act 2005 be amended in order that the Department of Social Protection's debt recovery powers be restricted so that a claimant's income does not fall below the relevant Supplementary Welfare Allowance rate for the claimant or the claimant's family.