Submission on the Social Welfare and Pensions Bill 2014

FLAC and Northside Community Law and Mediation Centre

6 June 2014

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 Northside Community Law and Mediation Centre

Established in 1975, the Northside Community Law and Mediation Centre (NCLMC) 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 NCLMC aims to protect socio-economic rights, create a more just society and empower the local community through its campaign work, research and education programmes.

NCLMC Policy
You can download/read NCLMC's law reform submissions at
http://www.nclc.ie/publications/default.asp

For ***more information***, contact us at

FLAC,
13 Lower Dorset Street, Dublin 1
T: 1890 350250 / 01 874 5690 **|** E: info@flac.ie **|** W: www.flac.ie

Northside Community Law and Mediation Centre,
Northside Civic Centre, Bunratty Road, Coolock, Dublin 17
T: 01 847 7804 | E: info@nclc.ie| W: www.nclc.ie

(6 June 2014)

SUMMARY OF RECOMMENDATIONS IN THIS SUBMISSION

Recommendation 1: That there be a reasonable lead in time between the publication of Social Welfare and Pensions Legislation and its debate in the Oireachtas and that the Explanatory Memorandum accompanying Bills include the proposed text of the consolidated Social Welfare legislation to give context to the technical and textual amendments proposed.

Recommendation 2: Following the enactment of this legislation, the Department of Social Protection should seek prioritisation of the consolidation of social welfare legislation under the Law Reform Commission's programme of Statute Law Restatement, consolidating all amendments into a single text.

Recommendation 3: In section 8, subsection 4 (i) should be removed and revised to ensure all families in need of an adequate income to support their children be treated equally in terms of eligibility for Family Income Supplement regardless of the relationship status of the parents.

Recommendation 4: That the proposed new section 246(1) (d) and 246(1) (e) as proposed in section 10 of the Bill be deleted.

Recommendation 5: Section 14 should be amended to include detailed procedures to permit due process and fair procedures to a person who might be subject to these powers before any payment is recovered in this way. If this is not possible immediately, then this section should not be commenced until such processes, including right of appeal, are in place. No sums should ever be recovered that risk a claimant falling below adequate income levels.

For further information/ clarification, please contact:

FLAC: Noeline Blackwell 086-8139089
FLAC: Yvonne O'Sullivan 01-8873626
NCLMC: Moya de Paor 01-8477804
NCLMC: Jane O'Sullivan 01-8477804

Introduction and general comment.

The Social Welfare and Pensions Bill 2014 was published on 28 May 2014 and debate on this difficult to read piece of legislation commenced on 5 June 2014, with a hurried passage expected through the Oireachtas. The first two recommendations in this report relates to the manner in which social welfare bills are presented and quickly pushed through the Houses of the Oireachtas. Social Welfare Law affects the lives and basic living standards of many of the most vulnerable people in the State and yet, the legislation is usually fast tracked through the houses of the Oireachtas, with little time for discussion, leaving politicians and the public without a comprehensive understanding of the implications of the proposed changes. Thus the underlying democratic principles of participation and transparency are undermined in the process.

This Bill proposes to amend the Social Welfare Consolidation Act 2005, an Act which has been amended many times, making the reading of the Social Welfare and Pensions Bill 2014 and the general legislation both challenging and almost inaccessible to those who wish, and must, make contributions if there is to be informed debate. The language in this bill is technical and confusing making it awkward to read and to understand.

Social welfare payments benefit 1.5million people directly and another 750,000 indirectly therefore TDs and Senators, civil society and the interested public should have the primary legislation at their disposal when a new bill is introduced.

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Recommendation 2: Following the enactment of this legislation, the Department of Social Protection should seek prioritisation of the consolidation of social welfare legislation under the Law Reform Commission's programme of Statute Law Restatement, consolidating all amendments into a single text.

This submission now addresses three main issues of concern in the proposed legislation. They are changes to Family Income Supplement, changes to the Habitual Residence Condition and provisions for collection of overpayments.

Section 8 Family Income Supplement-meaning of family

Section 8(4)(b)(i) and 8(4)(b)(ii) propose to amend Section 227 of the Social Welfare Consolidation Act 2005. Currently, Family Income Supplement is paid to low paid workers with one or more children where they are living with the child(ren), or financially supporting the child(ren). It is proposed that the legislation be amended whereby a claimant who does not reside with his/her children will have to establish that they are:

(i) **Wholly or mainly** maintaining their spouse or civil partner, as the case may be, **and**
(ii) Contributing substantially towards the maintenance of a child who is normally a member of the same household as that spouse or civil partner.

This amendment unfairly distinguishes between families. Namely, parents who live apart, but were previously a couple based on marriage or civil partnership, will both potentially be able to access the payment, albeit with a much higher maintenance burden. It is also important to state that only one FIS payment can be made to a household at any time. However in circumstances where a parent has no legal obligation to maintain the other, only one parent can potentially access this income support.

All families should be treated equally, and if a separated parent is working, and is maintaining the child(ren) sufficiently, then adequate income support should be provided by the State to avoid discrimination and to serve the best interests of the child(ren).

Recommendation 3: In section 8, subsection 4 (i) should be removed and revised to ensure all families in need of an adequate income to support their children be treated equally in terms of eligibility for Family Income Supplement regardless of the relationship status of the parents.

Section 10 Habitual Residence Condition

Section 10 (d) and (e)

As we understand it, the proposed new subsection (1) of Section 246 of the 2005 Act is to clarify the Habitual Residence Condition, and in particular to distinguish the distinct protections afforded to EU workers and their families. Unfortunately, subsections [d] and [e] undermine that intent and present as confusing and superfluous to the meaning of the provision. In order to explain this, we take each of the subsections in turn.

Subsection 1(a) states – at unnecessary length in our view – that a person must be and must remain habitually resident to avail of payments where the habitual residence requirement exists.

Subsection 1(b) confirms that where the person is a worker or self-employed person within the meaning of EU Law, they are deemed to be habitually resident.

Subsection 1(c) extends this EU protection to the family members of the worker or self-employed person.

In EU legislation and case law, it is clear that in general, where a person is a worker or self-employed for more than 12 months and then becomes unemployed but is a registered job-seeker , they retain their worker status in the host state. Those with less than 12 months' work before unemployment will retain that status for at least 6 months. It seems clear that if the facts do not support a person's claim that they are a worker their claim will automatically fall to be decided in accordance with the relevant HRC provisions as set out in subsection [4] of the Act.

It follows that the provisions of ss 1(d) and ss 1(e) are unnecessary and opaque in their construction, which in turn could result in misinterpretation by decision makers. The provisions appear to refer only to those who have less than 12 months' work in the host country and the members of their family but this is not clearly stated as they refer to ss1(b) which speaks of all workers. In our contention, these subsections add no value to what has been previously stated and mean that poor decisions could be made.

It may be that subsections (d) and (e) are inserted to meet the wish of the Department to review the habitual residence of a person in receipt of a payment. This seems to be one purpose of the section according to the Explanatory Memorandum for s.10. However, a right of review already exists where circumstances change and it will be important to get confirmation that those in receipt of payments will not be subject to oppressive levels of review.

Recommendation 4: That the proposed new section 246(1) (d) and 246(1) (e) as proposed in section 10 of the Bill be deleted.

The proposal to delete existing Section 246(1) of the Social Welfare and Consolidation Act 2005 in order to remove references to the 'two year rule' is long overdue and is welcomed by FLAC and NCLMC. Despite being contrary to the provisions of EU law, this rule remained on the statute book which in turn led to errors in decision making. NCLMC and FLAC would hope to see an improvement in the standard of decision making around the application of the habitual residence condition for social welfare payments as a result of its removal.

Section 14. Power to recover overpayments by attachment of certain lump sums.

This permits attachment of payments including lump sums due under the Redundancy Payments Acts and Protection of Employees Insolvency Acts, apparently without the consent of the claimant. This has to be seen in the context of the reality that redundancy payments are a resource to a household to

compensate for loss of employment and income and this proposal will allow recovery from a person at a time when a household is at its most vulnerable following the loss of a job.

Our concern relates to the lack of any adequate objective and fair systems to ensure that claimants and their families are not subjected to hardship in the calculation of what should be taken. This concern is exacerbated by current practice in the recovery of overpayments under Section 13 of the 2012 Act. This permits the Department to recover historic overpayments from claimants up to 15% of their basic social welfare payment – and even more than 15% if the claimant agrees to it. It is our experience that in many, many cases, and most of those of which we are aware, the Department always looks to recover the full 15% without any evidence that the capacity of the person to pay has been adequately taken into account. Claimants are not being provided with the original decision regarding the overpayment nor is there any right of appeal against the debt collection mechanism.

Employees have a statutory right to a redundancy lump sum under the Redundancy Payments Acts which involves a very arduous process to secure it. In practice where employers do not pay the redundancy payment an employee is obliged to take a case to the EAT to get a determination to prove the fact of redundancy. This can take up to 2 years. Once a determination has issued an application is made to the Minister for payment. However this now can be wiped out by an alleged overpayment which a claimant has not had the opportunity to challenge. Claimant's rights of fair procedures must be safeguarded and provided for in Section 14. This section is essentially unfair and has the effect of defeating a statutory right to a redundancy payment.

The existing provision allowing deduction of 15% offends the basic principle that a person should have sufficient funds to meet their subsistence needs. In that case it is more important than ever that fair process be employed and that capacity to pay be thoroughly assessed.

Recommendation 5: Section 14 should be amended to include detailed procedures to permit due process and fair procedures to a person who might be subject to these powers before any payment is recovered in this way. If this is not possible immediately, then this section should not be commenced until such processes, including right of appeal, are in place. No sums should ever be recovered that risk a claimant falling below adequate income levels.