

Submission on the Social Welfare and Pensions (Miscellaneous Provisions) Bill 2013

FLAC

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About FLAC

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

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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.

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FLAC (Free Legal Advice Centres) is concerned that the proposed amendments to the Social Welfare and Pensions (Miscellaneous Provisions) Bill 2013, introduced by the Minister for Social Protection at Committee stage, may have serious consequences for people who have allegedly been overpaid by the Department of Social Protection.

Section 15 of the Social Welfare and Pensions (Miscellaneous Provisions) Bill 2013, as passed by Dáil Éireann, would amend Part 11 of the Social Welfare (Consolidation) Act 2005 - the Principal Act - by inserting a significant number of amendments relating to Overpayments, Repayments, Suspension of Payment, etc. These amendments will invest far-reaching powers of overpayment recovery in the Minister directly although she can then delegate these functions to one of her officers.¹ Through these changes she will be able to recover an amount of money owed to the Department due to an overpayment, directly from a person's employer, from a bank account or from a "relevant person" or in other words someone who owes a debt to the overpaid person without any requirement for a court order.

There are similarities between the new powers and the powers given to the Revenue to enforce the Local Property Tax. However, it appears that these powers given to the Minister for Social Protection are far more extensive, in particular the power to attach the property of others held in joint bank accounts. The mechanism put in place to collect the Local Property Tax at least puts in place a coherent recovery structure which includes a right of appeal.

Overpayments

An overpayment is described by the Department of Social Protection as "any Social Welfare assistance or benefit payment which the person who received the amount was not entitled to receive". There are many circumstances which can lead to a person incurring an overpayment. The Department of Social Protection may review a claim, and new facts or evidence may come to light that show a person was not entitled to a payment for a particular period. These decisions are retrospective in their application and can lead to significant amounts being owed to the Department of Social Protection. In many cases there may not be any wilful concealment of fact on the part of the claimant. Additionally, administrative delays on the part of the Department of Social Protection can lead to protracted claim reviews which inadvertently result in a person incurring an overpayment.

Decisions regarding the recovery of monies from a social welfare recipient, or former recipient, are made by Authorised Officers of the Department, not Deciding Officers. Consequently, a person cannot appeal an Authorised Officer's decision to the Social Welfare Appeals Office. A person must challenge the initial decision by the Deciding Officer in order to advance any arguments regarding the amount owed or relevant mitigating factors.

¹ Section 343J(7) of [Social Welfare and Pensions \(Miscellaneous Provisions\) Bill 2013](#).

Often a person who receives a notification about an overpayment will not query or appeal the decision on the amount of an overpayment and will not seek advice from organisations or advocates familiar with the social welfare system. Also an overpaid person may agree or feel pressured to agree to a deduction which will leave them in an insecure financial situation without receiving any appropriate legal or financial advice.

An overpayment of a social welfare payment can also occur through fraud on the part of the applicant. Section 337 of the Principal Act specifically allows for prosecution of that person, where appropriate, under s.32 of the Larceny Act 1916 or Part 2 of the Criminal Justice (Theft and Fraud) Offences Act 2001.

Proposed Amendments to Recover Overpayments

Under the proposed legislation a person who is informed that he or she owes the Department money due to an alleged overpayment under ss. 302, 319 or 325 of the Principal Act, will be required to make arrangements to repay the amount owed. The Minister must first take into account the circumstances of the overpaid person including

- (a) his or her personal and family circumstances;*
- (b) any statutory deductions that may affect his or her earnings or income;*
- (c) the amount of the overpayment;*
- (d) the period of time for which the overpayment is outstanding;*
- (e) the amount of net income or earnings of the overpaid person;*
- (f) the employment circumstances of the overpaid person;*
- (g) the amount of debt due to the overpaid person.²*

There is no reference to whether any weight is given to a person's financial circumstances, for example whether he or she is over-indebted.

Lack of Fair and Transparent Process

Before a notice of attachment is made, the Minister must notify the person of her intention to issue such a notice unless the overpaid person makes arrangements to repay the debt or makes representations to the Minister for her consideration within fourteen days. The Bill states that the Minister "shall give due consideration to any response received from the overpaid person... before he or she decides to give a notice" but the process for considering these matters is not outlined. Instead it would seem that this decision is entirely at the discretion of the Minister as there is no fair and

² See s.343C of [Social Welfare and Pensions \(Miscellaneous Provisions\) Bill 2013](#).

transparent procedure in place for examining these issues. Furthermore, there would not appear to be any right of appeal when a final decision is made.

In relation to making representations, the legislation does not provide for the voice of an interested party to be heard or considered by the Minister prior to her decision. An interested party could include a joint account holder or former partner who is in receipt of maintenance by mutual agreement or through an informal arrangement. These people may have a legitimate interest in the overpaid person's financial arrangements as they could have a detrimental impact on their income or savings.

Rate of Deduction

In relation to s.343E the Minister can seek to recover money from a person's net income, directly from his or her employer through periodical deductions. The Minister will then determine the rate of these deductions taking into account the circumstances of the person. This cannot exceed a rate of more than 15 per cent of the overpaid person's net weekly income without his or her written consent, or exceed an amount that would cause a person's income to drop below the threshold for eligibility for Supplementary Welfare Allowance (SWA) which is standard basic minimum income set by the State itself. Therefore, the Minister has discretionary powers to determine which of these two rates she will apply in relation to these provisions. However, if these proposed measures are in fact introduced, FLAC contends that the rate determined should be the lesser amount of the two.

In relation to attachment of money in a financial institution (also considered a "relevant person"), under s.343F of the Bill a notice can be sent to the bank or institution in relation to an overpaid person's savings account which can be targeted by the Department to recover the overpayment. In relation to joint accounts the Department will consider that the money in the account is held equally unless the overpaid person can provide evidence to the financial institution that the co-signee owns a greater percentage of the deposit. This evidence must be produced within ten days of the notice by the institution which is much too short a timeframe where external evidence may have to be gathered.

The proposed legislation also requires the bank or institution to inform the Minister when any money is received into the overpaid person's account and subsequently pay it directly to the Minister. Therefore, if an overpaid person receives his or her salary into a bank account, or receives regular instalments from a client or customer in the case of a contractor or self-employed person, this money can be paid to the Minister without consent. Where the amount is "equal to or less than the relevant amount" [the debt owed] the entire amount can be transferred to the Minister. This may leave the person without any money left from the transaction providing it would not cause the person to become entitled to claim Supplementary Welfare Allowance.³

³ Section 343F(4) of [Social Welfare and Pensions \(Miscellaneous Provisions\) Bill 2013](#).

Privacy Concerns

FLAC is concerned that the proposed amendments will cause an unacceptable interference in a person's right to privacy. The amendments allow the Minister to contact an employer, contractor or holder of a joint account to inform them of the debt that a person owes to the Department. This action on the part of the Minister may harm a person's reputation and must therefore be regarded as a questionable encroachment on a person's right to privacy; particularly if the overpayment is due to an error or oversight on the part of the Department. The potential effect of these measures could result in self-employed contractors losing work through suspicion that they have defrauded the social welfare system. New employees may also have their reputation called into question by their employer where an order is received by the Department which does not specify the circumstances under which the overpayment occurred. There would not appear to be any safeguards in place to ensure employment protection. Also, in terms of joint accounts, often the children of elderly or frail parents may hold a joint account with their parents therefore the notification to all joint account holders may cause anxiety or stress.

There is no obligation on the Minister to "maintain secrecy"; on the contrary, the proposed provisions state that, "any other restriction on the disclosure of information by the Minister shall not apply in relation to information contained in a notice of attachment."⁴ It is therefore unclear in what form the Minister could release or publish this information to the detriment of the overpaid person.

Conclusion

While the Minister and the Department of Social Protection are entitled to recover overpayments, this must be done in a fair and proportionate way. Essentially through these changes, the Minister is seeking to recover a debt which the Department states a person owes, without proper procedures and oversight in place, or any external scrutiny including an independent right of appeal.

Recommendations:

The legislation should recognise and specify that overpayments can occur due to an error on the part of the Department and that this should be made clear and distinguished in any attachment order which is not caused by proven fraudulent behaviour on the part of the overpaid person.

The list contained in s.343C should be amended to include a reference to the financial circumstances of the overpaid person. Any other debts which the overpaid person owes should also be taken into account.

⁴ Section 343(J)(5) of [Social Welfare and Pensions \(Miscellaneous Provisions\) Bill 2013](#).

Section 343D(1) should allow for an interested party to intervene and make separate representations to the Minister where he or she can demonstrate that the notice of attachment against the overpaid person could have a negative impact on his or her circumstances.

Section 343D(2) should set out a fair and transparent procedure for examination by the Minister of any representations made by an overpaid person. This procedure should ensure that due process is followed and the rules of natural justice are applied, including the right of the person to be heard.

Section 343E should conclude with the phrase “whichever is the lesser amount”.

The time limits referred to throughout the proposed amendments should be extended or at the very least should state that the number of days specified are “working days”.