

Pre-budget submission 2013

A submission by FLAC to the Minister for Social Protection

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.

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>

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

FLAC, the Free Legal Advice Centres, is a human rights organisation which exists to promote equal access to justice for all. One of FLAC's key aims is to achieve greater fairness, consistency and transparency in the administration of the social welfare system. FLAC campaigns for social welfare law reform to improve the situation of different groups impacted by particular social welfare policies and to ensure that fundamental human rights are put at the heart of the welfare system.

It is in this capacity that FLAC makes this pre-Budget submission which it hopes will inform the debate about measures being considered by the Cabinet.

Respecting Rights in a Recession: Austerity measures and the Budget

While FLAC is aware of the State's financial commitments to the Troika, we would also like to take the opportunity to highlight that the State's human rights commitments are still binding during times of deep recession. In fact, during such hard financial times people are even more in need of social assistance and a functioning, effective social welfare system. While the argument that adhering to these commitments is unreasonable or impossible given the current strain on resources, it is imperative that people are not allowed to fall into destitution or that their rights are infringed due to financial concerns. At a time when more people are accessing the social welfare system, it seems unfair that the budget for this assistance will be reduced even further.

In June 2012, the Parliamentary Assembly of the Council of Europe (PACE) raised concerns about the impact of austerity measures throughout Europe:

... "budgetary cuts in social expenditure risk further deepening the crisis and undermining social rights." It also pointed out that the implementation of austerity measures is often linked to bodies "whose character raises questions of democratic legitimisation", such as the troika of the IMF, the European Commission and the ECB.¹

In its 16-page report, *Austerity measures – a danger for democracy and human rights*, the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly clearly stated its position on austerity measures versus increasing the tax base:

From an economic point of view, cuts in government expenditure, social safety nets or wages are not effective measures against the current crisis, given that they especially affect lower income groups and further undermine their purchasing power and self-subsistence. Instead of trying to reach balanced budgets through public expenditure cuts, there is a need to address the wealthier social groups by increasing their taxes and introducing new ones. Such measures only affect private expenditure slightly and thus have higher "multiplier effects".²

¹ News from the summer session of the Parliamentary Assembly of the Council of Europe 25-29 June 2012: http://www.assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=7789.

² Full report available online at: <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=18745&Language=EN>.

Also, the UN Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda, along with her assistant Carly Nyst, issued a publication in 2012 entitled *The Human Rights Approach to Social Protection* in which she recommends that

States must ensure, at the very least, minimum essential levels of non-contributory social protection – not as a policy option, but rather as a legal obligation under international human rights law.³

The Rapporteur recently briefed the International Labour Organisation (ILO) encouraging it to adopt a human rights approach to provide a basic minimum social protection otherwise known as a ‘social protection floor’.⁴ She has also described the human rights approach to social protection as recognising that States have international human rights obligations to guarantee the right to social security and this can be achieved

By transferring resources to those living in extreme poverty and allowing beneficiaries to generate income, protect their assets and accumulate human capital, social protection programmes have the potential to contribute to considerably improving standards of living, including access to food, clothing, housing, and water and sanitation; facilitating access to education and health services; stimulating the economy by generating aggregate demand and improving the well-being of the labour force; and improving social cohesion and community ownership of development and poverty eradication initiatives.⁵

In her briefing to the ILO, Ms Sepúlveda stated:

The adoption of such an approach not only responds to international obligations and commitments but also improves the effectiveness of social security systems in reducing poverty, inequality and social exclusion and aligns them with the holistic perspective required to tackle the various dimensions of poverty. Those most in need of assistance are more likely to be reached by a human rights-based social protection programme, and the assistance they receive is more likely to be appropriate and effective in addressing their deprivations.⁶

The new Council of Europe Commissioner for Human Rights, Nils Muižnieks, has also stressed the importance of National Human Rights Structures (NHRS) which include bodies such as Human Rights Commissions as well as the Ombudsman. He emphasises the need to refer to these bodies when making budgetary decisions.

It is therefore necessary that Governments, particularly in countries undergoing serious austerity, involve NHRSs at all stages of the budget process. They can provide expert advice on the groups that

³ See Sepúlveda and Nyst, *Human Rights Approach to Social Protection*, available online at:

<http://www.ohchr.org/Documents/Issues/EPoverty/HumanRightsApproachToSocialProtection.pdf>. This publication was published by the Ministry of Foreign Affairs of Finland.

⁴ For more information on the ‘social protection floor initiative see the 2012 factsheet developed by the Global Extension of Social Security available online at: <http://www.social-protection.org/gimi/gess/RessShowRessource.do?ressourceId=30430>.

⁵ UN Special Rapporteur on Extreme Poverty and Human Rights - Background Note: *The Role of Comprehensive Rights-Based Social Protection in Facilitating Equitable and Sustainable Development* available online at: <http://www.ohchr.org/Documents/HRBodies/SP/BNComprehensiveRightsSustainableDevelopment.pdf>.

⁶ International Labour Conference, 101st Session 2012 Report IV (2B) Social protection floors for social justice and a fair globalization - *Promotion of and respect for rights and dignity: a briefing note* available online at: http://www.ohchr.org/Documents/Issues/EPoverty/briefSPILO_Recommendation101.pdf.

need the most protection, on the impact of various policy measures and on the more general human rights consequences of the crisis, which shows no signs of abating in many European countries.⁷

The Combat Poverty Agency previously played a critical role in such policy decisions and a gap remains as it has not been adequately replaced.

Finally, and very importantly, FLAC believes that all budgetary provisions should be subject to poverty impact assessment. These assessments, such as the templates offered by the Social Inclusion Unit of the Department for Social Protection, would demonstrate the State's commitment to protect those living in poverty. The Special Rapporteur on Extreme Poverty and Human Rights has stressed the importance of such mechanisms:

Human rights obligations relate not only to the final outcome of social protection programmes, but also to the process through which such programmes are implemented. Therefore, Governments are obliged not only to adopt social protection programmes, but to design, implement, monitor and evaluate such programmes in accordance with human rights standards. This includes mainstreaming principles of equality and non-discrimination (including accessibility, acceptability, affordability and the incorporation of the gender perspective), participation, transparency and accountability into social protection systems.⁸

Without such an assessment of how its proposals affect the lives of people who are already hard-pressed and often vulnerable, the government cannot state with any degree of credibility that it has taken into account all necessary information in setting its budget.

Recommendations:

- 1. The Department of Social Protection should ensure that there is a 'social protection floor' in place to ensure that every person can live a life of dignity free of financial hardship.**
- 2. The Government should refer to National Human Rights Structures including the Irish Human Rights Commission, the Equality Authority and the Ombudsman for advice on the budgetary impact of its policies and austerity measures on groups susceptible to poverty.**
- 3. The Department of Social Protection should carry out Poverty Impact Assessments on all proposed budgetary measures and make these publically available on its website.**

Social Welfare administration and systems

In 2011, FLAC raised the issue of maladministration by the Department of Social Protection at the Pre-Budget 2012 forum. Our concerns centre on unclear access to the social welfare system. The Ombudsman's annual report for 2011 indicated that almost a third of all complaints about public bodies related to the Department of

⁷ Comment by Nils Muižnieks, Council of Europe Commissioner for Human Rights, published on 31 May 2012 - *National Human Rights Structures can help mitigate the effects of austerity measures* available online at: <http://humanrightscomment.org/2012/05/31/nhrs/>.

⁸ UN Special Rapporteur on Extreme Poverty and Human Rights - Background Note: *The Role of Comprehensive Rights-Based Social Protection in Facilitating Equitable and Sustainable Development* available online at: <http://www.ohchr.org/Documents/HRBodies/SP/BNComprehensiveRightsSustainableDevelopment.pdf>.

Social Protection.⁹ At the launch of the report, Ombudsman Emily O'Reilly criticised the use of discretion to restrict access to welfare supports and stated that “[p]ublic bodies may have less money and fewer human resources, but basic standards cannot be sacrificed”.¹⁰

In response to queries we have received, FLAC has developed three factsheets on various aspects of the social welfare system, both to highlight possible improvements in the administration of the system and to inform people of their rights and entitlements. These guides provide information on making a social welfare application, making a social welfare appeal and on the Habitual Residence Condition.¹¹ What we are hearing is that claimants sometimes receive poor information around their entitlements or on the practical steps involved in efficiently processing a claim. This can lead to misunderstandings, especially when people are not familiar with the language and terminology used in the social welfare system.

Such misunderstandings may result in unnecessary appeals around payments, which in turn uses up valuable resources. Statistics issued by the Social Welfare Appeals Office consistently demonstrate that many successful appeals are actually sanctioned by the official who had originally refused the payment. This suggests that steps should and could be taken to improve first-instance decision-making on social welfare applications.

Recommendations:

- 4. Claim forms should be reviewed and simplified so that the relevant information is provided by the claimant at the outset.**
- 5. Training should be carried out to ensure that all frontline staff are aware of the Department’s own guidelines on natural justice and decision-making and their obligations under the European Convention on Human Rights Act 2003.**
- 6. There should be a greater emphasis on better first-instance decision-making in the social welfare system, to reduce the number of reviews and appeals dealt with by the Appeals Office. This would also reduce the demand on resources and lead to quicker and more efficient processing of appeals.**

Social Welfare Appeals Office

FLAC has completed a significant piece of analysis on the social welfare appeals system to determine whether it complies with our domestic and international human rights obligations. This report will be published in October 2012.

The current delays in the appeals procedure are adding to the pressure on the overall social welfare system. As outlined above, in many cases when an appeal is referred to the initial decision-maker by the Appeals Office, he or she reviews it at that point. However, by this time resources have already been used up in registering the appeal and contacting the relevant payment section. In more than 6000 cases (18 per cent of the total finalised

⁹ Available online at: <http://www.ombudsman.gov.ie/en/Reports/AnnualReports/AnnualReport2011/index.html>.

¹⁰ See Irish Times, *Surge in complaints over public services*, 27 June 2012 available online at: <http://www.irishtimes.com/newspaper/ireland/2012/0627/1224318805344.html>.

¹¹ These FLACsheets are all available online at: <http://www.flac.ie/publications/category/legalinformation/>.

appeals) the initial Deciding Officer revised the decision after an appeal was lodged.¹² By comparison, no statistics are available on the number of successful reviews when the claimant asks for a review before lodging an appeal so it is not known if there is a difference in the success rate depending on who asks for the review: whether it is the claimant or an Appeals Officer. However, what is clear is that ensuring better first-instance decision-making would reduce the workload of the Appeals Office.

FLAC also has concerns about the transparency of the process and whether it affords equality of arms to both the appellant and the Department of Social Protection. The fact that legal aid is not available to appellants making an appeal means that any justice which they may have access to through the Social Welfare Appeals Office is limited and is restricted to the help which they may obtain from an advocacy organisation or what they can achieve themselves. This does not lead to a system in which a person can have complete faith. Providing assistance to people in this situation would allow a person to have access to a system which is efficient and fair and it could also assist Appeals Officers in their deliberations where a case was presented in a structured way.

FLAC welcomes the inclusion of more case studies in the 2010 and 2011 annual reports of the Social Welfare Appeals Office. However, the 19 cases published in 2010 and 20 cases in 2011, reflect a tiny fragment of the tens of thousands of cases which the Appeals Office has dealt with in the past two years alone. The Chief Appeals Officer herself has recognised the value of maintaining a database for training Appeals Officers¹³ but FLAC believes that this database would serve a greater purpose if it was made accessible to appellants and their representatives as it would help to ensure consistency and promote transparency and fairness in the operation of the system.

Recommendations:

- 7. *The Social Welfare Appeals Office should publish important decisions and make them accessible to appellants and their representatives with the aim of greater fairness, transparency and consistency in decision-making on appeals.***

Mortgage Arrears and Mortgage Interest Supplement

FLAC is concerned about the changes to Mortgage Interest Supplement (MIS) which came into effect in June 2012. The changes to MIS restrict the payment to those who have entered into an alternative repayment arrangement and have complied with such an arrangement for at least 12 months. However, FLAC is concerned that this may result in some mortgages which would otherwise be manageable in the short-term with some state assistance now becoming unsustainable over that period. We understand that your Department's rationale for the change is to ensure that lenders engage with borrowers, but we feel that the measures are disproportionate. The restriction of MIS places further stress on the borrower without putting any legal requirements in place to make lenders enter into fair and reasonable alternative repayment arrangements.

¹² The Social Welfare Appeals Office 2011 Annual Report available online at: <http://www.socialwelfareappeals.ie/pubs/annreps/annrep11.pdf>.

¹³ Presentation by the Chief Appeals Officer to the Joint Oireachtas Committee on Jobs and Social Protection available online at: <http://debates.oireachtas.ie/FAJ/2012/03/21/00003.asp>.

The timeframe outlined in legislation is unrealistic, as the procedures for notifying the lender and availing of the Mortgage Arrears Resolution Process will inevitably take some time to process. While the legislation refers to a 12-month period, it is more likely that a person may have to wait up to 18 months or more to be allowed to apply for the payment. Given that rescheduled repayment arrangements are usually granted for a period less than 12 months, this is not reflected in the legislation.

Even after this period, there is no guarantee that a borrower will be granted the payment as he or she will still have to meet the eligibility criteria. An unemployed person whose spouse or partner is working for 30 hours or more will not be entitled to the payment. Also a home-owner will not be allowed to put his or her house up for sale where he or she is claiming MIS. These issues were examined by both the Cooney and the Keane groups and recommendations were made for other changes which remain unimplemented. In this context and in light of the pending personal insolvency legislation, FLAC suggests that this step is premature.

Recommendation:

- 8. The statutory instrument giving effect to the changes to Mortgage Interest Supplement should be annulled until a complete suite of measures is available to tackle the mortgage arrears problem.**

Rent Supplement

Following the changes to rent supplement in Budget 2012 there are concerns that the rent limits do not fairly reflect the current rental market and people are finding it difficult to find suitable accommodation within these limits. The basis for the changes to the supplement to bring rents in line with current market values may result in a negative impact on the Department's own client, the tenant. The Department does not exert any pressure directly on landlords and instead tenants have to renegotiate rents or alternatively move from their rented homes if the landlord does not agree to lower the rent. While a landlord may find another tenant to replace his or her existing tenant, the current tenant is inconvenienced and may not find an alternative place within the limits. Since there is no legal requirement for landlords to reduce rents it is unclear that this initiative will work in the way intended by the Department of Social Protection.

Recommendation:

- 9. The maximum rent limits should not be lowered further without consultation with tenants and landlords. The Department of Social Protection should engage directly with landlords to ensure that rent limits are fair and will be reduced where necessary.**

Habitual Residence Condition (HRC)

The application of the Habitual Residence Condition to all means-tested payments and Child Benefit continues to be an issue of concern. The Condition is of itself complex and requires a decision-maker to assess a number of different criteria to determine habitual residence. The way in which the legislation has been updated and consolidated adds to the confusion as there is still reference to a period of "two years" which at times still continues to be applied.

Magdalena Sepúlveda, the UN Special Rapporteur on Extreme Poverty and Human Rights, noted that the Condition was impacting on particular groups and in her follow-up report on Ireland presented to the UN Human Rights Council in June 2012, stating that she

...remains concerned about the application of the habitual residency condition to social protection benefits. This requirement can pose a significant threat to the access to essential services and thus enjoyment of human rights by members of vulnerable groups, particularly people experiencing homelessness, Travellers, asylum-seekers, migrant workers and returning Irish migrants. The Special Rapporteur encourages the Government to review the impact of the condition as a matter of priority.

Prior to the general election in 2011 the Minister's colleague Roisin Shortall TD, then Labour spokesperson on social protection, signed a pledge to review the application of the Habitual Residence Condition. To date this has not yet been done. However, FLAC welcomes the establishment of the Migrant Consultative Forum following the launch of the *Name or Number* report by Crosscare, Nasc and Doras Luimni where social welfare issues affecting migrants can be raised. The Condition continues to cause hardship for some of the groups named by the Special Rapporteur but also victims of domestic violence, members of the Roma community and undocumented migrants.

Recommendations:

- 10. A review of the Habitual Residence Condition should be carried out with particular reference to its impact on vulnerable groups.**
- 11. The reference to two years should be removed from primary legislation to avoid further confusion for front line staff and the public in particular.**

Child Benefit

Following calls by the International Monetary Fund (IMF) to revise the 'universal' payment of Child Benefit, FLAC is concerned that this payment, which is targeted at helping children, will be targeted in the upcoming budget. Since the introduction of the Habitual Residence Condition in 2004, this payment is actually no longer universally applied, as the children of parents who are found not to be habitually resident cannot avail of it. This has led to an inequality between children and FLAC is concerned that any further measures to reduce the wide-ranging nature of the payment would have a further negative impact.

The UN Convention on the Rights of the Child requires the State to ensure that there is no discrimination against any child based on his or her parent or parents' status (Article 2), that the best interests of the child must be considered in any decisions taken regarding the child (Article 3) and that there is a recognised right to social security for children (Article 26). Any decision made about the availability of Child Benefit must take these considerations into account.

Recommendation:

- 12. Child Benefit should not be limited further and the rights of the child enshrined in the UN Convention on the Rights of the Child should be part of any revision of the payment.**