



Joint submission by FLAC and Community Law & Mediation on Social Welfare Bill 2016

November 2016

About FLAC

FLAC (Free Legal Advice Centres) is a human rights organisation which exists to promote equal access to justice for all.

FLAC Policy

In our work, we identify and make policy proposals on how the law excludes marginalised and disadvantaged people, principally around social welfare law, personal debt & credit law and civil legal aid. We advance the use of law in the public interest and we co-ordinate and support the delivery of basic legal information and advice to the public for free and in confidence. We also engage in strategic litigation.

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). 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/law-reform/submissions.245.html>

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Overview of Recommendations

Recommendation 1: Ensure that the Houses of the Oireachtas set aside adequate time for consideration of the Social Welfare Bill 2016.

Recommendation 2: Explain the necessity for the inclusion of Section 12 in the Social Welfare Bill 2016.

Recommendation 3: Amend Schedule 2 of the Social Welfare Bill 2016 to provide for equal payments among all those receiving Jobseeker's Allowance.

Recommendation 4: Amend the Social Welfare Bill 2016 to provide for the deletion of Section 11 of the Social Welfare and Pensions Act 2013.

Recommendation 5: Amend the Social Welfare Bill 2016 to place the Social Welfare Appeals Office on a statutorily independent footing.

Recommendation 6: Amend the Social Welfare Bill 2016 to provide a statutory underpinning for the Direct Provision allowance.

Recommendation 7: Pending further reform of the system, increase the weekly allowance for asylum seekers living in Direct Provision to €38.74 for adults and to €29.80 for children in line with the recommendations of the McMahon report.

Introduction

The Social Welfare Bill 2016, published on 4th November 2016, gives legislative effect to the social welfare measures announced in Budget 2017. It also deals with a number of other unrelated matters. FLAC and CLM's joint submission addresses a number of relevant issues including the general manner in which social welfare bills are presented in the Houses of the Oireachtas as well as specific parts of the Bill itself. FLAC and CLM also highlight a number of matters which are, regrettably, not addressed in the Bill.

On the whole, FLAC and CLM welcome the publication of the Social Welfare Bill 2016. The Bill contains a number of positive aspects including an increase in the income disregards for those in receipt of the One-Parent Family Payment, greater social welfare supports for self-employed people and a €5 rise in almost all weekly social welfare payments. Nevertheless, some issues of concern exist and are explored in more detail below.

General comments

FLAC and CLM share the view that policy-making should be open, accessible, inclusive and wide-ranging. The input of civil society and other relevant stakeholders, particularly those who are directly affected by policy decisions, provides crucial value to the political decision-making process, enhancing the quality, understanding and longer-term application of the policy initiative. It is therefore important that discussions not be limited as this will lead to lack of proper scrutiny of legislation and the curtailment of necessary debate and participation.

In recent years little time has been provided to review and debate the potential significance of amendments to the Social Welfare Consolidation Act 2005 in both the Dáil and the Seanad. As a result, the underlying democratic principles of participation and transparency are undermined, and there is an increased risk that vulnerable and marginalised groups will be adversely affected as legislation, in particular social welfare legislation which affects the lives and basic living standards of many of the most vulnerable people in the State, is not properly scrutinised. In this context, the Oireachtas must set aside adequate time for consideration of the Social Welfare Bill 2016.

<p>Recommendation 1: Ensure that the Houses of the Oireachtas set aside adequate time for consideration of the Social Welfare Bill 2016.</p>

Specific comments

- **Section 12**

Section 12 of the Bill proposes to amend section 220 of the Social Welfare (Consolidated) Act 2005 and insert the following section:

“Regulations

220A. Regulations may provide for requiring an employer to give such information to the Minister as he or she may require for the purposes of determining entitlement to child benefit.”

The Explanatory Memorandum to the Social Welfare Bill 2016 states that, “[i]n order to facilitate reviews of entitlement where Child Benefit is payable in accordance with EU Regulations, Section 12 provides for an amendment to require employers to provide information in relation to Child Benefit claims”. In effect, Section 12 of the Bill proposes to provide wide powers for the Minister for Social Protection to enact regulations to compel all employers to provide information on employees for the purpose of determining entitlement to Child Benefit claims.

Child Benefit is classified as a family benefit for the purposes of EU regulations. Accordingly, EU nationals who come to work in Ireland but whose families reside in another EU Member State have an entitlement to family benefits in Ireland under EU regulations.¹ This means that EU migrants can access Child Benefit payments in Ireland, even if their children live in another EU Member State.²

FLAC and CLM have a number of concerns with regard to this proposed provision and how it will operate in practice. In particular, we are unclear as to the necessity for such a provision.

First, Section 12 as presently drafted does not fulfil its stated aim of applying solely to Child Benefit claims payable in accordance with EU Regulations.³ The proposed wording is extremely broad and goes beyond its stated intended scope to relate to any Child Benefit claims (however, given that the employment status of an Irish parent is immaterial to a Child Benefit claim, it is likely that the Department will only contact employers for information regarding non-Irish nationals if the provision is maintained in its current form).

Secondly, the need for such a measure is questionable in light of the responsibility on all social welfare applicants to prove to the Department that they qualify for the payment they are applying for, including Child Benefit payments payable in accordance with EU Regulations. Therefore, it is not clear why the Department is seeking to place a legal obligation on employers to provide information regarding Child Benefit claims for EU migrant workers when the onus is already on those workers to establish their eligibility for the payment.

Thirdly, information confirming the employment status of an EU migrant worker in Ireland will often be available to the Department of Social Protection through social insurance contributions records. To be considered an EU migrant worker, a person must have been in genuine employment since coming to Ireland. Casual work does not count. Where an EU migrant worker is engaged in genuine employment in Ireland, they and their employer will be making social insurance contributions to the Department of Social Protection. Thus, the need for this measure is unclear.

Finally, privacy concerns also exist in relation to this proposal. By requiring employers to provide information in respect of Child Benefit claims, they may become privy to personal information

¹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 provides that “[a] person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State.”

² For more information see the Department of Social Protection’s “Operational Guidelines on Child Benefit”, available at <http://www.welfare.ie/en/Pages/Child-Benefit.aspx> [accessed 07 November 2016]. See also the Department of Social Protection’s Info Sheet on Family Benefits, available at <http://www.welfare.ie/en/downloads/EUGuidelinePart9.pdf> [accessed 07 November 2016].

³ See the Social Welfare Bill: Explanatory Memorandum, available at <http://www.oireachtas.ie/viewdoc.asp?DocID=33807&&CatID=59> [accessed 07 November 2016].

regarding the family situations of their employees which has no relevance to the employment relationship, and where the relationship between the employer and employee may be impacted by a compulsion to provide information to the Department of Social Protection.

In light of the above, FLAC and CLM await clarification from the Department of Social Protection regarding the need for this measure and whether it has been equality and human rights proofed in line with the Department's responsibilities under the public sector duty.⁴

Recommendation 2: Explain the necessity for the inclusion of Section 12 in the Social Welfare Bill 2016.

- **Section 22**

Section 22 provides for new rates in relation to social assistance payments as set out in Schedule 2 to the 2016 Bill. Section 22 proposes to increase almost all weekly social welfare payments by €5. However, young jobseekers aged 18 – 25 on reduced social welfare payments will only receive a proportionate increase under the provisions of the 2016 Bill. As a result, young jobseekers aged 18 – 24 will receive a weekly increase of €2.70, meaning that their payment will total €102.70 per week. Young jobseekers aged 25 will receive an increase of €3.80, meaning that their weekly payment will total €147.80. By contrast, those aged over 26 will receive an increase of €5 meaning their weekly payment will amount to €193. Despite repeated calls in advance of Budget 2017 to restore full social welfare payments for young people under the age of 26, inequalities between young people and those aged over 26 will actually deepen if the Bill is passed in its present form.

As previously stated, there appears to be an assumption by the State that adults below the age of 26 are able to live with and be supported by parents or family members; this assumption has led to a generalised measure, not specific to the circumstances or realities of each young person in receipt of social welfare. FLAC and CLM welcome some limited measures announced in Budget 2017 which are designed to alleviate some of the difficulties experienced by young people under the age of 26 who are not living with family members, including lower Rent Supplement contributions. The personal rent contribution for young people aged 18 – 24 who are receiving Jobseeker's Allowance of €100 per week will be reduced from €30 to €10 and from €30 to €20 for those aged 25 receiving €144 per week. The 2016 Bill will also increase the Back to Education Allowance for young jobseekers aged under 26 from €160 to €193. However, while welcome, these measures are not sufficient.

Concerns remain that reduced social welfare payments increase the vulnerability of people under the age of 26 to homelessness, particularly those who are already disadvantaged and without family supports such as LGBTI persons, migrants, victims of domestic violence, Travellers and Roma.⁵ Focus Ireland has reported that over 570 people under the age of 25 were living in emergency homeless accommodation in July 2015.⁶ FLAC is concerned that young people who end up homeless are

⁴ Section 42 of the Irish Human Rights and Equality Commission Act 2014.

⁵ The UN Special Rapporteur on the right to adequate housing has found that homelessness disproportionately affects particular groups, including women, young people, children, indigenous peoples, people with disabilities, migrants and refugees, the working poor, and LGBT people. Office of the High Commissioner for Human Rights (2015) *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, Geneva: OHCHR, p.21.

⁶ Focus Ireland (2016) *Pre-Budget Submission 2016*, Dublin: Focus, p.8.

finding it extremely difficult to leave homeless services and break the cycle of homelessness as they are priced out of the private rental market due to reduced social welfare payments.

FLAC and CLM recommend that the rate of Jobseeker's Allowance paid to those under 26 years of age be increased to €193 per week.

Recommendation 3: Amend Schedule 2 of the Social Welfare Bill 2016 to provide for equal payments among all those receiving Jobseeker's Allowance.

Important matters requiring legislative change not addressed by the Bill

In addition to the proposed changes detailed, FLAC and CLM note with disappointment that the Bill was not taken as an opportunity to make other necessary legislative changes in the area of social welfare law. FLAC and CLM share the hope that the following proposals will be considered as the Bill progresses through the Houses of the Oireachtas.

- **Mortgage Interest Supplement**

Section 11 of the Social Welfare and Pensions Act 2013 amended Section 198 of the Social Welfare (Consolidation) Act 2005 to provide for the closure of the Mortgage Interest Supplement scheme to new entrants from January 2014 and the cessation of the scheme by the end of December 2017.

The Mortgage Interest Supplement scheme provides short-term income support to borrowers who are unable to meet their mortgage interest repayments. The Supplement assists with the interest portion of the mortgage repayment but does not help with payment of the capital portion of the loan. The closure of the scheme to new claimants and its planned abolition means that people experiencing income difficulties cannot access social welfare assistance to meet mortgage interest repayments.

During the economic crisis, a number of expert and inter-departmental groups were established, tasked with examining the issue of mortgage arrears. While sharing the view that Mortgage Interest Supplement should be a time-bound support, each emphasised the importance of the scheme to borrowers experiencing short-term financial difficulties.⁷ Abolition of the Supplement was not recommended.

FLAC and CLM are of the common view that the Mortgage Interest Supplement scheme is a positive one which can help prevent temporary financial problems due to illness or unemployment from leading into insolvency, with the attendant social and economic consequences that may follow for the households involved and for society generally. The Oireachtas Committee on Housing and Homelessness has adopted a similar position, recommending that a targeted use of Mortgage Interest Supplement be restored to assist people with a short-term mortgage arrears problem.⁸

Taking the above into account, FLAC and CLM recommend that Section 11 of the Social Welfare and Pensions Act 2013 be deleted and that a targeted use of Mortgage Interest Supplement be restored to assist people with a short-term mortgage arrears problem.

⁷ These included the Inter-Departmental Working Group on Mortgage Arrears, the Working Group on the Review of the Mortgage Interest Supplement and the Expert Group on Mortgage Arrears and Personal Debt.

⁸ Oireachtas Committee on Housing and Homelessness (2016) *Report of the Committee on Housing and Homelessness*, Dublin: Oireachtas Committee on Housing and Homelessness, p.76.

Recommendation 4: Amend the Social Welfare Bill 2016 to provide for the deletion of Section 11 of the Social Welfare and Pensions Act 2013.

- **Ensuring the independence of the Social Welfare Appeals Office**

In October 2012, FLAC published a landmark report on the social welfare appeals system, *“Not Fair Enough”*.⁹ It made the case for thorough reform of the social welfare appeals system based on international human rights standards of transparency, fairness and the right to an effective remedy. One of the key proposals advanced was to place the Social Welfare Appeals Office on a statutorily independent footing. While the Appeals Office is classified as “independent”, the necessary safeguards are not in place to ensure its actual and perceived independence. For example, Appeals Officers are appointed by the Minister for Social Protection and employed by the Department of Social Protection, and appeals decisions are influenced by policy directions from the Department of Social Protection. Placing the Social Welfare Appeals Office on a statutorily independent footing would ensure its actual and perceived independence from the Department of Social Protection. Such a move is essential for a robust system which commands public confidence.

Recommendation 5: Amend the Social Welfare Bill 2016 to place the Social Welfare Appeals Office on a statutorily independent footing.

- **Social Welfare Payments for Asylum Seekers living in Direct Provision**

While many vulnerable groups, including older persons, one-parent families and people with disabilities, benefited from Budget 2017 to some degree, asylum-seekers were once again left sidelined and marginalised with no increase in the weekly allowance to those living in Direct Provision. As a result, asylum seekers living in Direct Provision continue to receive a weekly allowance of €19.10 per adult and €15.60 per child.

While the child rate of payment was increased by €6 to €15.60 in January 2016, the adult rate has remained unchanged since it was first introduced in 2000. These rates of payment are not adequate and do not meet the basic needs of asylum seekers.¹⁰ Furthermore, there is no statutory basis for the payment of the Direct Provision allowance or for the setting of the amounts paid.

There have been frequent calls to increase the Direct Provision allowance over the past number of years. In June 2015, the final report of the Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, commonly referred to as the McMahon report, recommended that the Direct Provision weekly allowance for adults be increased to €38.74 and to €29.80 for children.¹¹ According to the Working Group:

“The implementation of the proposed increase to the weekly allowance would bring tangible benefits to residents in their daily lives that would allow them to live with greater dignity. In

⁹ Free Legal Advice Centres (2012) *Not Fair Enough*, Dublin: FLAC.

¹⁰ See Free Legal Advice Centres (2009) *One Size Doesn't Fit All*, Dublin: FLAC.

¹¹ Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers (2015) *Final Report*, Dublin: Working Group on the Protection Process, p.208.

addition to facilitating residents in meeting the needs of themselves and their families, it would provide a greater degree of control and decision-making power.”¹²

Additionally, in July 2015, the UN Committee on Economic, Social and Cultural Rights voiced concerns regarding restrictions asylum seekers face in accessing social security benefits.¹³ More recently, in January 2016, the UN Committee on the Rights of the Child noted that the child allowance provided to asylum seekers has not kept pace with the rise in the cost of living and inflation in Ireland and recommended that the child allowance provided to asylum seekers be proportionately increased to ensure that it correlates with the cost of living.¹⁴

Recommendation 6: Amend the Social Welfare Bill 2016 to provide a statutory underpinning for the Direct Provision allowance.

Recommendation 7: Pending further reform of the system, increase the weekly allowance for asylum seekers living in Direct Provision to €38.74 for adults and to €29.80 for children in line with the recommendations of the McMahon report.

Other matters not addressed in Budget 2017

The following section deals with the need to establish a database of social welfare appeals decisions. While legislation is not required to provide for the establishment of such a database, FLAC and CLM nonetheless feel that this issue merits further consideration.

- **Social welfare appeals database**

FLAC and CLM were disappointed to note that Budget 2017 contained no specified budget line for the creation of a social welfare appeals database, despite calls from regional and international human rights bodies to ensure greater consistency in social welfare decision-making. Both bodies have also recommended that such a database be established, with CLM originally publishing research on this issue as far back as 2005.¹⁵

The Social Welfare Appeals Office does not currently maintain a database of previous decisions. At present, only a limited number of cases are published each year in its annual reports, usually on a thematic basis. The lack of such a database presents all individuals taking social welfare appeals with practical difficulties, especially in relation to complex issues such as the Habitual Residence Condition. In the absence of a database, individuals taking appeals are forced to prepare their cases within a vacuum of information. For example, they may be unclear as to how legislation is applied and interpreted. Furthermore, without a database, appeals staff must make decisions in isolation,

¹² Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers (2015) *Final Report*, Dublin: Working Group on the Protection Process, p.208.

¹³ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.14.

¹⁴ UN Committee on the Rights of the Child (2016) *Concluding observations on the combined third and fourth report of Ireland*, Geneva: OHCHR, para.66.

¹⁵ Community Law & Mediation (formerly Northside Community Law Centre) (2005) *The Social Welfare Appeals System: Accessible & Fair?*, Dublin: CLM.

resulting in inconsistencies in decision-making. In this regard, it is relevant to note that almost 59% (14,946) of the 25,406 appeals finalised in 2015 were successful.¹⁶

Human rights bodies have long emphasised the need for consistency in social welfare appeals decision-making and the adverse impact of failing to provide a database for appellants. In 2012, the then Independent Expert on Extreme Poverty and Human Rights called for decisions of the Appeals Office to be published in a form which allows for broad dissemination and understanding among existing and potential beneficiaries.¹⁷ Similarly, the UN Committee on Economic, Social and Cultural Rights has urged that decisions on appeals be made in a consistent and transparent manner.¹⁸

In March 2016, the European Commission against Racism and Intolerance (ECRI), a human rights body of the Council of Europe which monitors issues related to racism, discrimination and xenophobia, published its conclusions on the implementation of recommendations received by Ireland in its fourth country report in 2013.¹⁹ In its 2016 follow-up conclusions, the ECRI noted that the Irish authorities had only published a very low number of social welfare appeals cases related to the Habitual Residence Condition and that no consistency in publishing such decisions could be observed. The ECRI reiterated its 2013 call to publish appeals decisions related to the Habitual Residence Condition (HRC) in order to ensure a “sufficient level of predictability” in decision-making.

It is relevant to note that CLM, which operates Casebase, a database of social welfare appeals decisions, will publish a new report on the operation of the social welfare appeals system in the near future. The report, which is being carried out by an independent consultant, shall examine the themes of consistency and transparency within the decision making process of the social welfare appeals system and shall contain key findings and recommendations.

¹⁶ Social Welfare Appeals Office (2016) *Annual Report 2015*, Dublin: SWAO, p.14.

¹⁷ Office of the High Commissioner for Human Rights (2011) *Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona to the Human Rights Council*, Geneva: OHCHR, p.12.

¹⁸ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.20.

¹⁹ European Commission against Racism and Intolerance (2016) *ECRI conclusions on the implementation of the recommendations in respect of Ireland subject to interim follow-up*, Strasbourg: ECRI.