

# Pre-budget submission 2012

A submission by FLAC to the Minister for Social Protection

**FLAC**

September 2011

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FLAC (Free Legal Advice Centres) 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.

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## 1. Human rights obligations

FLAC, the Free Legal Advice Centres, is an independent human rights organisation dedicated to the realisation of equal access to justice for all. Access to justice includes access by a person to the relevant information relating to the laws and policy that affect them. It also includes access to effective redress systems and it involves the vindication of the rights of those whose rights are not being respected. This submission focuses on the underlying laws and processes involved in the administration of the social welfare system and makes recommendations on how the Department of Social Protection can ensure that the rights of those most in need can be upheld within a budgetary context.

Fundamental human rights are not expendable and cannot be disregarded in times of economic uncertainty. Even where resources are limited, the rights of the people living in Ireland must be maintained to the best extent possible.

### 1.1 Respecting rights in a recession

By becoming a signatory to international human rights law treaties, the Irish State has committed itself to respecting, protecting and to promoting or fulfilling the rights outlined in those treaties for every individual living in the State. Provisions obliging states to fully realise these rights, either immediately or progressively can be found in these international instruments. In particular, rights, such as the right to social security, will for the most part have to be realised progressively over time but are subject to the immediate obligation that they cannot be applied with any form of discrimination.

Signatories to international human rights treaties have a core obligation to ensure the satisfaction, at the very least, of minimum essential levels of economic, social and cultural rights. This requires the State to ensure sufficient access to a social security scheme that provides a minimum level of payments to all individuals and families to enable them to acquire essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.<sup>1</sup>

There is also an obligation on every state to consider with special care the impact of retrogressive measures. There is no specific definition of what constitutes a 'deliberate retrogressive measure' in the treaties, but the Committee on Economic, Social and Cultural Rights has made the following point:

...a general decline of living and housing conditions, directly attributable to policy and legislative decisions by State parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.<sup>2</sup>

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<sup>1</sup> UN Committee on Economic Social and Cultural Rights, General Comment No 19, *The Right to Social Security* (2008) paragraph 59 <http://www.unhcr.org/refworld/docid/47b17b5b39c.html>.

<sup>2</sup> UN Committee on Economic Social and Cultural Rights, General Comment No. 4, *The Right to Adequate Housing* (1991) UN Doc. E/1992/23 annex III at page 114, paragraph 11. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/469f4d91a9378221c12563ed0053547e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/469f4d91a9378221c12563ed0053547e?Opendocument) .

If any deliberate retrogressive measures are taken by a State that has ratified the Covenant, the State has the burden of proving that they have been introduced after the most careful consideration of all alternatives.

In a statement following her visit to Ireland in January 2011, the United Nations Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepulveda, noted that:

Any deliberate retrogressive measures in the enjoyment of any economic, social and cultural rights need to be fully justified and in the context of the maximum available resources. The Government must commit to a human rights based recovery, where all economic, social and cultural rights are ensured without discrimination of any kind, in which there is equality of access to public services and where participation of civil society actors is guaranteed in all levels of decision making structures.<sup>3</sup>

FLAC welcomes the government's commitment in the *Programme for Government 2011* to act in "a way that is fair, balanced and which recognises the need for social solidarity"<sup>4</sup> and to maintain social welfare rates. Furthermore the promise of "a new Government guided by the needs of the many rather than the greed of the few"<sup>5</sup> indicates that this government is committed to putting people at the heart of policy. People must be assured of a basic minimum income which will not allow any person in the State to become destitute through the lack of appropriate state provision.

FLAC submits that the fundamental human rights standards mentioned above are a useful way of objectively assessing whether that commitment is being met. This will involve firstly an identification of the various basic minimum needs of every member of society, a particular identification of vulnerable individuals and groups most susceptible to poverty and then an assessment of the potential impact that any proposed changes might have on these particularly vulnerable people. Poverty impact assessment guidelines were formulated by the Office of Social Inclusion and circulated to government departments in May 2008.<sup>6</sup> The guidelines explain that:

Poverty impact assessment should be carried out at all stages where significant policy proposals or changes are being considered, including where an existing policy is being evaluated with a view to possible change. Poverty impact assessment should not be considered as something to be performed after a decision has been made but rather as an inherent part of the policy development process.<sup>7</sup>

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<sup>3</sup> UN Expert on Extreme Poverty, Interim Report of Visit to Ireland 10 to 16 January 2011, available online at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10658&LangID=E>

<sup>4</sup> Department of the Taoiseach, *Programme for Government 2011*, at page 22, available online at: [http://www.taoiseach.gov.ie/eng/Publications/Publications\\_2011/Programme\\_for\\_Government\\_2011.pdf](http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf)

<sup>5</sup> Department of the Taoiseach, *Programme for Government 2011*, at page 3, available at: [http://www.taoiseach.gov.ie/eng/Publications/Publications\\_2011/Programme\\_for\\_Government\\_2011.pdf](http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Programme_for_Government_2011.pdf)

<sup>6</sup> Office of Social Inclusion, *Guidelines for Poverty Impact Assessment* (2008) available online at: [http://www.socialinclusion.ie/documents/PIAGuidelineswithnewEU-SILCfigures\\_000.pdf](http://www.socialinclusion.ie/documents/PIAGuidelineswithnewEU-SILCfigures_000.pdf)

<sup>7</sup> Office of Social Inclusion, *Guidelines for Poverty Impact Assessment* (2008) available online at: [http://www.socialinclusion.ie/documents/PIAGuidelineswithnewEU-SILCfigures\\_000.pdf](http://www.socialinclusion.ie/documents/PIAGuidelineswithnewEU-SILCfigures_000.pdf) at page 11.

In order to determine whether it is necessary to carry out a full assessment, initial screening should be carried out based on the significance of the policy, the level of expenditure which may be involved and its relevance to certain vulnerable groups. If the screening identifies the need for an assessment, then the guidelines identify seven stages which should be followed:

1. Consultation;
2. Define policy aims and target groups;
3. Identify available data and research;
4. Assess impacts;
5. Make decision and arrange monitoring;
6. Publish results; and
7. Return summary sheet.<sup>8</sup>

Given the nature and extent of the likely impact of the budget on particularly vulnerable groups, it is essential that all seven steps are followed to ensure that people's rights are taken into account particularly in terms of their economic and social rights. FLAC welcomes the opportunity to participate in the pre-budget forum as the first step in this process and hopes that the recommendations made by civil society will contribute to informed policy-making which upholds and protects the rights of those most affected by the upcoming budget.

## 1.2 European Convention on Human Rights Act 2003

Ireland is a signatory to the European Convention on Human Rights (ECHR) which was incorporated into Irish law in 2003. Section 3(1) of the ECHR Act 2003 obliges "every organ of the State" to "perform its functions in a manner compatible with the State's obligations under the Convention provisions". In addition to all those working directly in state departments, an "organ of the State" includes a "tribunal or any other body... which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised" and thus includes officials of the Department of Social Protection and all those who work within the Social Welfare Appeals Office.

The Convention contains a number of guarantees which are important in relation to decisions about social welfare entitlements and payments, whether in the context of a budget or of an individual payment. These include the right to life, the prohibition on cruel inhuman or degrading treatment, the right to family and private life, the right to a fair hearing and an effective remedy, and the right of non-discrimination. When these are combined with the State's obligation to promote and protect rights, it is clear that those who draft policy and regulations, as well as those who make decisions about changes to social welfare and those who make individual decisions must be familiar with the provisions of the Convention and how it impacts on the people who are affected by their decisions. FLAC views the transfer of Community Welfare Officers from the Health Service Executive (HSE) to the Department of Social Protection as an opportunity to review the information and training received and to ensure that their induction training incorporates human rights awareness.

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<sup>8</sup> Office of Social Inclusion *Guidelines for Poverty Impact Assessment* (2008) available online at: [http://www.socialinclusion.ie/documents/PIAGuidelineswithnewEU-SILCfigures\\_000.pdf](http://www.socialinclusion.ie/documents/PIAGuidelineswithnewEU-SILCfigures_000.pdf) at page 13.

The Convention also prohibits discrimination under Article 14 on the basis of “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. This prohibition on discrimination applies to all administrative decisions which also have to be made with reference to the ECHR.

**Recommendations:** *All proposed budget cuts and measures should be subject to an assessment of their impact on the basic human rights of the people affected before they are introduced. Such assessments should be published.*

*All staff of the Department of Social Protection, and all those carrying out actions on its behalf, should be fully aware of their obligations under the ECHR Act 2003 to act in a manner compatible with the ECHR and to ensure that they carry out their duties to the public reflecting these obligations. In particular, the transfer of functions from the HSE to the Department gives a specific opportunity to review and ensure that all those who administer the social welfare system have a thorough understanding of human rights law and practice as it applies to them.*

## 2. Procedures in the administration of the social welfare system

In the current economic climate, where applications for social welfare have increased dramatically, the staff and agents of the Department of Social Protection are under immense pressure to cope with the number of applications received. That pressure could give rise to unfairness and lack of consistency which could result in people in need being unable to access payments to which they are entitled and which they need in a respectful and timely way. This section suggests some areas of concern to FLAC.

### 2.1 Problems with applications and written decisions

Through anecdotal information arriving via FLAC’s information line and second-tier advice service, it has become apparent that some people have been discouraged by officials from actually applying for a payment, without any proper assessment of their case, as they are told they will not satisfy the qualifying conditions. From what we are hearing, this most often happens in relation to applications for Mortgage Interest Supplement (MIS) and for payments subject to the Habitual Residence Condition (HRC).

Every person is entitled to apply for a payment and have that application considered in line with fair procedures. Decision-makers must issue a response in writing, and where that response is negative, the applicant must be informed of the reasons for the decision.<sup>9</sup> Individuals and organisations have informed FLAC that people are dissuaded from applying in the first place or are not given a refusal in writing with reasons given for refusal. This practice goes against the Department of Social Protection’s own *Operational Guidelines on Decision-Making and Natural Justice*<sup>10</sup> which recognise

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<sup>9</sup>Article 191 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007, Introduced by Statutory Instrument No. 142 of 2007.

<sup>10</sup>Guidelines available online at

<http://www.welfare.ie/EN/OperationalGuidelines/Pages/decnatj.aspx#record>.

that it is contrary to natural justice not to issue the written decision necessary in order to appeal a refusal. The Department's own guidelines to its decision-makers clearly state that a decision "should be recorded in writing" and must be:

- clearly written;
- properly signed; and
- dated.

The apparent failure to accept applications and record decisions has an impact on the accuracy of any statistics collated on the number of applications received and refused in any particular payment scheme. This makes it more difficult to accurately assess the budgetary requirements for a particular scheme. FLAC is concerned that the actual number of refusals for some payments cannot be ascertained as there are individuals who will not access the appropriate information or assistance and therefore are not aware of their entitlement to make an appeal. In terms of the Mortgage Interest Supplement payment, the Department itself has noted the importance of recording decisions and states that "cases which are not eligible should be recorded as disallowed with the appropriate reason code".<sup>11</sup>

Quite apart from the need to permit people to make applications for a payment to which they may be entitled, application of correct procedures will be consistent with a key outcome of the Department's *Interim Statement of Strategy*, which is to "deliver seamless customer service in a more pro-active, efficient and effective manner".<sup>12</sup> FLAC notes that the Department has forecast to save €11 million in its budget from "efficiencies in administration".<sup>13</sup>

**Recommendation:** *All officials and staff of the Department of Social Protection should be fully familiar with the Department's Guidelines. All applications must be accepted and in all cases written decisions must be issued in line with regulations.*

## 2.2 Inconsistent decision-making at first instance and delays

Given the current delays in processing applications as well as the extended delays in the appeals process, individuals may be left in a very vulnerable situation especially where it may not be possible to access a Supplementary Welfare Allowance payment in the interim. The current waiting times for processing a social welfare application vary depending on the payment section. For example, this can range from two weeks, for a Jobseeker's Benefit or State Pension Non-Contributory (formerly known as the Old Age Pension) application, to 17 weeks, for One Parent Family Payment or Disability Allowance. The most notable wait is in relation to an award of Child Benefit to EU nationals from other states, which can take up to 41 weeks on average. This is in stark contrast to the processing of a domestic case, which takes only an average of two weeks.<sup>14</sup> On top of these waiting times, a

<sup>11</sup> [http://www.welfare.ie/EN/OperationalGuidelines/Pages/admin\\_mis.aspx](http://www.welfare.ie/EN/OperationalGuidelines/Pages/admin_mis.aspx)

<sup>12</sup> Department of Social Protection (DSP), *Briefing Material for the Minister 2011* at p.4 available at: [http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister\\_Brief\\_2011.pdf](http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister_Brief_2011.pdf).

<sup>13</sup> Department of Social Protection (DSP), *Briefing Material for the Minister 2011* at p.8 available at: [http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister\\_Brief\\_2011.pdf](http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister_Brief_2011.pdf).

<sup>14</sup> Figures taken from Minister Burton's response to a parliamentary question on 21 July 2011 available at <http://www.kildarestreet.com/wrans/?id=2011-07-21.1790.0&s=burton+revise+social+welfare+appeal#g1794.0.r>.



person might then wait 27.4 weeks or more for a decision on a summary appeal, which is a review of the papers in the case, or almost a year for a decision following an oral hearing.

Of the 28,166 appeals concluded in 2010, 42.7 per cent (or 12,029 appeals) were decided in favour of the appellant. FLAC's consistent experience is that misunderstandings in first instance decisions mean that a lot of unnecessary appeals have to be filed. In 2010, of the 12,029 successful appeals, 7282 decisions were changed by the Department of Social Protection's original decision-maker when the file was sent back to that person to review after an appeal was lodged; this equates to 25.9 per cent of the total number of appeals finalised. While the Minister for Social Protection has stated that some revisions are due to "new facts or fresh evidence produced by the claimant after the original decision",<sup>15</sup> the Social Welfare Appeals Office has also questioned the issue of the quality of first instance decisions and submissions by Deciding Officers. In 2009 the Social Welfare Appeals Office and the Decisions Advisory Office circulated a bulletin<sup>16</sup> to Deciding Officers following a 2008 survey which examined 1686 live appeals "of which some 8% revealed shortcomings and deficiencies of varying degrees in relation to the deciding officer's decision or the appeal submission on the grounds of appeal". Errors included the lack of formal decisions on the file, the decision not being properly explained to the client and inadequate comment on the grounds of a valid appeal.

The allocation of more resources to monitoring and putting in place better quality controls of first instance decisions by the Decisions Advisory Office would mean that ultimately fewer appeals would have to be taken or, alternatively, that they would be processed more speedily thus reducing delays and administrative costs.

These measures should also be considered in light of the consolidation of the social welfare appeals process which, from 1 October 2011, will receive appeals directly on refusals of Supplementary Welfare Allowance and its related supplements. The briefing material to the Minister noted that in 2010, "the SWAO received approximately 1,000 SWA appeals which represent approx 10% of the cases appealed to the HSE".<sup>17</sup> If in future SWA appeals will come directly to the Social Welfare Appeals Office, then steps need to be taken to ensure that the office is not overwhelmed with these cases. The briefing material also notes that the elimination of the two step process may present an opportunity to improve processes.

**Recommendation:** *All necessary steps should be taken including training and mentoring of officials, as well as monitoring of decisions on a regular basis, to ensure better first level decisions which would meet the needs of those who seek the payment. This would also substantially reduce the burden imposed on various parts of the social welfare system by the need to process appeals where the decision was manifestly incorrect in the first place.*

<sup>15</sup> Response by Joan Burton TD, Minister for Social Protection, to a Parliamentary Question on 25 May 2011.

<sup>16</sup> Available online at <http://www.welfare.ie/EN/OperationalGuidelines/Pages/daobulletin15.aspx>.

<sup>17</sup> Department of Social Protection (DSP), *Briefing Material for the Minister 2011* at page 192 available online at: [http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister\\_Brief\\_2011.pdf](http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister_Brief_2011.pdf).

### 3. The Habitual Residence Condition

The Habitual Residence Condition is used as a qualifying condition for a number of social welfare allowances. Based on EU law, it sets out how a person's habitual residence is to be identified. Entitlement to a payment can depend on whether a person is 'habitually resident' in Ireland and it has become an obstacle for some vulnerable people accessing their rights in Ireland. The following section addresses the obstacles faced by specific groups in accessing the social welfare system, as well as giving an overview of the difficulties caused by the misapplication of the condition. Because of its complexity, it can consume both time and resources to administer the rule correctly, but failure to do so will result in some people in need being left without the means to survive in a way that protects their basic human dignity.

#### 3.1 The Two-Year Rule

The Department's new *Operational Guidelines to Deciding Officers on the Determination of Habitual Residence*<sup>18</sup> make it clear that a decision on "habitual residence cannot be determined simply by reference to a specific period of residence in a country". However, there is a widely-held but erroneous view that the condition is worked on the basis of a 'two-year rule'. Furthermore, in reports under the European Code of Social Security, to which Ireland is a signatory, the State has confirmed that the reference to two years is not relevant for HRC. In relation to the two-year habitual residence requirement, in its 32<sup>nd</sup> Report (covering the period 2004-5) to the Council of Europe on Ireland's compliance with the European Code of Social Security, the Government stated at page 9:

Ireland is aware that the relevant jurisprudence of the European Court of Justice precludes reliance on any specific duration of residence (e.g. two years) for the purposes of establishing habitual residence and has ensured that no such specific period is the determining factor in any HRC decision.

The European Court of Justice (ECJ) has also clarified that a State cannot specify a period of time to determine habitual residence. Instead, a decision should be based on the five factors taken from the Court's *Swaddling* decision<sup>19</sup> which are laid down in social welfare legislation since 2007.<sup>20</sup>

Nonetheless, in her annual report for 2010, the Chief Appeals Officer stated that if a person had resided continuously in the Common Travel Area for two years then he or she did not have to rebut the presumption that he or she is not habitually resident unless evidence is provided to the contrary.

While FLAC welcomes the clarification of this provision in the Department's recently published guidelines, the provision in legislation which refers to 'two years' continues to cause confusion and leads to incorrect decisions which deny people their entitlements. Therefore, to increase efficiency

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<sup>18</sup> Published by Department of Social Protection, available online at <http://www.welfare.ie/EN/OperationalGuidelines/Pages/habres.aspx#7.1>

<sup>19</sup> *Robin Swaddling v Adjudication Officer*, C-90/97.

<sup>20</sup> *FLAC's Guide to the Habitual Residence Condition* can be viewed online at <http://www.flac.ie/publications/habitual-residence-condition-guide/>.

and transparency as well as to ensure entitlements are properly paid, the reference to two years should be removed from all legislation.

**Recommendation:** *The reference to the two-year requirement to satisfy the HRC should be repealed and removed from the legislation and it should be clarified for all decision-makers that it is not relevant for the purposes of determining habitual residence.*

### 3.2 The effect of the HRC on Supplementary Welfare Allowance

The HRC applies to Irish citizens as well as non-citizens, but it is usually much easier for Irish citizens to show a sufficient connection to the Irish State in order to satisfy the Condition than for non-Irish citizens. Supplementary Welfare Allowance (SWA), regarded as the 'safety net' payment, is meant to guarantee a minimum basic income and ensure that no one is left destitute. However, people who are awaiting a decision on their application for another payment subject to HRC cannot access the SWA in the meantime, as this payment is also subject to the same Condition. The HRC guidelines explicitly state that

SWA cannot at any time be viewed as a temporary or interim means of income support available independently of the HRC, while an applicant awaits the outcome of either a decision - or an appeal against a decision - on a claim for a social welfare payment from Department of Social Protection.<sup>21</sup>

The briefing document for the Minister highlighted that 60 per cent of people in receipt of a basic Supplementary Welfare Allowance are awaiting a decision on their entitlement for another payment<sup>22</sup> which may include a payment in respect of which they are appealing a refusal. This figure does not include people who are waiting for a determination on habitual residence, as they will not be entitled to basic SWA on the same basis. They may receive SWA in the form of Exceptional or Urgent Needs Payments which are not subject to HRC and are granted at the discretion of a Community Welfare Officer. In some cases a weekly payment will be granted in this way while there is a live appeal but in general, these payments are considered once-off payments and are not usually seen as payments which can sustain a person while they await a final outcome for months, or in some cases, more than a year. As a person cannot access homeless services without a social welfare payment, this may mean that they become destitute and without shelter while waiting for an application or an appeal to be processed. This could lead to a breach of the State's commitment to protect the basic human dignity of all those living within its borders.

The issue of destitution has been the subject of litigation in Britain<sup>23</sup> as the House of Lords found that there was a positive obligation on the government, arising from Article 3 of the European Convention on Human Rights, to ensure that a person was not allowed to become destitute. While the threshold set is quite high, a person who is left homeless without access to any resources, depending on their own personal circumstances, may be considered to have been subjected to inhuman or degrading treatment. There are no available figures on the number of people refused

<sup>21</sup> <http://www.welfare.ie/EN/OperationalGuidelines/Pages/habres.aspx#7.1>.

<sup>22</sup> Department of Social Protection, *Briefing Material for the Minister 2011*, at page 118, available online at: [http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister\\_Brief\\_2011.pdf](http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister_Brief_2011.pdf).

<sup>23</sup> *R. v Secretary of State for the Home Department, Ex p. Adam Limbuela and Others*, [2006] 1 AC 396 (HL).

Supplementary Welfare Allowance on the basis of habitual residence as the HSE, the body currently responsible for administering the payment, does not maintain these statistics.<sup>24</sup> Given the upcoming transfer of SWA appeals directly to the Social Welfare Appeals Office, it is important that SWA appeals are dealt with as a matter of urgency so that further delays in this area do not develop.

**Recommendation:** *Applicants appealing a decision on the basis of the Habitual Residence Condition should be able to access Supplementary Welfare Allowance while awaiting the outcome of the appeal. Appeals against refusals of Supplementary Welfare Allowance should be dealt with as quickly as is consistent with fair procedures to avoid the risk of destitution.*

### 3.3 Groups adversely affected by the Habitual Residence Condition

The rationale for the introduction of the HRC was to prevent 'welfare tourism' from nationals of the ten States acceding to the EU in May 2004. However, since the European Commission issued infringement proceedings against the State as the application of the Condition to EU migrant workers was found to inhibit freedom of movement, the groups which have been particularly affected by the HRC are not those who were the initial target of the Condition. This Condition has created inequity between the general population and already vulnerable groups applying for social welfare assistance.

#### 3.3.1 Asylum Seekers (Protection Applicants)

In a series of cases taken by FLAC in 2009, the former Chief Social Welfare Appeals Officer held that the social welfare legislation did not contain any blanket exclusion of asylum seekers or other persons within the leave to remain or subsidiary protection processes. The decisions stated that each person's individual circumstances should be taken into account when assessing his or her habitual residence. Following the issuing of the final set of decisions in December 2009, a last-minute amendment to the Social Welfare and Pensions (No. 2) Act 2009 was guillotined through the Dáil without adequate time for debate which seeks to exclude all individuals in the asylum or subsidiary protection processes from satisfying the Habitual Residence Condition. As a result, applicants who are still awaiting a decision on whether they will be offered protection in Ireland are now refused on the basis of the Habitual Residence Condition no matter how long they have been living in Ireland which can often be for a period of years.

##### 3.3.1.1 Child Benefit

While Child Benefit is classified as a universal payment and has been described by the Irish Government as "an important means of reducing child poverty"<sup>25</sup> a number of children living in the State are denied this payment due to the application of the Habitual Residence Condition. Prior to the introduction of the HRC in 2004, Child Benefit was a universal payment paid to the parents of all

<sup>24</sup> Response of Joan Burton TD, Minister for Social Protection, to Parliamentary Question dated 15 June 2011, available online at <http://www.kildarestreet.com/wrans/?id=2011-06-15.1530.0&s=habitual+residence+statistics#g1538.0.r>.

<sup>25</sup> Department of Health and Children (2000) *National's Children's Strategy 2000 – 2010* at page 71, available online at [http://www.dohc.ie/publications/pdf/childstrat\\_report.pdf?direct=1](http://www.dohc.ie/publications/pdf/childstrat_report.pdf?direct=1).

children living in Ireland. Due to the Department's application of the HRC to people within the protection process, an inequality between children living in Ireland has been created.

Children whose parents have not yet received a decision on their immigration status are refused the payment contrary to Articles 2 and 3 of the United Nations Convention on the Rights of the Child to which the State is a signatory. Article 2 of this Convention prohibits discrimination of any sort based on the status of a child's parent, including his or her immigration status. Article 3 states that in all decisions concerning children, the "best interests of the child" must be a paramount consideration. Furthermore Article 26 of the Convention obligates States to realise the right of a child to benefit from social security. The Government maintains that the best interests of an asylum-seeking child are met through the direct provision and dispersal scheme but FLAC's report, *One Size Doesn't Fit All*,<sup>26</sup> highlights particular issues arising out of that scheme which negatively impact on the child's wellbeing.

Given that the key outcome of one of the Department's strategic objectives is to "reduce the risk of child poverty for households with children",<sup>27</sup> it is important that this differential treatment of children, depending on their status, is addressed.

### 3.3.2 EU Migrant Workers and Job-seekers

A number of issues arise in the context of EU nationals who are workers, former workers or job-seekers.

FLAC has received calls to our telephone information line from EU nationals who have been told that they are no longer entitled to a social welfare payment because they were made redundant and are no longer considered to be habitually resident. However, a person's habitual residence is not solely based on his or her employment as there are other factors to be considered, including a person's centre of interest and his or her future intentions.

In some cases, decision-makers have apparently misunderstood the concept of retaining EU worker status even after a person has been made redundant. As FLAC explains in its *Guide to the Habitual Residence Condition*,<sup>28</sup> a person who has worked in the State for more than twelve months is entitled to Supplementary Welfare Allowance indefinitely while he or she continues to job-see; those who have worked here for less than a year still retain worker status for six months and are entitled to SWA for that time while continuing to look for work.

Another aspect is that some migrant workers are not always told of their entitlement to Jobseekers Benefit which is not subject to Habitual Residence Condition and is linked instead to social insurance contributions. Instead some individuals have not known about their entitlement or have not been able to access the Benefit and instead have been assessed under the HRC which should not be applied in this situation.

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<sup>26</sup> Available online at [http://www.flac.ie/download/pdf/one\\_size\\_doesnt\\_fit\\_all\\_full\\_report\\_final.pdf](http://www.flac.ie/download/pdf/one_size_doesnt_fit_all_full_report_final.pdf).

<sup>27</sup> Department of Social Protection (DSP), *Briefing Material for the Minister 2011* at page 4 available at: [http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister\\_Brief\\_2011.pdf](http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister_Brief_2011.pdf).

<sup>28</sup> *FLAC's Guide to the Habitual Residence Condition* can be viewed at <http://www.flac.ie/publications/habitual-residence-condition-guide/>.

### **3.3.3 Victims of Domestic Violence**

The rigid application of the HRC to spouses whose immigration status is linked to that of their partner has a particularly negative effect on individuals (usually women) who are forced to flee the family home due to domestic violence. The non-profit organisation Women's Aid, in its submission on the Immigration, Protection and Residence Bill in 2008, identified the HRC as a barrier for non-Irish women facing gender-based violence.<sup>29</sup> This is due to the fact that some women's immigration status is linked to their partners' status; therefore, if they separate it may cause problems in accessing a payment in their own right. In these cases, the HRC may severely impact on a person's ability to leave a violent relationship and to access support services. She or he may not be regarded as HRC compliant and may therefore have no access to any financial assistance, including emergency assistance through the Supplementary Welfare Allowance scheme which is essential.

The submission also highlights the difficulty faced by women's refugees which cannot support a person fleeing a violent relationship unless she is entitled to a social welfare payment.

In these situations, Community Welfare Officers should exercise a degree of flexibility and ensure that the individual's safety is paramount in any decision regarding an application for a payment. While the person may initially receive an Emergency or Urgent Needs Payment not subject to HRC under the Supplementary Welfare Allowance scheme, the difficulty occurs when he or she seeks to access a long-term payment where she may be deemed not to be habitually resident.

### **3.3.4 Frontier workers**

FLAC has been contacted by individuals experiencing problems accessing social welfare payments due to cross-border issues. Colleagues in Northern Ireland have also identified issues where people who live in one jurisdiction and work in the other cannot access their entitlements on either side of the border which can lead to hardship for those involved. There seems to be a lack of cohesion between the authorities on both sides of the border in ensuring that one State is responsible for this person and that he or she receives the payment to which he or she is entitled. Given the nature of certain payments which are linked to a primary payment, such as Rent Supplement which is not itself subject to HRC but is linked to the issuing of a job-seekers payment or Supplementary Welfare Allowance which are both subject to HRC, people have been refused this payment as their pattern of employment has taken place in Northern Ireland.

However once any contribution-based payments have expired they are not considered by the decision-maker as being habitually resident in the Republic of Ireland for social assistance payments despite being able to show other clear connections to this State.

In FLAC's experience, individuals from Northern Ireland who reside in the Republic and who may own property here, have worked here or have other connections here, have been told that they are not habitually resident and have been refused a payment despite showing a clear connection to the State.

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<sup>29</sup>Available online at [http://www.womensaid.ie/download/pdf/submission\\_on\\_immigration\\_residence\\_and\\_protection\\_bill.pdf](http://www.womensaid.ie/download/pdf/submission_on_immigration_residence_and_protection_bill.pdf).



The Department of Social Protection, referring to a paper compiled by the Secretariat of the North South Ministerial Council (NSMC) on Obstacles to Cross Border Mobility, acknowledges that frontier workers may experience difficulties in the social welfare area.<sup>30</sup> Apart from the injustice to which this gives rise, there is scope for confusion and bureaucratic difficulties because of the lack of clarity for such frontier workers.

### 3.3.5 Travellers

Given Travellers' traditional nomadic way of life, the application of the HRC is particularly harsh on Travellers returning from another part of the Common Travel Area to resume residence in the State where they have retained family or other links. FLAC has been contacted by individuals and organisations working with Travellers in relation to the application of the HRC to Travellers returning from Northern Ireland or another part of the Common Travel Area who have been refused on the basis of the HRC despite having spent most of their lives in the State. The Irish Traveller Movement has highlighted the extent of the problem, stating that:

The current policy and practice is causing extreme hardship and distress. Whilst the decision can be appealed and may be overturned, this can take weeks or months, during which time the applicant has no source of income. There is a risk of extreme poverty and homelessness in these cases.<sup>31</sup>

**Recommendations:** *The State should carry out a poverty impact assessment on how the Habitual Residence Condition impacts on vulnerable groups, in particular children.*

*Child Benefit should be universal and paid to every child living in the State.*

*The Condition should not be applied in a restrictive sense in cases involving particularly vulnerable groups at risk of poverty and destitution. A common sense approach should be taken and each case decided on its own individual merits to ensure that nobody who should be entitled to a payment is left without any means of subsistence.*

*Appeals against refusals of Supplementary Welfare Allowance should be dealt with as quickly as is consistent with fair procedures, to avoid the risk of destitution.*

## 4. Improved support for housing: Mortgage Interest Supplement and Rent Supplement

Central Bank figures at the end of June 2011<sup>32</sup> indicate that 55,763 (7.2 per cent) of residential mortgages are now in arrears for three months or longer of which 40,040 (over 70 per cent) have been in arrears for over six months. Some 69,837 (9 per cent) have been rescheduled, with nearly 40 per cent of these involving an interest-only payment. In effect, this means that 95,158 (or almost

<sup>30</sup> Department of Social Protection, *Briefing Material for the Minister 2011* at page 140, available online at: [http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister\\_Brief\\_2011.pdf](http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister_Brief_2011.pdf).

<sup>31</sup> For more information, see online at <http://www.itmtrav.ie/keyissues/myview/85>.

<sup>32</sup> The figures for the second quarter of 2011 are available at <http://www.centralbank.ie/press-area/press-releases/Pages/LatestMortgageArrearsDatashow72ofMortgageAccountsInArrears.aspx>. See also [www.flac.ie](http://www.flac.ie) for further information on this topic.

one in eight) residential mortgages are in difficulty.<sup>33</sup> 124 new orders for repossession were granted by the courts in the second quarter of 2011 and 173 houses were actually repossessed by lenders; 54 by way of court order and 119 following voluntary surrender or abandonment by the borrower. This means that 260 court orders for possession or sale have been granted in the first half of 2011 and the number of actual repossessions to June 2011 stands at 313.

#### 4.1 The Money Advice and Budgeting Service (MABS)

The *Programme for Government 2011* clearly identifies MABS as a key player in managing debt in any reformed law. Overstretched as it is, MABS offers a lifeline for many seriously indebted people in Ireland. Making it into a quasi-judicial institution would remove that basic function of advice and budgeting assistance, together with its capacity to represent the most vulnerable debtors against powerful and well resourced creditors in areas other than mortgage debt. It is essential to ensure that those who are over-indebted have access to appropriate advice and direction. Any review of its functions must balance the existing need against any expertise that money advisers may have to drive forward a debt management agency.

By providing appropriate advice and assistance, money advisers assist the State in supporting people who are seriously over-indebted. The depth of the recession has led to a sizeable increase in demand for MABS services so that waiting lists have developed in some areas.

**Recommendation:** *FLAC recognises that public finances are under huge pressure, but in order to address the needs of indebted people frontline services simply require more resources.*

#### 4.2 Mortgage Interest Supplement

Mortgage Interest Supplement is an important component in tackling the current problem of over-indebtedness and mortgage arrears. The reports of the Mortgage Arrears and Personal Debt Review Group<sup>34</sup> in July and November 2010 identified a number of reforms to make the scheme more effective. To date, none of them have been implemented.<sup>35</sup> FLAC submits with respect that the implementation of these reforms is an urgent and essential first moderate step in the support of homeowners. The recommendations have general approval and from the need identified by callers to FLAC's telephone line, their implementation is urgently needed.

The recommendations by the Group could alleviate some of the pressure placed on people who find themselves under financial strain due to mortgage payments. One suggestion was to remove the exclusion on paying the supplement to a couple where one of the partners works more than 30 hours per week. This change could easily be incorporated into legislation and would demonstrate a common sense approach to a problem which is causing difficulties for a number of families where one partner has been made redundant or there has been a reduction in salary. FLAC understands

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<sup>33</sup> This figure for mortgages in difficulty comprises the total number of mortgages in arrears (55,763) as well as the mortgages which have had to be restructured (39,395).

<sup>34</sup> See online at <http://www.finance.gov.ie/viewdoc.asp?DocID=6585&CatID=45&StartDate=01+January+2010>.

<sup>35</sup> Department of Social Protection, *Briefing Material for the Minister 2011* at page16, available online at: [http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister\\_Brief\\_2011.pdf](http://www.welfare.ie/EN/AboutUs/Minister/Documents/Minister_Brief_2011.pdf). See also response of Joan Burton TD Minister for Social Protection to Parliamentary Question on 5 July 2011 at <http://debates.oireachtas.ie/dail/2011/07/05/00268.asp>.



that the Department is undertaking an implementation plan on Mortgage Interest Supplement which incorporates the findings of the Department's review on the recommendations of the Expert Group.

FLAC welcomes the fact that the Programme for Government recognises that Mortgage Interest Supplement is a more cost-effective alternative to Rent Supplement as a means of supporting families in mortgage arrears. In the lead up to the general election, both coalition partners committed to using Mortgage Interest Supplement as a means to "adequately cover families in need" (Fine Gael election manifesto 2011)<sup>36</sup> and "support families who cannot make their mortgage repayments" (Labour election manifesto 2011).<sup>37</sup> In particular, Labour stated in its election manifesto that the 30-hour rule for MIS would be amended. However, this amendment was not made at the earliest possible opportunity when the Social Welfare and Pensions Bill was introduced in June 2011.<sup>38</sup> The Bill did not refer to MIS and the Minister has explained the omission by stating that,

[a]ny changes to the mortgage interest supplement scheme must be considered in a budgetary context because a number of the changes put forward have significant implications and very detailed work is being done on the detail of the recommendations of the mortgage arrears and personal debt expert group.<sup>39</sup>

Given the acknowledgment by the coalition partners that MIS is a more cost effective measure than rent supplement then it is not clear why this change has not yet been implemented.

**Recommendation:** *The recommendations of the Expert Group on Mortgage Arrears and Personal Debt in relation to Mortgage Interest Supplement should be implemented as a matter of urgency.*

### 4.3 Rent Supplement

In terms of Rent Supplement, FLAC notes that the Government intends to review the operation of the scheme and we would like to contribute to this discussion. Through our telephone information line and our work with other organisations, FLAC has become aware of a number of anomalies in the operation of the scheme which is leading to people in vulnerable situations being deemed ineligible for any kind of housing support. These include victims of domestic violence, partners who have left the family home following the breakup of a relationship and respondents of a barring order.

The guidelines issued to decision-makers on Rent Supplement<sup>40</sup> include a list of exclusions but there is no clear recognition of an entitlement to Rent Supplement for people who have had to leave the

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<sup>36</sup> See Fine Gael election manifesto online at:

<http://www.finegaelelection2011.com/pdf/Fine%20Gael%20Manifesto%20low-res.pdf>.

<sup>37</sup> See Labour election manifesto online at:

[http://www.labour.ie/download/pdf/labour\\_election\\_manifesto\\_2011.pdf](http://www.labour.ie/download/pdf/labour_election_manifesto_2011.pdf).

<sup>38</sup> See FLAC's submission on the Bill online at at <http://www.flac.ie/publications/submission-on-social-welfare-and-pensions-bill-2011/>.

<sup>39</sup> See debate on Social Welfare and Pensions Bill 2011 available online at

<http://debates.oireachtas.ie/dail/2011/06/16/00006.asp#N87>.

<sup>40</sup> Available online at

<http://www.welfare.ie/EN/Schemes/SupplementaryWelfareAllowance/Pages/RentSupplement.aspx>.

family home but remain a co-owner, as often they are deemed not to have a “housing need”. The discretionary nature in the administration of the payment may lead to inconsistencies in decision-making.

Community Welfare Officers have no clear guidance on how to assess such cases as the rules and regulations do not specify that individuals who are victims of domestic violence, separated spouses or respondents of a barring order should be properly regarded as having a housing need, given that they cannot remain in the family home. Guidelines should specifically provide for instances where victims of domestic violence apply for Rent Supplement to ensure that they are not forced to remain in a violent situation due to a lack of alternative accommodation. Similarly, provision should be made to recognise the need for Rent Supplement in situations where a partner has to leave the family home due to a breakup or where a partner is legally required to move out of the family home under a barring order. These issues must be addressed as a matter of urgency.

***Recommendation: Appropriate guidance is given to decision-makers to make provision for people in difficult circumstances, in particular in relation to domestic violence or the breakdown of a relationship, to ensure that no-one is left homeless and destitute or without viable housing options.***

## Conclusion and summary of recommendations

FLAC realises that resources are scarce in the current economic climate but a more holistic approach could increase both value for money and ensure that people's needs are adequately met in the medium to longer-term. The State is ultimately responsible for ensuring that people are not left destitute therefore steps must be taken to poverty-proof any new budgetary measures to make certain that marginalised people who are already in need of social welfare assistance are not disadvantaged further through severe austerity measures.

In this context FLAC makes the following recommendations:

- 1. All proposed budget cuts and measures should be subject to an assessment of their impact on the basic human rights of the people affected before they are introduced. Such assessments should be published.***
- 2. All staff of the Department of Social Protection, and all those carrying out actions on its behalf should be fully aware of their obligations under the ECHR Act 2003 to act in a manner compatible with the ECHR and to ensure that they carry out their duties to the public reflecting these obligations. In particular, the transfer of functions from the HSE to the Department gives a specific opportunity to review and ensure that all those who administer the social welfare system have a thorough understanding of human rights law and practice as it applies to them.***
- 3. All officials and staff of the Department of Social Protection should be fully familiar with the Department's Guidelines. All applications must be accepted and in all cases written decisions must be issued in line with regulations.***
- 4. All necessary steps should be taken including training and mentoring of officials, as well as monitoring of decisions on a regular basis, to ensure better first-level decisions which would meet the needs of those who seek the payment. This would also substantially reduce the burden imposed on various parts of the social welfare system by the need to process appeals where the decision was manifestly incorrect in the first place.***
- 5. The reference to the two-year requirement to satisfy the HRC should be repealed and removed from the legislation and it should be clarified for all decision-makers that it is not relevant for the purposes of determining habitual residence.***
- 6. Applicants appealing a decision on the basis of the Habitual Residence Condition should be able to access Supplementary Welfare Allowance while awaiting the outcome of the appeal. Appeals against refusals of Supplementary Welfare Allowance should be dealt with as quickly as is consistent with fair procedures to avoid the risk of destitution.***
- 7. The State should carry out a poverty impact assessment on how the Habitual Residence Condition impacts on vulnerable groups, in particular children.***
- 8. Child Benefit should be universal and paid to every child living in the State.***

- 9. *The Condition should not be applied in a restrictive sense in cases involving particularly vulnerable groups at risk of poverty and destitution. A common sense approach should be taken and each case decided on its own individual merits to ensure that nobody who should be entitled to a payment is left without any means of subsistence.***
- 10. *FLAC recognises that public finances are under huge pressure, but in order to address the needs of indebted people frontline services simply require more resources.***
- 11. *The recommendations of the Expert Group on Mortgage Arrears and Personal Debt in relation to Mortgage Interest Supplement should be implemented as a matter of urgency.***
- 12. *Appropriate guidance is given to decision-makers to make provision for people in difficult circumstances, in particular in relation to domestic violence or the breakdown of a relationship, to ensure that no-one is left homeless and destitute or without viable housing options.***