



Submission to the OHCHR on the occasion of Ireland's second review under the Universal Periodic Review mechanism

**A submission by FLAC to the Office of the United Nations High Commissioner for
Human Rights**

FLAC, September 2015

About FLAC

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

Today FLAC focuses on the use of law as a tool for social change and on the right of equal access to justice for all. We work particularly on the protection of economic, social and cultural rights, identifying and making 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 are an Independent Law Centre and take on a small number of strategic litigation cases each year. 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.

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>

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1. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

During Ireland's first UPR examination, the Government partially accepted a recommendation (107.4) to sign and ratify the OP-ICESCR.¹ In a welcome move, the Government signed the OP-ICESCR on 23 March 2012. However, no steps have been taken towards ratification. In particular, the Government has failed to initiate an inter-departmental consultation which is typically the first step towards ratification.

Recommendation:

1.1 Take all necessary steps to ratify the Optional Protocol to ICESCR.

2. Incorporation of Economic, Social and Cultural Rights into Domestic Law

During Ireland's first UPR examination, there was a recommendation that the State incorporate the right to health and housing (107.4)² and take the measures required to respect economic, social and cultural rights (106.18).³

The Government-established Constitutional Convention⁴ considered the inclusion of economic, social and cultural rights, including the right to health and housing, in the Irish Constitution. In February 2014 it voted in favour of inserting into the Constitution 'a provision that the State shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts'.⁵ As of September 2015, the Government had not responded to this recommendation in spite of the Convention's terms of reference requiring a response from Government within four months of receiving the Convention's report.⁶

Recommendation:

2.1 Ensure the direct applicability of the International Covenant on Economic, Social and Cultural Rights, including through incorporation of the Covenant into domestic law.

¹ Office of the High Commissioner for Human Rights (2011) *Report of the Working Group on the Universal Periodic Review: Ireland*, Geneva: OHCHR, Rec.107.4.

² Office of the High Commissioner for Human Rights (2011) *Report of the Working Group on the Universal Periodic Review: Ireland*, Geneva: OHCHR, Rec.107.4.

³ Office of the High Commissioner for Human Rights (2011) *Report of the Working Group on the Universal Periodic Review: Ireland*, Geneva: OHCHR, Rec.106.18.

⁴ The Convention was established by Resolution of both Houses of the Irish Parliament to consider and make recommendations on certain topics as possible future amendments to the Constitution. More information is available at <https://www.constitution.ie/Convention.aspx> [accessed 16 September 2015].

⁵ The Convention of the Constitution (2014) *Eighth Report of the Convention of the Constitution: Economic, Social and Cultural (ESC) Rights*, Dublin: Convention on the Constitution.

⁶ This report was sent to the Government in March 2014. The report is available at <https://www.constitution.ie/AttachmentDownload.ashx?mid=5333bbe7-a9b8-e311-a7ce-005056a32ee4> [accessed 15 September 2015].

3. Human Rights and Budgeting

During Ireland's first UPR examination, it was recommended that the necessary steps be taken to ensure that the current economic crisis did not erode human rights (107.18)⁷ and that economic measures did not disproportionately impact upon the elderly (106.35).⁸

Following the Memoranda of Understanding with the 'Troika' of the European Commission, International Monetary Fund (IMF) and European Central Bank (ECB) in 2010, the Irish Government introduced a range of austerity measures through successive budgets.⁹

As documented by the Committee on Economic, Social and Cultural Rights, austerity measures have had and continue to have a significant adverse impact on the whole population, and particularly on vulnerable and marginalised groups.¹⁰ Many of these regressive measures were adopted without thorough assessment of their impact on vulnerable groups.¹¹ While the Department of Social Protection does undertake a social impact assessment of measures relevant to its Department,¹² these assessments should be undertaken more extensively, across all Departments, and should incorporate a human rights and equality analysis.

Recommendation:

- 3.1 Undertake a human rights and equality impact assessment on all proposed budgetary measures in all Government departments;
- 3.2 Put in place measures to ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected by budget measures;
- 3.3 Identify a social protection floor and ensure the protection of this core content at all times.

4. Civil Legal Aid

⁷ Office of the High Commissioner for Human Rights (2011) *Report of the Working Group on the Universal Periodic Review: Ireland*, Geneva: OHCHR, Rec.107.18 (partially accepted).

⁸ Office of the High Commissioner for Human Rights (2011) *Report of the Working Group on the Universal Periodic Review: Ireland*, Geneva: OHCHR, Rec.106.35.

⁹ The EU-IMF bailout agreement imposed budget restrictions requiring €15 billion in savings to curtail public expenditure.

¹⁰ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.11.

¹¹ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.11.

¹² The impact assessment carried out annually by the Department of Social Protection is confined to an analysis of social welfare and tax measures and is carried out after the budget has been implemented rather than beforehand. Department of Social Protection (Jan 2015) *Research Briefing: Social Impact Assessment of the main welfare and tax measures for 2015*, available at <http://bit.ly/1F3AkYM> [accessed 13 August 2015].

Article 14 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the right of fair procedures and states that *'all persons shall be equal before the courts and tribunals'*. A State-funded civil aid scheme has as its purpose *"to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases"*.¹³ The civil legal aid system is administered by the Legal Aid Board.

While its statutory remit is fairly broad, the vast majority of advice and representation relates to family law.¹⁴ The Legal Aid Board is precluded by law from providing representation before many tribunals. These include social security appeals, employment appeals and most housing proceedings, all of which have become more relevant in recessionary times.

In recent years, demand for statutory civil legal aid has risen dramatically¹⁵ while resources have been reduced¹⁶ and the workload of the Legal Aid Board has been broadened,¹⁷ resulting in increased pressure on the service and longer waiting times¹⁸.

In addition, in 2013 the Government increased the minimum financial contributions for both legal advice and representation by 200% and 160% respectively.¹⁹ Such measures have had a disproportionate impact on lower income, vulnerable groups. Although a system of waiver does exist, the Legal Aid Board has discretion as to whether or not to accept such applications. As a result, decisions relating to waiver applications have been inconsistent. FLAC is particularly concerned at the impact of these measures on victims of domestic violence who are often in urgent need of legal services but may not be able to pay the increased fee.

Recommendations:

4.1 Ensure that the Legal Aid Board is adequately resourced so that all those in need of civil legal aid can access appropriate legal information and representation in a timely fashion.

¹³ Civil Legal Aid Act 1995.

¹⁴ Legal Aid Board (2013) *Legal Aid Board Annual Report 2012*, Cahirciveen, Legal Aid Board, p.18.

¹⁵ In 2007, prior to the economic downturn, the number of applications for legal services stood at 12,814 (Legal Aid Board (2008) *Legal Aid Board Annual Report 2007*, Cahirciveen, Legal Aid Board, p.15). In 2013, applications totalled 17,559, an increase of 37% (Legal Aid Board (2014) *Legal Aid Board Annual Report 2013*, Cahirciveen, Legal Aid Board, p.14). Legal Aid Board Annual Reports available at http://www.legalaidboard.ie/lab/publishing.nsf/Content/Annual_Reports [accessed 15 September 2015].

¹⁶ In the period 2008 – 2011, the Legal Aid Board's budget was cut by over 15%. Whilst in recent years, funding allocated to the Board has increased incrementally, it remains below 2008 levels.¹⁶ The staffing levels also remain lower than pre-recession. (Legal Aid Board Annual Reports available at http://www.legalaidboard.ie/lab/publishing.nsf/Content/Annual_Reports [accessed 15 September 2015].

¹⁷ Legal Aid Board (2013) *Legal Aid Board Annual Report 2012*, Cahirciveen, Legal Aid Board.

¹⁸ In the period 2007 – 2013, the number of people waiting on a first consultation with a solicitor increased by 335%.

Waiting times frequently exceed LAB's own target of two to four months; 16 Law Centres had a waiting time of more than four months at the end of 2013 (Legal Aid Board (2014) *Legal Aid Board Annual Report 2013*, Cahirciveen, Legal Aid Board).

¹⁹ Civil Legal Aid Regulations 2013 increased the minimum contribution payable for legal advice from €10 to €30 and for legal aid from €50 to €130.

- 4.2 *Ensure that all persons who need legal services to access justice, in spite of their means, can access the civil legal aid scheme.*
- 4.3 *Broaden the remit of the Legal Aid Board to include issues related to social welfare, housing and employment.*
- 4.4 *Provide civil legal aid to borrowers or tenants in difficulty to ensure that they receive adequate legal advice and are supported in any legal proceedings which may result in repossession or eviction.*
- 4.5 *Remove the requirement for contributions for applicants at risk of domestic violence.*

5. Right to Social Security

Overpayments

FLAC is concerned that individuals and families may be pushed below the poverty line due to the Department of Social Protection's updated system for recovering social welfare overpayments.²⁰

Legislation introduced in 2012 permits the Department to recover 15% of a person's social welfare payment without his or her consent²¹, and even more if such consent is obtained. As a result, social welfare claimants may end up receiving less than the basic minimum rate set by the Government to ensure an adequate standard of living. Prior to this legislative change, the Department was prohibited from recovering an amount which would result in a person receiving less than the basic social welfare rate.²²

Social Welfare Payments for Under 26s

At the moment, young people under the age of 26 years who are eligible for a social security payment receive a lesser amount than those aged over 26. In other words, eligible individuals aged 26 and over receive a basic weekly payment of €186, claimants aged between 18 and 24 years with no dependent children receive €100, while claimants aged 25 years receive €144. These lower payments fall below the basic minimum income standard of €186 set by the Government.²³

There appears to be an assumption by the State that adults below the age of 26 are able to live with parents or family members, which is not always the case; consequently, concerns abound that these age-related social welfare cuts increase the vulnerability of people under the age of 26 to homelessness, particularly those who are already disadvantaged and without family supports.²⁴

²⁰ Overpayments can result from an error made by the claimant or the Department of Social Protection, the claimant not informing the Department of a change in circumstances or the claimant intentionally giving false information to receive a payment.

²¹ Section 3 of the Social Welfare Act 2012.

²² For more information on social welfare overpayments please see FLAC and Community Law & Mediation's Guide to Social Welfare Overpayments available on www.flac.ie.

²³ Information available at <http://bit.ly/SWAinfo> [accessed 10 September 2015].

²⁴ Saint Vincent de Paul (2013) *Analysis of budget 2014*, Dublin: SVP, p.4.

Habitual Residence Condition

The Habitual Residence Condition (HRC) is an additional qualifying condition for all means-tested social welfare payments and Child Benefit by which an applicant has to show a connection to the State.²⁵ The HRC was introduced following EU enlargement in May 2004. The Habitual Residence Condition has had a disproportionate impact on migrants, asylum seekers, Travellers, Roma, victims of domestic violence, children, people who are homeless and returning Irish emigrants.

The UN Independent Expert on Extreme Poverty²⁶ and the Committee on Economic, Social and Cultural Rights²⁷ have both expressed concerns about the discriminatory impact of the HRC on such vulnerable and marginalised groups.²⁸

Social Welfare Appeals

The social welfare appeals system, as it currently operates, does not comply with the State's domestic and international human rights obligations²⁹ and does not provide a fair, efficient and effective remedy.³⁰

Decisions are only published at the discretion of the Social Welfare Appeals Office.³¹

Given the consistently high rate of successful appeals to the Social Welfare Appeals Office,³² it is also apparent that more resources must be channelled into training for decision-makers at first instance.³³ These views are

²⁵ Section 15 of the Social Welfare and Pensions (No.2) Act 2009 also introduced a 'right to reside' clause to supplement the existing Habitual Residence Condition. This test provides that a person who does not have a right to reside in Ireland cannot be regarded as being habitually resident in the State.

²⁶ 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, pp.11-12.

²⁷ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.21.

²⁸ The Committee on the Rights of the Child also raised this issue in the List of Issues submitted to the Government in June 2015. UN Committee on the Rights of the Child (2015) *List of issues in relation to the combined third and fourth periodic reports of Ireland*, Geneva: OHCHR, p.2.

²⁹ FLAC (2012) *Not Fair Enough: Making the case for the reform of the social welfare appeals system*, Dublin: FLAC.

³⁰ The Office remains a section of the Department of Social Protection and is not an independent entity. Appeals Officers are employees of the Department.

³¹ This issue was raised by the Committee on Economic, Social and Cultural Rights during their recent examination of Ireland. 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.

³² The Social Welfare Appeals Office provides an appeals service to persons who are unhappy with decisions of the Department of Social Protection on questions relating to entitlement to social welfare payments.

³³ In 2014, 56.5% of appeals were decided in favour of the appellant while 17% of the total number of appeals did not go to an Appeals Officer but were instead revised by the original decision-maker once an appeal was lodged. Social Welfare Appeals Office (2015) *Annual Report 2014*, Dublin: SWAO, p.6.

shared by the Committee on Economic, Social and Cultural Rights.³⁴ FLAC submits that a greater investment in first instance decision-making may lead to fairer and sounder decisions, which could in turn reduce the number of appeals applications.

In addition to the delivery of training to first instance decision-makers, there is a need for racial sensitivity training for the Department of Social Protection's frontline staff. In January 2015, five organisations including FLAC³⁵, launched a report, *Persons or Number? 2*³⁶, which examined issues faced by migrants in accessing social protection. Out of a random sample of 35 cases, eight cases were identified where an official used inappropriate behaviour and/or language.³⁷ These included situations where officials made disparaging remarks about people of a particular nationality.³⁸ Although some form of anti-racism training is provided to frontline staff, it is optional and is not comprehensive.

Recommendations:

- 5.1 *Ensure when recovering social welfare overpayments that a person's income is not reduced below a figure which would have a negative impact on their fundamental right to an adequate standard of living and social security.*
- 5.2 *End the discriminatory practice of providing a lower rate of social welfare payments to young people under the age of 26.*
- 5.3 *Review the Habitual Residence Condition so as to eliminate its discriminatory impact on access to social security benefits, particularly among vulnerable and marginalised individuals and groups.*
- 5.4 *Provide appropriate training to Department of Social Protection officials responsible for making decisions at first instance.*
- 5.5 *Provide mandatory and comprehensive anti-racism training to all Department of Social Protection frontline staff.*
- 5.6 *Place the Social Welfare Appeals Office on a statutorily independent footing.*
- 5.7 *Establish an anonymous, searchable database of social welfare appeals decisions.*

6. Right to Housing in relation to Over-Indebtedness

³⁴ UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, para.21.

³⁵ Crosscare, Doras Luimní, Dublin City Centre Citizens Information Service (DCCCIS) and Nasc.

³⁶ Crosscare, Doras Luimní, FLAC, Dublin City Centre Citizens Information Service (DCCCIS) and Nasc (2015) *Person or Number? 2*, Limerick: Crosscare, Doras Luimní, FLAC, Dublin City Centre Citizens Information Service (DCCCIS) and Nasc.

³⁷ Crosscare, Doras Luimní, FLAC, Dublin City Centre Citizens Information Service (DCCCIS) and Nasc (2015) *Person or Number? 2*, Limerick: Crosscare, Doras Luimní, FLAC, Dublin City Centre Citizens Information Service (DCCCIS) and Nasc, p.18.

³⁸ Crosscare, Doras Luimní, FLAC, Dublin City Centre Citizens Information Service (DCCCIS) and Nasc (2015) *Person or Number? 2*, Limerick: Crosscare, Doras Luimní, FLAC, Dublin City Centre Citizens Information Service (DCCCIS) and Nasc, p.18.

The mortgage arrears crisis has been one of the most striking aspects of the recession resulting in thousands of people either losing – or at risk of losing – their homes and finding themselves in significant debt. There has been some progress in seeking to address this issue, including the introduction of new legislation, the Personal Insolvency Act 2012, for which FLAC had been campaigning for over a decade. However, there remain many flaws and operational difficulties with the new scheme and finding a long-term sustainable solution is still out of reach for many people. The most recently available figures show that at the end of June 2015,³⁹ some 98,137 mortgage accounts for principal dwelling houses were in arrears, a decline of 6.3% compared to the first quarter of the year. The number of accounts in arrears for more than 90 days was 70,299; but worryingly 38,041 accounts were in arrears of more than two years. An imbalance in the relationship between lenders and borrowers has been an ongoing problem, particularly for borrowers seeking to negotiate solutions with their lenders without sufficient independent legal or financial advice.

Recommendations:

- 6.1 Provide civil legal aid to borrowers in difficulty to ensure that they receive adequate legal advice and are supported in any legal proceedings which may result in repossession or eviction.*
- 6.2 Require banks and other lending institutions to provide more detailed and verified information on responses to the mortgage arrears crisis.*

7. Promotion of Human Rights as a Charitable Purpose

The legislation relating to the regulation of charities in Ireland was reviewed and updated in 2009⁴⁰ and the Charities Regulatory Authority⁴¹ was established in 2014, aiming to increase transparency and accountability in the charities sector in Ireland. The Charities Act does not however recognise the advancement of human rights as a “charitable purpose”. This means that the promotion of human rights does not receive the same recognition for the purpose of registration, taxation and fundraising as all other charities, and does not enable human rights activity. Ireland is a current member of the UN Human Rights Council and leads on resolutions in the Council on civil society space; nevertheless, this anomaly makes it challenging for NGOs working to promote human rights within the country. Revisiting the definition of charities under the legislation to include the protection and promotion of human rights as a charitable purpose would recognise the essential work being done by many organisations who are seeking to promote the human rights that the Irish Government itself has already committed to; it would also enable organisations to work more efficiently and effectively.

Recommendation:

- 7.1 Amend the Charities Act 2009 to include the promotion of human rights as a charitable purpose.*

³⁹ Central Bank of Ireland (2015) *Residential Mortgage Arrears and Repossession Statistics: Q2 2015*, Dublin: CBI.

⁴⁰ Charities Act 2009.

⁴¹ <https://www.charitiesregulatoryauthority.ie/> [accessed 15 September 2015].