

# **Briefing for UN Independent Expert on Human Rights and Extreme Poverty**

**FLAC**

**January 2011**

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## **Introduction**

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all. FLAC was established in 1969 by law students to provide legal information, advice and representation to people who could not afford to pay for legal services and to campaign for a state civil legal aid system. Today FLAC has a full-time head office in Dublin and works in four key priority areas:

- ★ Civil Legal Aid
- ★ Debt and credit law
- ★ Social welfare law
- ★ Public Interest Law

In pursuit of the goal of promoting access to justice, FLAC works in a number of ways. These include outreach via a telephone information and referral line and a network of legal advice centres, campaigning on core issues and conducting research into areas of law and policy where FLAC can bring about positive social change. The organisation also generates publications and guides on legal topics aimed at informing the public about their rights and promoting access to justice. FLAC keeps statistics on legal queries received and conducts research on people's ability to access justice around the country. This has produced solid evidence on the extent of unmet legal needs in Ireland. In 2010 FLAC received 9,305 calls to its telephone information line and received more than 10,200 forms from the 58 centres which participate in the data collection programme.

Approximately 450 volunteer barristers and solicitors impart legal advice at FLAC's 88 centres around the country. They provide a much-needed service to those who cannot afford legal information and advice otherwise.

FLAC welcomes this opportunity to highlight some of our main concerns to Ms Sepúlveda, the Independent Expert on the Question of Human Rights and Extreme Poverty.

## **State Services**

While there are some excellent services provided by the State and people within the public service who are committed to ensuring that people are treated with respect and dignity, in all areas of our work FLAC encounters people who seek to access state services but are met with a lack of consistency, lack of respect for their dignity and who are denied their fundamental human rights. Those working within these administrative systems must recognise people's rights and entitlements not only to access services but to ensure that their rights are upheld in a fair and efficient way.

Furthermore, reliable up-to-date statistical information is essential to ensure that fair policies which address the actual needs of people are put in place. Currently the information and statistics available from the State in relation to most of our areas of work are outdated and do not represent the current situation for people affected by the drastic changes caused by the economic crisis.

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## **State Support for Human Rights, Anti-Poverty Measures and Equality**

The State has also reduced its capacity to protect some of the most vulnerable people in society through the decision to abolish the Combat Poverty Agency and the National Consultative Committee on Racism and Interculturalism (NCCRI) and reduce the budgets of a number of other key bodies established to protect the most vulnerable including the Irish Human Rights Commission and the Equality Authority.

The Combat Poverty Agency was established in 1986 and for over 20 years they played a key role in increasing awareness and understanding of poverty and in influencing and informing government policies to tackle poverty in Ireland. The Agency was abolished in July 2009 and its functions were integrated into the Department of Social and Family Affairs, now the Department of Social Protection. The Social Inclusion Division, as it is now known, has since been moved to the Department of Community, Equality and Gaeltacht Affairs in May 2010. Although the Combat Poverty Agency was state-sponsored, it functioned as a body to poverty-proof state policies and provided a constructive and critical voice for those affected by those policies. It is unclear whether the incorporation of its successor into a government department rather than leave it as a stand-alone body will enable the Social Inclusion Division to offer constructive criticism in the same way.

The NCCRI was established in 1998 as an independent expert body focusing on racism and Interculturalism, providing advice, training and technical assistance to government and non-government organisations and other groups. Due to Government cutbacks the NCCRI was closed in December 2008 and no similar body has taken over its responsibilities.

In 2009 the budgets of the Irish Human Rights Commission and the Equality Authority, two of the main bodies established to protect and promote human rights and ensure equality, were cut by 32 per cent and 43 per cent respectively. This has led to a reduction in staff numbers in both bodies as well as a reduction in their work capacity<sup>1</sup>. In 2011, the Commission's budget was cut by a further 12 per cent and the Authority by a further four per cent.

**Recommendation: Bodies which have been established to promote and protect equality and human rights should be supported and given the necessary supports in a time of economic crisis where poverty and infringement of basic rights will be exacerbated.**

## **The Irish Social Protection System and the Right to Social Security**

The social security or social protection system in Ireland is administered by the Department of Social Protection. Social welfare payments consist of payments based on contributory benefits, non-contributory payments and universal payments. While contributory benefits are based on the social insurance contribution, non-contributory payments are usually means-tested and subject to a number of qualifying conditions.

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<sup>1</sup> See the Equality and Rights Alliance petition to the European Union Commission for further details of the impact of these cuts available at [http://www.eracampaign.org/uploads/ERA\\_Petition\\_to\\_the\\_European\\_Parliament.pdf](http://www.eracampaign.org/uploads/ERA_Petition_to_the_European_Parliament.pdf)

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Child Benefit and Free Travel are the two universal payments. However, while Child Benefit is described as a universal payment it is no longer universal as it is also subject to the this condition and certain parents cannot receive this payment for their children living in Ireland as outlined below.

Jobseekers supports, Supplementary Welfare Allowance, rent supplement, and child benefit were all reduced in Budget 2011. The high rate of unemployment has inevitably led to a huge increase in the numbers claiming social welfare payments. In FLAC's experience, this has resulted in delays, inconsistencies and unfair decision-making, which has in turn led to increased pressure on the Social Welfare Appeals Office.

### **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". 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 both the Department of Social Protection and the Health Service Executive.

Article 6 of the ECHR provides for fair procedures which means that the appropriate steps have to be followed in accepting and assessing applications within a reasonable period of time. In relation to social welfare assistance the DSP has a duty of care to ensure that a person is not subjected to inhuman or degrading treatment (Article 3) which includes destitution.

**Recommendation: the Department of Social Protection should consider the State's obligations under ECHR in all its policies and social welfare decisions.**

### **European Social Charter**

While the State is a signatory to both the International Covenant on Economic, Social and Cultural Rights and the European Social Charter, economic, social and cultural rights are not incorporated into the domestic legal framework and there is very restricted scope for the adjudication of economic, social and cultural rights in the State.

While the State has ratified Articles 12 and 30 which grant the right to social security and right to protection against poverty and social exclusion, it has not ratified Article 31 of the European Social Charter which affords the right to housing. The latest report of the government on the European Social Charter was issued in 2009 and dealt with the period 1 January 2005 to 31 December 2007<sup>2</sup>. An up-to-date report has not been submitted to address the issues arising out of the economic crisis and to assess the impact of the crisis on the rights to social security and protection against poverty and social exclusion.

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<sup>2</sup> Available at [http://www.coe.int/t/dghl/monitoring/socialcharter/reporting/statereports/Ireland6\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/reporting/statereports/Ireland6_en.pdf)

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**Recommendation: the State should ratify the right to housing in the European Social Charter and incorporate the ICESCR into the domestic legal framework. The State should carry out an impact assessment of the economic crisis on the enjoyment of economic, social and cultural rights.**

## **The Administration of the Social Welfare System**

FLAC's work addresses inequities in the administration of the social welfare system through strategic casework and political lobbying. Through its work FLAC is aware of a number of issues arising out of maladministration of the social welfare system and bad practices which have been exacerbated due to the economic crisis.

### **Problems with Applications and Written Decisions**

The perception of some of the callers to FLAC's information line is that they have been discouraged from actually applying for a payment as they are told they will not satisfy the qualifying conditions without a proper assessment carried out. This happens most often in relation to applications for Mortgage Interest Supplement and for payments subject to the Habitual Residence Condition.

A person is entitled to apply for a payment, have the application considered and receive a written response. 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>3</sup> as it is contrary to natural justice not to issue a written decision which is necessary in order to appeal a refusal. The Department's own guidelines to its decision-makers<sup>4</sup> clearly state that a decision "should be recorded in writing" and must be:

- *clearly written;*
- *properly signed (full signature (initials not sufficient) and name typed/written in capitals underneath);*
- *and dated.*

The 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. FLAC is concerned that the actual number of refusals cannot be ascertained as there are individuals who will not access the appropriate information or assistance and are therefore not aware of their entitlement to make an appeal.

**Recommendation: a person should be allowed to make an application and have that application considered in full. The Department of Social Protection should issue written decisions in the case of any refusal and should keep comprehensive and up-to-date statistics on the number of applications received, granted and refused in relation to all payments.**

## **Inconsistent Decision-Making at First Instance and Need for Adequate Training for Decision-Makers**

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<sup>3</sup> Available at <http://www.welfare.ie/EN/OperationalGuidelines/Pages/decnatj.aspx#record>

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In the current economic climate where applications for social welfare have increased dramatically, Deciding Officers and Community Welfare Officers are under immense pressure to cope with the number of applications received. Since 1 January 2011 Community Welfare Officers have been transferred from the Health Service Executive to the Department of Social Protection.

Community Welfare Officers administer the Supplementary Welfare Allowance scheme, regarded as the 'safety-net' payment, to ensure a minimum income and ensure that no one is left destitute. There are a number of associated supplements which also form part of this scheme such as rent supplement and emergency once-off payments known as Urgent Needs Payments or Exceptional Needs Payments. These are usually granted at the discretion of the Community Welfare Officer and this has led to inconsistencies and people being left without any payment whatsoever. The transfer of the Community Welfare Officers to the Department of Social Protection presents an opportunity to ensure that they receive adequate training which incorporates a human rights element.

Given the current delays in the appeals system which mean that on average a person may be waiting 22 weeks for a decision on his or her appeal, 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 as explained below.

**Recommendation: Comprehensive training should be made available for Deciding Officers and Community Welfare Officers which adequately explains people's rights to payments. This will ensure that people can access payments to which they are entitled without delay while also ensuring that correct decisions are made at first instance thereby reducing the number of unnecessary social welfare appeals.**

### **The Social Welfare Appeals Process and Delays**

The [Social Welfare Appeals Office](#) (SWAO) is described as an independent body set up to decide on appeals relating to decisions of Deciding Officers from the Department of Social Protection as well as decisions of Community Welfare Officers from the HSE related to social welfare payments. However, Social Welfare Appeals Officers including the Chief Appeals Officer are appointed by and serve at the pleasure of the Minister for Social Protection.

In October 2010, during a Joint Oireachtas Committee on Social Protection meeting<sup>5</sup>, the Deputy Chief Social Welfare Appeals Officer stated that it is expected that the office will have received up to 33,000 appeals by the end of 2010 and that average processing times were currently 27.5 weeks. While the office has taken on extra staff to deal with this increase in demand the increase in the workload of the office reflects the need for better decision making at first instance.

To put this into context, the Social Welfare Appeals Office's Annual Report 2009 stated that the office received a total of 25,963 appeals in 2009 and 7832 further cases were carried over from 2008. The estimated 2010 figure represents a further 27 per cent increase on the number of appeals received during the year while the 2009 figure had already increased from 2008 by 43 per cent. Of the 17,787 appeals concluded in 2009, 48.2 per cent,

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<sup>5</sup> The transcript of the Committee on debate dealing with Habitual Residence and related appeals is available at <http://debates.oireachtas.ie/FAJ/2010/10/27/00005.asp>

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or in other words 8568 appeals, were decided in favour of the appellant. This is a very high figure and suggests inadequate and overly restrictive decision-making at first instance. These statistics demonstrate the pressure currently placed on the entire system both at Department level and at appeal stage.

**Recommendation: the Social Welfare Appeals Office should be appropriately resourced and better decision-making should be ensured at first instance through the above-mentioned training.**

### **The Habitual Residence Condition (HRC)**

The Habitual Residence Condition (HRC) is a qualifying condition for social welfare payments which was introduced to prevent welfare tourism from nationals of the ten States acceding to the EU in May 2004. All persons seeking means-tested social welfare payments and Child Benefit after that date have been required to satisfy this condition and show a connection to the State.

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 who have been particularly affected by the HRC are not those who were the initial target of the Condition. This is an invidious Condition which creates inequity between the general population and already vulnerable groups applying for social welfare assistance.

The HRC applies to Irish citizens as well as non-citizens but it is, of course, usually much easier for Irish citizens to show a sufficient connection to the Irish State in order to satisfy the Condition than for non-citizens.

### **Supplementary Welfare Allowance and the Habitual Residence Condition**

The purpose of the Supplementary Welfare Allowance scheme is to provide a basic minimum income for someone who does not fit into a particular welfare category, usually on a temporary basis. Payment of Supplementary Welfare Allowance is not contingent on a person being a jobseeker. It operates essentially as a 'safety net' in the event that a person has no other source of income and it was previously available as an interim payment to guarantee a minimum level of income support pending the outcome of an appeal against a refusal of a payment to which a person may be entitled. However, when a person appeals a refusal of another payment subject to the Condition he or she is unable to rely on an income support under the Supplementary Welfare Allowance scheme unless they are found to meet the all the conditions applicable to SWA, a payment which is also subject to the habitual residence test.

As a person cannot receive SWA as an interim payment pending the outcome of an appeal, the claimant will therefore have no income or insufficient income to pay for their basic needs. In the case of those appealing habitual residence a further consequence has been the denial of access to homeless services as they are not in receipt of a payment.

**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.**

### **Groups Adversely Affected by the Habitual Residence Condition**

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### **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 this final set of decisions in December 2009, 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, leave to remain or subsidiary protection processes from satisfying the Habitual Residence Condition.

The Chief Appeals Officer's approach outlined a straightforward and consistent way to deal with social welfare applications that would not entitle persons who are here for quite short periods or who have no intention of remaining here to access full social welfare benefits but would not exclude a whole category of people who have been in the State for lengthy periods. Instead new applicants who are still awaiting a decision on their immigration status 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<sup>6</sup>.

Prior to the introduction of the HRC in 2004, Child Benefit was a universal payment paid to the parents of all children living in Ireland. Due to the Department's application of the HRC to people within the asylum or 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 and Article 3 states that in all decisions concerning children the "best interests of the child" must be a paramount consideration. A further inequality also exists between children within the asylum process as the parents of children who were in receipt of the payment before May 2004 continue to receive it, as do parents who have been granted the payment on appeal, whereas the parents of children who were born here or arrived after the introduction of the Condition do not.

For more information on these cases see FLAC's briefing documents on the Habitual Residence Condition ([August](#) and [December 2009](#)) available on [www.flac.ie](http://www.flac.ie)

### **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

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<sup>6</sup> According to the latest figures available from the Reception and Integration Agency (RIA), in August 2010 there were 2642 people living in accommodation provided by RIA for more than three years. See [http://www.ria.gov.ie/filestore/publications/RIAug\(A4\)2010.pdf](http://www.ria.gov.ie/filestore/publications/RIAug(A4)2010.pdf)

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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>7</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-seek and those who have worked 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 of this issue is that people are not told of their entitlement to Jobseekers Benefit which is not subject to HRC and is linked instead to PRSI 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.

### **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.

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 gender-based violence<sup>8</sup>. This is due to the fact that some women's immigration status is linked to that of her partner's status therefore if they separate it may cause her problems in accessing a payment in her own right:

*The HRC severely impacts on a woman's ability to leave a violent relationship and to access support services. Firstly, she 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<sup>9</sup>.*

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

In these situations the Community Welfare Officer 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 payment not subject to HRC under the Supplementary Welfare Allowance scheme, the difficulty occurs when she seeks to access a long-term payment where she may be deemed not to be habitually resident.

### **Cross-border Issues**

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<sup>7</sup> Available at [http://www.flac.ie/download/pdf/2010\\_09\\_06\\_habitual\\_residence\\_condition\\_guide\\_final.pdf](http://www.flac.ie/download/pdf/2010_09_06_habitual_residence_condition_guide_final.pdf)

<sup>8</sup> Available 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)

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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 is given the payment to which he or she is entitled. Given the nature of certain payments which are linked to a primary payment, e.g. rent supplement which is not itself subject to HRC but linked to payment of a job-seekers payment or Supplementary Welfare Allowance which is, 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.

### **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>10</sup>.*

**Recommendation: 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.**

## **The Right to an Adequate Standard of Living for Migrants**

### **Direct Provision and Dispersal**

The direct provision and dispersal system, which provides food and board for people seeking protection, is administered by the Reception and Integration Agency (RIA), an administrative unit under the aegis of the

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<sup>10</sup> <http://www.itmtrav.ie/keyissues/myview/85>

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Department of Justice and Law Reform. Direct provision residents are given a residual weekly allowance of €19.10 for an adult and €9.60 for a child.

According to the latest figures available from the end of October 2010<sup>11</sup>, there are currently 6249 asylum seekers in Direct Provision accommodation of which over 30% are children. The Government originally envisaged that a person would remain within the direct provision system on 'on a short term basis (not more than six months)' however the latest figures show that 2707 (43%) of residents have spent more than 3 years in such accommodation.

Ireland and Denmark are the only two EU member states which have not opted into the Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers which includes the right to work after a specified period of time if a final decision has not been made on their claim for asylum. Given that direct provision residents are reliant on very limited social welfare payments<sup>12</sup> they are particularly susceptible to poverty.

FLAC has carried out a legal analysis of the direct provision and dispersal system in the context of both domestic and international human rights law in its report *One Size Doesn't Fit All*<sup>13</sup>. The report found that the system does not respect and protect the human rights of asylum seekers and those seeking other forms of protection including their right to housing, food and social security. Instead the residents are completely excluded from anti-poverty and social inclusion strategies as they are neither counted in statistics measuring poverty in households nor in homeless facilities.

**Recommendation: the direct provision and dispersal system should be abolished but while it remains in place, it should be administered in a fair and transparent way to ensure that people can exercise their right to an adequate standard of living including their right to housing and right to food.**

**Furthermore, those seeking protection in Ireland should be included in household statistics and specifically provided for in anti-poverty and social inclusion strategies.**

### **Protection of Migrants**

The Immigration, Protection and Residence Bill, first introduced in 2007, has been reintroduced into the Oireachtas on three separate occasions. A change in Government presents the opportunity to consider the law pertaining to immigration and protection separately. Both areas need to be addressed in updated legislation but they must not be put together in the same statute. The focus of refugee law is the protection of an individual from persecution in his or her country of origin whereas provisions dealing with general immigration matters are primarily concerned with the State's security and entrance to and permission to remain in the State for non-Irish citizens.

<sup>11</sup> Reception and Integration Agency, Monthly Statistics Report, October 2010 available at [http://www.ria.gov.ie/filestore/publications/RIAOct\(A4\)2010.pdf](http://www.ria.gov.ie/filestore/publications/RIAOct(A4)2010.pdf)

<sup>12</sup> Apart from the weekly direct provision allowance, residents usually receive a clothing allowance twice a year but this is granted at the discretion of a Community Welfare Officer and is not an automatic entitlement.

<sup>13</sup> FLAC (2010) *One Size Doesn't Fit All: A legal analysis of the direct provision and dispersal system in Ireland, 10 years on* available 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) and executive summary available at [http://www.flac.ie/download/pdf/one\\_size\\_doesnt\\_fit\\_all\\_exec\\_summary\\_final.pdf](http://www.flac.ie/download/pdf/one_size_doesnt_fit_all_exec_summary_final.pdf)

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As outlined in FLAC's submission on the IRP Bill, provisions in the existing draft legislation which restrict migrants' access to public services, the courts and remedies should be removed forthwith.

An underlying theme of the Bill is the manner in which it proposes that a person will be regarded as unlawfully in the State as soon as their specific permission expires, or is withdrawn. At that stage then, such persons will only be able to access very limited services<sup>14</sup>. All social welfare, except emergency supplementary welfare allowance in the form of a once off "exceptional needs" payment are to be withdrawn. FLAC recommends that no person should be left destitute, or without the necessary provisions for a reasonable quality of life by virtue of the withdrawal or ending of residence status.

FLAC is greatly concerned at the substantive restrictions on access to the courts for those who seek the protection of the courts against negative decisions. If the Bill is not amended, these restrictions will be limited even further than they currently are. The time limits within which judicial review must be brought has been restricted to 14 days and solicitors run the risk of being personally penalised by an award of costs against them if another judge concludes that the grounds of the case put forward are "frivolous or vexatious"<sup>15</sup>, a provision which cannot be found elsewhere segregating those with migrant rights issues.

Under the current legislation there is no independent appeals mechanism for immigration decisions. An independent, fair appeals process would help deliver a consistent high quality in decisions. It would result in more a more streamlined administration of immigration applications and a better use of limited funds available to the State. It would benefit the person who is affected by the decision and would also benefit the administration of justice in general.

An improved single procedure which will be carried out fairly and efficiently will also ensure that people who seek the State's protection will not be left to endure the direct provision system for years on end.

The UN Human Rights Committee in its Concluding Observations on Ireland's compliance with the International Covenant on Civil and Political Rights (ICCPR) in 2008 stated that "Ireland should also introduce an independent appeals procedure to review all immigration- related decisions"<sup>16</sup>.

**Recommendation: all persons, regardless of immigration status, should be entitled, without discrimination to equal access to all courts, tribunals, ombudsman's offices and like bodies.**

### **Right to Housing and Over-indebtedness**

During the 'Celtic Tiger' years, a culture of consumer borrowing resulted in increased over-indebtedness through the granting of one hundred per cent mortgages, unsolicited pre-approved loans and 'daisy chain' credit card usage. A 'sub-prime lending' market also developed which led to unsustainable mortgages and an increase in

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<sup>14</sup> Section 9 Immigration, Residence and Protection Bill 2010

<sup>15</sup> Section 133 (7) Immigration, Residence and Protection Bill 2010.

<sup>16</sup> UN Human Rights Committee Concluding Observations, ICCPR Ireland (2008) CCPR/C/IRL/CO/3

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repossessions. FLAC published a report in July 2009 entitled *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System*<sup>17</sup>.

The issue of over-indebtedness must be addressed urgently. The latest figures from the Central Bank show that for the Third Quarter of 2010 there were 40,472 mortgage accounts in arrears for more than 90 days which represents 5.1 per cent or just over one in every 20 mortgages. 28,049 or 3.6 per cent of those in arrears have been in arrears for six months or more. The Report of the Expert Group on Mortgage Arrears and Personal Debt<sup>18</sup>, in which FLAC participated, indicates that the number of rescheduled mortgage accounts is up to 45,000. This means there is an estimated total of 70,000 who are either in arrears or have rescheduled. The Central Bank figures also show that there were 81 repossessions in the Third Quarter of 2010 - 22 on foot of Court Orders and 59 which were voluntarily surrendered or abandoned. More than 500 homes were repossessed in 2010.

The government's main response to the issue of personal debt and over-indebtedness has been to fund organisations such as MABS (Money, Advice and Budgeting Services) to deal with the problems of personal debt. There was, however, no real processes established to work with indebted people to progress much needed law reform. In a society where credit has become the main driver of consumer spending, this was an unacceptable failure to act in a timely manner to reform the law.

Access to information and advice is critical in tackling financial problems. The longer a person has to wait, the more serious and difficult the problems become. Despite the prospect of budgetary restraints, the provision of timely, appropriate and well-resourced advice services must be protected.

Arising from our work on mortgage arrears, FLAC has become aware of serious flaws in the State's social housing policy. The Government must take a coordinated approach to the economic crisis and ensure that no one is left without a home because of difficulties such as family breakdown, over-indebtedness or unemployment. The State has ultimate responsibility for all those who are left destitute; however government departments currently seem to work independently of each other in addressing a person's housing needs. A harmonised response to the problem of homelessness as a result of repossessions and evictions needs to be adopted and implemented as a matter of urgency. The social housing budget for 2011 has been cut by 36 per cent and no adequate provision has been put in place to address the increased need for this type of housing.

Changes to the rent supplement scheme in July 2009 whereby a person must have lived in private rented accommodation for at least six months, or have had a housing needs assessment carried out, in order to access the payment, has resulted in refusals to people in need. These people include those who have undergone the breakdown of a relationship, women fleeing domestic violence and immigrants as they are not deemed to have a housing need and therefore no housing needs assessment will be carried out. A review of the Rent Supplement Scheme was indicated in Budget 2011 but any review should ensure that no person in need of the supplement will be deprived of it and left without somewhere to live.

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<sup>17</sup> FLAC (2009), *To No One's Credit: The Debtor's Experience of Instalment and Committal Orders in the Irish Legal System* available at [http://www.flac.ie/download/pdf/to\\_no\\_ones\\_credit\\_june09.pdf](http://www.flac.ie/download/pdf/to_no_ones_credit_june09.pdf) and the executive summary is available at [http://www.flac.ie/download/pdf/to\\_no\\_ones\\_credit\\_executive.pdf](http://www.flac.ie/download/pdf/to_no_ones_credit_executive.pdf)

<sup>18</sup> Available at <http://www.merrionstreet.ie/wp-content/uploads/2010/11/Mortgage-Arrears-and-Personal-Debt-Group-Report-17th-November-2010.pdf>

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This year alone FLAC notes that every one in ten calls to its information line and visits to its network of legal advice centres are debt-related. This represents a jump from under 2 per cent in 2007 to between 10 and 11 per cent by the end of 2010.

**Recommendation: the State should implement the recommendations published by the Expert Group on Mortgage Arrears as an urgent priority, including:**

- ★ Reform of the Mortgage Interest Supplement scheme;
- ★ Early assessment of housing need where houses are voluntarily surrendered;
- ★ A commitment to continuously review the Code of Conduct on Mortgage Arrears;
- ★ Establishment of a Mortgage Arrears Resolution Process;
- ★ Sufficient access to financial and legal information and advice where necessary;
- ★ The overhaul of personal debt and bankruptcy systems in line with the Law Reform Commission's recommendations;
- ★ Regulation of debt collection and management.

### **Consumer Credit**

Current consumer credit legislation currently consists of the Consumer Credit Act 1995 and Statutory Instrument No. 281 of 2010, European Communities (Consumer Credit Agreements) Regulations 2010 which transposed the latest European Union Directive on consumer credit. This has resulted in a body of law which is out-of-date and extremely difficult to navigate.

While moneylenders in the State are licensed unlike debt collectors and debt management companies, they are entitled to charge up to 186 per cent interest on loans which leads to further financial hardship for people who have resorted to such measures.

**Recommendation: The law needs to be updated and consolidated to produce a piece of comprehensive and comprehensible legislation which will protect consumers.**

### **Legal Aid**

In this anxious time the State should, at a minimum, commit to maintaining current levels of funding and resources to those providing legal aid. Cutting legal aid will discourage and deny people on low incomes access to the courts and dispute resolution systems that other people will still be able to access. To deny people access to the system, or to the people who can explain and interpret the system to them, is to deny a very basic right and should not be tolerated in a system based on the rule of law. Two State-run law centres currently have waiting lists to see a solicitor of more than eight months, and 11 have waiting lists of five months, substantially beyond the maximum waiting period of two to four months set down by the High Court in a 2004 case.

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In addition, the transfer of the administration of the Criminal Legal Aid scheme to the Civil Legal Aid Board must not result in the dilution of the already stretched services of the Board nor must it deny Criminal Legal Aid to those in need of it.

FLAC centres operate to bridge the gap between the time a person applies for legal aid and the time he or she may get an appointment to see a Legal Aid Board solicitor.

Civil legal aid is not available for people seeking to take a social welfare appeal and while it is not necessary that a person is legally represented, often complex legal concepts (such as the Habitual Residence Condition) are at the subject of the appeal so there is often an inequality of arms where the appellant cannot argue his or her case.

**Recommendation: the Legal Aid Board must be supported to carry out its important work in a timely fashion and waiting times must be reduced.**

## **Conclusion**

The State must make concrete commitments to ensure that human rights are protected. Fundamental human rights are not expendable and cannot be disregarded in times of economic uncertainty. In fact, this is the time when people become even more susceptible to potential infringements of their basic rights and face the risk of poverty.