

Submission on Social Welfare Bill 2012

FLAC and Northside Community Law Centre



11 December 2012

About FLAC

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

FLAC Policy

Towards achieving its stated aims, FLAC produces policy papers on relevant issues to ensure that government, decision-makers and other NGOs are aware of developments that may affect the lives of people in Ireland. These developments may be legislative, government policy-related or purely practice-oriented. FLAC may make recommendations to a variety of bodies drawing on its legal expertise and bringing in a social inclusion perspective.

You can download/read FLAC's policy papers at <http://www.flac.ie/publications/policy.html>

About Northside Community Law Centre

Established in 1975, the Northside Community Law Centre (NCLC) provides free legal information and advice to the residents of North Dublin (specifically those in the electoral constituencies of Dublin North-Central and Dublin North-East). The NCLC aims to protect socio-economic rights, create a more just society and empower the local community through its campaign work, research and education programmes.

You can download/read NCLC's law reform submissions at <http://www.nclc.ie/publications/default.asp>

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(December 2012)

FLAC and NCLC are concerned that a serious and significant proposed change to the Principal Social Welfare Act¹ has the potential to force people into destitution by introducing increased powers of recovering overpayments which will push them below the accepted threshold that the State itself has set as a “basic minimum income”² in the form of Supplementary Welfare Allowance (SWA). The current basic rate of Supplementary Welfare Allowance is €186 per week.

An overpayment is described by the Department of Social Protection as “any Social Welfare assistance or benefit payment which the person who received the amount was not entitled to receive”.³ There are many circumstances which can lead to a person incurring an overpayment. The Department of Social Protection may review a claim, and new facts may come to light that show a person was not entitled to a payment for a particular period. These decisions are retrospective in their application and can lead to significant amounts being owed to the Department of Social Protection. In many cases there is no wilful concealment of fact on the part of the claimant. Additionally, administrative delays on the part of the Department of Social Protection can lead to protracted claim reviews which inadvertently result in a person incurring an overpayment. The Social Welfare Appeals Office 2011 report noted:

Where an overpayment does arise, officers of the Minister (who are usually also Deciding Officers) must then address the question of whether and how much recovery should be pursued. It may be that the power of Deciding Officers to examine the circumstances of the case to determine the date from which the decision should be revised is overlooked on the basis that such circumstances can be taken into account when looking at the question of recovery.⁴

It is important to note that decisions regarding the recovery of monies from a social welfare recipient are made by Authorised Officers, not Deciding Officers. Consequently, a person cannot challenge their decisions by way of appeal to the Social Welfare Appeals Office. A person must challenge the initial decision by the Deciding Officer in order to advance any arguments regarding the amount owed or relevant mitigating factors.

Currently recovery is permitted through court proceedings or through deductions from payments⁵. The limit of recovery through deductions from a social welfare payment by the Department is set out in regulations⁶ or secondary legislation at a level which

¹ The Social Welfare (Consolidation) Act 2005 otherwise referred to as the Principal Act available at http://www.welfare.ie/EN/Policy/Legislation/Acts/Documents/swcact_05.pdf.

² See Department of Social Protection’s [Operational Guidelines on Supplementary Welfare Allowance \(SWA\)](#).

³ See Department of Social Protection’s [Overpayment Recovery - Guidelines on the Recovery of Debt by Department of Social Protection](#).

⁴ See [Social Welfare Appeals Office Annual Report 2011](#).

⁵ Section 341 of the Social Welfare (Consolidation) Act 2005.

(December 2012)

...shall not cause, without the prior written agreement of the person liable to repay the overpayment, that person's weekly payment of benefit to fall below the weekly rate of supplementary welfare allowance appropriate to his or her family circumstances that would be payable if the person was not in receipt of any benefit or assistance.

As many primary payments (such as Jobseeker's payments, One Parent Family Payment, Blind Pension) are all set at a maximum rate of €188 per week, this means that currently the Department can only recover €2 a week as this would reduce a person's payment to €186. Where a person is receiving a larger payment, the amount which can be recovered can be greater.

However, the proposed s.13 will mean that the Department can recover up to 15 per cent of a person's weekly payment without his or her written consent. In other words the Department will be able to deduct up to €28 per week from a person already struggling to live on a minimum subsistence payment. In cases where a person gives written consent the Department could deduct an even higher amount.

Section 13 of the Social Welfare Bill 2012 proposes:

13.– (1) Section 341 of the Principal Act is amended—

(a) in subsection (7) by substituting "Subject to subsection (7A), any benefit," for "Any benefit," and

(b) by inserting the following subsections after subsection (7):

"(7A) The weekly amount of any benefit or assistance to be deducted for the purposes of the recovery of any benefit, assistance, supplement or payment in accordance with subsection (7) shall not, without the prior written consent of the person liable to repay the overpayment, exceed 15 per cent of the weekly rate of benefit or assistance to which the person concerned is or becomes entitled.

(7B) In subsection (7A) 'weekly rate' means the appropriate weekly rate of benefit or assistance payable to a person under Part 2 or Part 3, but does not include any increases under Part 2 or Part 3 of such benefit or assistance as the case may be.

(7C) A person who is in receipt of any benefit or assistance, other than supplementary welfare allowance, from which a deduction is being made for the repayment of any

⁶ See [Social Welfare \(Consolidated Claims, Payments and Control\) Regulations 2007 \(S.I. 142 of 2007\)](#) as amended by [Social Welfare \(Consolidated Claims, Payments and Control\) \(Amendment\) \(No. 4\) \(Overpayments\) Regulations 2011 \(S.I. 461 of 2011\)](#).

(December 2012)

benefit, assistance, supplement or payment in accordance with subsection (7), shall not be entitled to claim for supplementary welfare allowance under section 196.”

(2) Section 196(1) (amended by section 9 of the Act of 2010) of the Principal Act is amended by inserting “, section 341(7C)” after “section 341(7)”.

Necessary safeguards are not included:

- A person will be forbidden from applying for a top-up payment of SWA where he or she is in receipt of another primary payment to bring them to the same level as the “basic minimum income”.
- The power will apply no matter how the overpayment arose. Even when the mistake arose through the error of a departmental miscalculation, the claimant is at risk of being punished by such deductions.
- The process under which these deductions can be made does not protect the procedural rights of people receiving payments. There is no guarantee that deductions will not be made until recipients have had an adequate opportunity to seek advice or to appeal a decision on the amount owed.

FLAC and NCLC are concerned that people do not appeal or query such decisions on the amount of overpayment and will not seek advice from organisations or advocates familiar with the social welfare system. Also a person on social welfare may agree or feel pressured to agree to a deduction which will leave them in a precarious situation without any recourse to further social assistance to his or her own detriment.

While the Department is entitled to recover overpayments, this should be done in an appropriate and measured way to ensure that claimants will not be forced into destitution. In cases of fraud, the Department has powers to prosecute a fraudulent claimant and these should be exercised where appropriate. However, in cases where a person has been paid whether through a mistake on his or her part or that of the Department, the Department must strike a balance between its responsibility to recover overpayments and its obligation to allow a person to live in dignity with a minimum income.

The Department of Social Protection, an “organ of the State” as defined in s.3 of the European Convention on Human Rights (ECHR) Act 2003, is legally required to act in a manner compatible with the rights contained in that Convention. Article 3 of the ECHR ensures that a person will not be subjected to “inhuman or degrading treatment” which includes destitution.

(December 2012)

Ensuring a minimum basic income is also a requirement under other international human rights instruments including the International Covenant on Economic Social and Cultural Rights (ICESCR). Magdalena Sepúlveda, UN Special Rapporteur on Extreme Poverty and Human Rights, said in 2012 that “States must ensure, at the very least, minimum essential levels of non-contributory social protection – not as a policy option, but rather as a legal obligation under international human rights law”.⁷

If the Government proposes to enact this measure, which will mean that a person will fall below the level that the State has deemed the lowest amount needed for a minimum essential standard of living, then it needs to be clear about the impact that this will have on the fundamental human rights of the people affected. Further, the legislature needs to know what that impact is. It is not clear that any poverty or other impact assessments have been carried out to examine how this proposed measure will impact on poor people who are reliant on social welfare payments. Certainly, none have been published to FLAC and NCLC’s knowledge.

Section 189 of the Principal Act currently provides for payment of SWA:

189.—Subject to this Act, every person in the State whose means are insufficient to meet his or her needs and the needs of any qualified adult or qualified child of the person shall be entitled to supplementary welfare allowance.

FLAC and NCLC suggest that the enactment of such a provision will conflict with s.189 and will create a situation where a person will not have even the very minimum essential level of income.

Recommendations:

- 1. To avoid this important issue being ignored through use of the guillotine, that legislators seek an early debate on s.13 of the Bill.**
- 2. Because the proposed section 13 of the Social Welfare Bill 2012 risks driving people below the minimum essential level of income, it is incompatible with fundamental human rights and therefore should be deleted.**

⁷ See Sepúlveda and Nyst, *Human Rights Approach to Social Protection*, available online at: <http://www.ohchr.org/Documents/Issues/EPoverty/HumanRightsApproachToSocialProtection.pdf>. This publication was published by the Ministry of Foreign Affairs of Finland.