Submission to the consultation on the proposed new Social Welfare Appeal Regulations

May 2023

About FLAC

FLAC (Free Legal Advice Centres) is an independent human rights and equality organisation, which exists to promote equal access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights, including economic, social and cultural rights. FLAC operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information, and runs a nationwide network of legal advice clinics where volunteer lawyers provide free legal advice.

As an Independent Law Centre, FLAC takes on a number of cases in the public interest each year. As well as being important for the individual client, these cases are taken with the aim of benefiting a wider community. FLAC also operates a Roma Legal Clinic, Traveller Legal Service and LGBTQI Legal Clinic.

FLAC makes policy recommendations in relation to social welfare law, equality and anti-discrimination law, human rights and access to justice. This includes policy reports and submission to national and international bodies, including human rights bodies. Through our *Casebook* Blog, FLAC provides updates and analysis of developments in social welfare law and our casework in this area.

FLAC is a member of the Department of Social Protection's Migrant Consultative Forum. We are also a member of the Chief Justice's Access to Justice Committee and the Review Group for the Department of Justice's current Review of the Civil Legal Aid Scheme.

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FLAC's Vision for a fit-for-purpose, rights-based Social Welfare Appeals Tribunal

Social Welfare is an investment people and their rights. The delivery of social welfare is a public service.

Social welfare plays a significant role in the promotion of equality and social inclusion, the protection of human rights, and combatting disadvantage. It is a vital safety net for people living in poverty and extreme poverty. As well as being a human right in itself, social welfare is vital for the realisation for some of the most basic human rights.

Delays in accessing social welfare payments can be catastrophic, and can have a devastating impact on individuals' and their families' lives – it can result in evictions, and exacerbate or create health issues and debt issues.

Respect for the dignity of individuals should be to be at the heart of the social welfare system.

For decades, FLAC, and other independent Law centres who deal with social welfare matters on a daily basis, have called for major reforms to the appeals system. More recently the Comptroller and Auditor General has also been critical of the "management" of social welfare appeals system and social welfare decision-making more generally.

The Draft Regulations published by the Department of Social Protection propose to make major changes to the procedures followed by the Appeals Office, and should present an opportunity for overdue major systemic reform of how social welfare appeals are administered. However, the current proposals do not address the long-standing structural issues with the appeals system and, in some instances, they would make those issues worse.

Getting it Right First Time

Approximately 55% of appeals against refusals of social welfare applications are successful. This suggests that over half of appellants have been incorrectly denied access to social welfare and have to wait an average of around three months to get what they are entitled to.

The quality of the initial decisions refusing social welfare needs to be improved as a matter of urgency. The Department should be concerned with reducing the number of people who need to take a social welfare appeal to vindicate those rights.

Duty to Promote Social Welfare Take-Up & Provide Accessible Information

The Department should be mandated to ensure that individuals receive the social welfare payments which they are eligible for and to undertake 'take-up' campaigns.

Every individual should have the right to access independent advocacy in connection with the determination of their entitlement to social welfare. In this regard, the role of the Citizens

Information Board needs to be expanded to ensure that it can provide independent advice, advocacy and representation in relation to social welfare claims and appeals.

The Department must have regard to the importance of providing information in a way that is accessible for individuals who have a sensory, physical or mental disability, or language and literacy issues. The Department must ensure that information on social welfare rights, claims and procedures is provided to individuals in a format that is accessible to them.

Legal Aid

Legal Aid is currently unavailable for social welfare appeals - which often deal with complex legal issues. The blanket exclusion of social welfare from the scheme of civil legal aid must be ended. Access to legal representation is a core element of the right to fair procedures and also improves the prospect of success at appeal.

An Independent Social Welfare Appeals Tribunal

Where a person disagrees with a decision of the Department, they should have access to a specialised and independent social welfare appeals tribunal. The independence of the Appeals Office (and the Appeals Officers who decide appeals) is crucial to ensuring that the appeals process is fair, trustworthy and able to make impartial decisions based on the law.

At present, the Appeals Office is a branch of the very Department it is supposed to provide oversight of. Appeals Officers serve at “the pleasure” of the Minister.

The Draft Regulations if implemented would blur the lines between the Appeals Office and the Department even further by giving the Chief Appeals Officer a role in Departmental decision-making. Instead, legislation should be introduced which clearly establishes the independence of the Appeals Office and its Appeals Officers.

Non-Adversarial hearings

Appeals should be conducted in an inquisitorial way. The appeals officer should have a duty to investigate, hear and decide the appeal. This means that the burden of producing legal arguments and evidence is not placed entirely on the appellant, and they should have access to the supports (such as translators) which they need.

Fair Procedures

Following fair procedures does not mean that the appeal system must become more legalistic, more formal or slower. Fair procedures should be built into all of the Appeals Office’s procedures and tailored to the efficient and informal nature of the system.

Appellants are often not provided with the evidence and information which they need to engage fully with the process. The Social Welfare Appeals Office does not always furnish appellants with a copy of the Department’s submission in respect of an appeal (and any

supporting documents to that submission) until the day an oral hearing is scheduled. Where no oral hearing is held in respect of the appeal, that documentation may not be provided at all.

There should be a **right of access to access to all relevant information**, submissions and evidence in relation to an appeal, as well as a right to reply to that information.

Under the current regulations Appeals Officers have discretion as to whether an appeal should proceed by way of an oral hearing, and the Department's Notice of Appeal Form does not inform appellants that they may request an oral hearing. An oral appeal hearing of the appeal ensures that appellants can engage fully with the appeal process and increases their prospect of success. There should be **a right to an oral hearing where necessary** (including where there is a conflict of evidence),

The initial **time-limit for lodging appeals should be extended from 21 days to 60 days.**

At present, it takes an average of over three months for appeals to be decided. **Appeals should be heard in a timely manner.**

Remote Hearings

The Appeals Office has continued to conduct oral hearings remotely since the lifting of restrictions introduced in response to the Covid-19 pandemic. The Department must also take measures to ensure that holding hearings remotely is not having a negative impact on the fairness of the process, and appellants should have a right to request an in-person hearing.

Publication of Decisions

Legislation should ensure that all decisions of Appeals Officers are published. At present, only a small number of 'case studies' are published by the Appeals Office. Publishing decisions ensure transparency, assist people who are taking appeals, and also promote better quality decision-making at all levels.

Introduction

FLAC welcomes the opportunity to make a submission to the consultation on changes to the social welfare appeal regulations. The introduction of new social welfare appeal regulations represents a significant opportunity for resolving long-standing issues in relation to the social welfare appeals system and could also be an important component of more comprehensive, rights-based reform of social welfare adjudication in Ireland generally.

FLAC's Perspective

Access to justice is essential to ensuring that welfare rights are vindicated. In this context, access to justice includes having access to an effective remedy - in the form of an accessible, independent, specialised social welfare appeals tribunal. That tribunal should respect and uphold relevant human rights and equality standards, as well as appellants' constitutional right to fair procedures and natural justice.

This submission is informed by FLAC's experience as an Independent Law Centre. FLAC frequently acts on behalf of clients in social welfare matters, including cases heard by the Social Welfare Appeals Office and the courts. Since 2015, social welfare has consistently been one of the areas of law in which FLAC most frequently provides legal representation.[1]

In recent years, FLAC's casework in this area has broadly focussed on the two (often inter-related) areas of:

- Access to social welfare payments for marginalised and disadvantaged groups such as members of the Roma Community. Such groups face specific challenges in engaging with social welfare decision-making processes and multiple complex areas of law may be relevant to their applications.
- The right to fair procedures and natural justice of persons subject to social welfare decision-making processes, including review and investigation processes.[2]

FLAC has long campaigned for comprehensive, rights-based reform of the social welfare appeals system.[3] In 2012, FLAC published *Not Fair Enough: Making the Case for Reform of*

[1] For example, Social Welfare cases constituted 18.2% of FLAC's overall open case files in 2021 and 26.7% of new files opened in 2021. Social Welfare files constituted the largest category of case files dealt with on behalf of callers to FLAC's Roma Legal Clinic and the largest number of new files opened by that service.

[2] See *FLAC Casebook* Blogs: How Safe is the Social Safety Net? Social Welfare Case illustrates how "control" procedures can impede access to Supplementary Welfare Allowance (23 June 2022), Outcome in FLAC case in relation to the entitlement of Direct Provision resident to the Covid PUP with effect from the time they were laid off (23 November 2020), Keeping them in Suspense: How confused social welfare decision-making can interfere with claimant's right to appeal (23 February 2021), Circular Reasoning: Outcome in FLAC case demonstrates that a non-legislative circular is being applied in a manner that does not accord with social welfare regulations (29 June 2021).

[3] FLAC (2012), *Time to reform social welfare appeals*.

the Social Welfare Appeals System, which analysed "the compliance of the existing appeals system with both domestic and international human rights law".[4] That report (and earlier such reports[5]) called for significant reforms to the social welfare appeals process.

The Current Proposals for Reform

The Department of Social Protection has published draft new social welfare appeal regulations – along with an explanatory document outlining the "change" brought about by each new regulation and the "rationale" for same.[6] The impetus for these reforms comes from the Comptroller and Auditor General's *Report on the Accounts of the Public Services 2020* which recommended significant reforms in the areas of social welfare decision-making and the "management of social welfare appeals".[7]

The reports of the Comptroller and Auditor General on the Accounts of the Public Services are concerned primarily with "matters relating to value for money" – and the relevant chapter of the 2020 report is specifically concerned with the "efficiency" of the social welfare appeals process. However, FLAC noted that many of the recommendations in the 2020 report (all of which were agreed by the Department) broadly echo recommendations previously made by NGOs and international human rights bodies, which have highlighted issues with the existing system of social welfare adjudication from a human rights and equality perspective. We highlighted that the obligations on public bodies to protect human rights and promote equality do not necessarily conflict with the desire to achieve value for money and efficiency in the provision of public services.[8] Indeed, a 2020 report by JUSTICE and the Administrative Justice Council on "reforming benefits decision-making" in the UK noted that the economic arguments for "getting benefits decision-making right first time" are twofold. First, fewer resources are spent "dealing with challenges to decisions". Second, investment in improved first instance decision-making "will likely result in significant public sector savings… including improved health outcomes for claimants and therefore savings to health and social care and fewer resources spent by councils on temporary accommodation and homelessness prevention".[9]

In an appearance before the Oireachtas Committee on Social Protection, Community and Rural Development and the Islands in November 2022, the Secretary General of the

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

[5] Northside Community Law Centre (2005), *The Social Welfare Appeals System: Accessible and Fair?*.

[6] Department of Social Protection (6 April 2023), *Public Consultation on Important Changes to Social Welfare Appeals Regulations*.

[7] Comptroller and Auditor General (2021), *Report on the Accounts of the Public Services 2020*, Chapter 10: "Management of Social Welfare Appeals".

[8] FLAC (2022), *The "Value for Money" Argument for Rights-Based Social Welfare Decision-Making*.

[9] JUSTICE and the Administrative Justice Council (2020), *Reforming Benefits Decision-Making*, p.15.

Department of Social Protection, Mr John McKeon, noted that the current proposals also arise from:

- concerns expressed by various Oireachtas Committees in relation to "appeals processing times",
- an "internal review of appeals operations in 2019", and
- the need for the Appeals Office to "upgrade and modernise its IT system".[10]

The intended effect of the regulations, he stated is "to provide additional rights to appellants and impose a greater responsibility on the Appeals Office and the Department to meet publicly committed and legislatively required timelines. They also provide for additional management oversight and reporting responsibility for the Chief Appeals Officer and improved feedback to the Department...".[11]

In a further appearance before the Oireachtas Committee in April 2023, Mr McKeon emphasised that "in developing these draft regulations the Department, working with the Chief Appeals Officer, is concerned to preserve the independent administrative nature of the appeals decision making process – to ensure that it does not become overly legalised or unnecessarily adversarial, but instead, as far as possible and in the interests of clients, to ensure that it is 'simple, informal and speedy'".[12]

The Broader Context for Reform of the Social Welfare Appeals System

Beyond the developments identified by the Department, it is important to highlight a number of additional matters which, in FLAC's view, should be of key concern in any attempt at reform in this area:

Issues with the quality of first-instance social welfare decision-making remain a significant concern. In 2021, 54.8% of a total of almost 24,000 appeals were decided in favour of the appellant.[13] This figure is in keeping with recent trends.[14] In 2015, the United Nations

[10] Opening statement of Mr John McKeon, Secretary General, Department of Social Protection to the Oireachtas Committee on Social Protection, Community and Rural Development and the Islands (9 November 2022).

[11] Mr McKeon further stated that the proposed new regulations arise in the context of the continued use of remote appeal hearings since the Covid-19 pandemic. He also stated that "the work of Department, and by extension the Appeals Office, has expanded significantly over the past 20, and in particular, the past ten years. Not only has the volume of work increased but the overall complexity of schemes has also increased - in particular with regard to the assessment of work capacity or care requirements relating to illness, disability or infirmity".

[12] Opening statement of Mr John McKeon, Secretary General, Department of Social Protection to the Oireachtas Committee on Social Protection, Community and Rural Development and the Islands (26 April 2023).

[13] Social Welfare Appeals Office (2022), *Annual Report 2021*, at p.21.

[14] The Social Welfare Appeals Office decides on around 20,000 appeals each year. In each of the last six years, almost 60% of appeal have been decided in favour of the appellant. See: Social Welfare Appeals Office, Annual Reports.

Committee on Economic, Social and Cultural Rights (UNESCR) expressed its concerns around the quality of first instance social welfare decision-making in Ireland and "the large number of social welfare appeals owing to the lack of clear understanding and consistent application of the eligibility criteria". The Committee recommended that the State should take measures to ensure that "initial decisions on social welfare appeals be made in a consistent and transparent manner and that appropriate training be provided to the public officers who make such decisions".[15] These concerns were echoed in the recent report of the Comptroller and Auditor General.[16]

The long-standing issues in this area suggests the need for significant measures to improve to quality of first-instance social welfare decision-making. They also underscore the significance of the Appeals Office's role as a safety-net - which allows those who have applied for social welfare payments to challenge decisions reached at first instance which may not be correct.

The need for oversight and accountability in respect of departmental decision-making is particularly important in light of developments in social welfare law and policy since the Great Recession.[17] Since this time, the Department adopted a more proactive approach to the recovery of overpayments and has introduced legal[18] and policy reforms[19] to allow for

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

[16] That report comments on "notable" discrepancies in the extent of the information provided by Deciding Officers to applicants whose claim has been refused, and recommends that: "The Department should review its current procedures so as to ensure that all claimants are informed clearly of the reason(s) for refusal of claims. This would allow claimants to make a better informed decision in relation to appeal."

The Comptroller and Auditor General reviewed a random sample of 75 previous appeals– 57 of which had succeeded. Of the successful appeals reviewed, "significant additional information" was provided in 70% of cases. The report therefore recommended that: "The Department should examine the application process and related guidance for those schemes which are medically or social and care needs assessed in order to ensure claimants are able to supply all necessary information to assess eligibility when they are making a claim."

It was also recommended that: "The Department should carry out periodic reviews of successfully appealed cases where no new or additional material information was provided. These reviews could assist the Department in learning from the cases determined by appeals officers and in improving the quality of decisions made by its deciding officers in determining claims". See: Comptroller and Auditor General (2021), *Report on the Accounts of the Public Services 2020*, Chapter 10: "Management of Social Welfare Appeals".

[17] Additional 'conditionality' attached to entitlement to social welfare payments has been a prevalent feature of social welfare policy internationally since the 2010s. Cousins notes that measures introduced in Ireland during that period include "both active sanctions whereby persons are penalised for not taking specific measures which might assist them to obtain alternative income and more 'passive' benefit limits which are intended to incentivise specific groups to seek work (or other support) rather than welfare". See: Mel Cousins (2019), *Welfare Conditionality in Ireland after the Great Recession*, Journal of Social Security Law.

[18] In 2011, the Department stated that legislation was being "reviewed continuously and updated to strengthen controls and penalties". See: Department of Social Protection (2011), *Fraud Initiative 2011-2013*, at p.16.

[19] In addition to legislative reforms, the Department subsequently adopted a number of multi-year compliance and anti-fraud strategies and, in 2016, reported on "the secondment of 20 gardaí to the Department's Special

enhanced "control" measures[20] - aimed at ensuring and monitoring compliance with the conditions attaching to social welfare schemes. This focus on (and the Department's increased powers in relation to) 'compliance' and 'control' has given rise to fresh concerns in relation to decision-making concerning ongoing or previous entitlement to social welfare payments and liability to repay overpayments.[21]

In 2019, the Ombudsman published a report setting out "concerns that the Department was not always using its powers in an appropriate manner and that, while guidance was in place for Deciding Officers, there was a failure by individual decision makers to adhere to the guidance in a consistent and proper manner".[22] That analysis resonates with FLAC's experience of representing clients who have been subject to 'control reviews' (including social welfare investigations[23]) and deemed liable to repay overpayments[24] in social welfare appeals.

The role and value of the social welfare system as part of the social safety net and in upholding human rights was evident during another crisis - the Covid-19 pandemic. However, during that period significant issues in relation to social welfare decision-making also emerged.[25] Such issues had a disproportionate negative impact on marginalised groups, including minority ethnic and migrant communities, and their ability to access social welfare payments.[26]

Investigation Unit to complement and extend the Unit's existing investigatory capacity". See: Department of Social Protection (2016), *Annual Report 2015*, at p.60.

[20]The Department now conducts over 500,000 "control reviews" annually. See: Department of Social Protection, Compliance and Anti-Fraud Strategy Annual Reports.

[21] It is worth highlighting that retroactive decisions in relation to entitlement to social welfare payments may lead to liability for significant sums of money to the Department and even criminal sanctions. See: Part 11 of the Social Welfare Consolidation Act 2005 (as amended).

[22] Office of the Ombudsman (2019), *Fair Recovery: How complaints helped to improve the Department of Employment Affairs and Social Protection's handling of overpayments*, at p.9.

[23] In 2019, FLAC represented a homeless Roma man whose claim for Disability Allowance was suspended and who had an overpayment in excess of €100,000 assessed against him. Records released under FOI revealed that the Department's investigation into the man's claim was initiated after he was approached at Dublin Airport by an agent of the Department who asked the man, who is illiterate and does not speak English, to sign a statement to the effect that he is not resident in Ireland and that he wished to withdraw his claim for Disability Allowance. Following an oral hearing, the assessed overpayment against the man was reduced by approximately €85,000 by the Appeals Office. See: FLAC (2020), *2019 Annual Report*, at p.34.

[24] In a 2020 case, the Appeals Office quashed the decision to assess an overpayment of €16,000 against a client of FLAC in relation to a claim for Jobseeker's Allowance he had made over ten years prior. The Appeals Officer stated as follows on the process which had led to the Department assessing the overpayment: "the lack of a prudent investigation and application of natural justice is lamentable". See: FLAC (2021), *2020 Annual Report*, at p.39.

[25] These included: the application of eligibility criteria with no basis in legislation, the implementation of control measures (including 'airport checks') which raised significant concerns, and the imposition of summary 'suspensions' of social welfare payments. See: FLAC (2021), *Remote Justice: 2020 Annual Report*, 'Social Welfare & the Covid-19 Pandemic: FLAC Policy and Litigation Response', pp.46-54.

[26] Irish Council for Civil Liberties (2021), *Human Rights in a Pandemic*, p.61.

The issues in relation to the Department's 'control' powers and activities further illustrate the importance of an independent and accessible accountability mechanism in relation to social welfare decision-making.

FLAC's View on the Current Proposals

Section 1 of this submission provides further details in relation to the specific legal and policy context for the proposed new regulations. It begins by setting out the relevant legal, constitutional, equality and human rights principles and standards. It then outlines a number of ongoing issues in relation to the operation of the Appeals Office by reference to those standards and principles, as well as FLAC's experience in the area.

Section 2 than analyses each of the proposed changes to the appeals process under the Draft Regulations.

The **recommendations** arising from FLAC's analysis are set out overleaf.

FLAC would be happy to engage further with the Department in relation to the matters raised in this submission and to provide further details where that would be helpful.

Recommendations

The Legal Framework for the Appeals System

Any reforms to the social welfare appeals process should be consistent with the significant **constitutional, human rights and equality standards and principles** which apply to appeals. In particular, the social welfare appeals system must include safeguards for appellants' rights to fair procedures and constitutional justice. These safeguard should include:

- A **right to an oral hearing** where necessary (including where there is a conflict of evidence),
- A **right of access to access to all relevant information**, submissions and evidence in relation to an appeal, as well as a right to reply to that information,
- The **publication of the decisions of Appeals Officers**.

The appeals process should also be consistent with the "**flexible and generous**" system of social welfare adjudication provided for under the SWCA and **appeals should be conducted in an accessible and inquisitorial fashion**.

In FLAC's submission, these matters should be provided for in **primary legislation** which should also provide for the Appeals Office's status as an independent tribunal– with only supplemental details being set out in regulations. At present, the very nature of the appeal process is dictated by Ministerial regulations which raises **significant questions around the independence of the Appeals Office, and the constitutionality of the legal framework underpinning it.** Regulations in relation to matters of procedure should be guided by principles and policies set out in primary legislation. These principles and policies should include a clear mandate for appeals to be conducted in a fair, accessible and inquisitorial manner. Such **regulations should be made by the Chief Appeals Officer** rather than the Minister.

The Minister and her Department should also **seek the views of IHREC in relation to the current proposals** pursuant to section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014.

Access to Justice

Legal aid should be available for social welfare appeals, including legal advice and representation. The remit of the Citizens Information Board should be expanded to include specific mandates to provide **legal information, advice and advocacy** in relation to social welfare. Legislation should also mandate the Department to undertake **accessible social welfare take-up campaigns**.

The Minister and her Department should introduce **policies in relation to the continued use of remote hearings** as a matter of urgency, to include

- The introduction and publication of policies around when a remote (as opposed to in-person) hearing should take place (in the interests of justice and fairness), and how an appellant may assert their preference for an in-person hearing.
- The introduction of measures to pro-actively identify cases where a remote hearing would not be suitable and schedule those matters for in-person hearing.
- The introduction of practical supports and safeguards to ensure meaningful access to remote hearings, including an assisted digital programme designed to help those who are 'digitally excluded' or lack digital skills to engage with remote processes.
- The introduction of an appropriate monitoring mechanisms to oversee the impact of remote hearings on access to and confidence in the tribunal, particularly amongst person with protected characteristics under equality law.

The Proposed New Appeal Regulations

Draft Regulation 5(6) and (7) raise serious concerns in relation to the independence of the Appeals Office. That regulation proposes to give the Chief Appeals Officer a role within the Department in relation first-instance decision-making. The addition of such a function for the Chief Appeals Officer may be ***ultra vires*** the powers of the Minister under the Social Welfare Consolidation Act 2005.

Draft Regulation 7 (Submission of appeal and information to be supplied by appellant):

- **Time Limits for Lodging an Appeal:** The initial time-limit for lodging appeals should be extended from 21 days to **60 days**. Primary legislation should provide for this and give the Chief Appeals Officer **discretion to accept late appeals at any point** beyond this, where there is reasonable cause for the delay.
- **Information to be provided when lodging an Appeal:** Regulations should provide that an appellant *may* set out grounds of appeal and provide documentary evidence in lodging their appeal – but no requirement to do so should be in place. The Appeal Form should advise appellants that further information and submissions may be submitted at a later date. On receiving an appeal, regulations should oblige the Appeals Office to notify the appellant that their appeal has been received and to provide them with information in relation to appeals procedure, rules of evidence and the legal and advocacy supports which are available.

Draft Regulation 8 (Notification of appeal to Minister and information to be supplied):

- The Department should be required to provide all "claim forms or other documentation submitted by the appellant and such other evidentiary information… including reports of any assessors or inspectors, when making the decision that is being appealed" within 21 days and to review the decision.

- In addition, the Department should be obliged to provide a written statement setting out the reasons for the decision reached on review, as well as a statement "showing the extent to which the facts and contentions advanced by the appellant are admitted or disputed".
- There should also be an obligation on the Department and/or the Appeals Office to furnish those **documents and statements to the appellant.**
- **Similarly, there should be an obligation on the Appeals Office to provide any reports they receive from assessors to the appellant.**

Draft Regulation 10 (Further information to be supplied and amendment of pleadings): No change should be made to the procedures provided for under the current regulations which gives **Appeals Officers discretion to request further information from appellants and to set the time-limit for when it should be provided**. The Draft Regulation mandates strict and unrealistic time-limits (with harsh penalties attached) for such information to be provided.

Draft Regulation 11 (Determination of appeals) limits the discretion of Appeals Officers (provided for in primary legislation) in relation to the manner in which appeals are determined. The regulation may go beyond the Minister's powers to introduce regulations which cannot be interpreted so as to allow her to amend primary legislation.

Draft Regulation 12 (Decisions involving an assessment of capacity to work or requirements for care): Appeals Officers should have a **discretion to seek the opinions of medical assessors** where they deem it necessary and an appellant should have the right to access and respond to any such opinions. **The medicalised approach to certain decisions proposed in Draft Regulation 12 should not be introduced.**

Draft Regulations 13, 14 & 15 (Summary Appeals & Oral Hearings): Regulations should impose a **pro-active duty on Appeals Officers** to determine if an oral hearing should be offered to the appellant, and should provide that the Appeals Office is obliged to notify the appellant of their right to request an oral hearing.

The proposal in **Draft Regulation 19** to only allow for adjournments in exceptional circumstances is unnecessary and **inconsistent with the inquisitorial approach** whereby, following engagement with the Appeals Officer, an appellant may be required to prepare submissions on certain points, gather evidence or seek the attendance of a witness.

Draft Regulation 21 should provide that **appellants may choose to receive communications by post and this option should be provided for on the Appeal Form.**

1. Social Welfare Appeals Reform: The Legal & Policy Context

The introduction to this submission set out, in general terms, the context for the current proposal to introduce reforms to the social welfare appeals system. This section deals with the specific legal and policy context in which those reforms are being considered, including by highlighting existing issues with the appeals system.

1.1. The Legal Framework

Legislation and regulations provide for the current appeals system. There are also overarching constitutional, human rights and equality principles and standards which apply to that legal framework.

1.1.1. Social Welfare Decision-Making

There are a significant number of social assistance and insurance schemes administered by the Department of Social Protection. These various schemes provide a safety net, including for those who are unable to work, who are unemployed, retired or in low paid employment. The Department of Social Protection processes over one million new claims each year.[27] During 2021, over two million people received some form of social welfare payment from the Department of Social Protection.[28]

Bar a few schemes established on an administrative basis, almost all social welfare payments are underpinned by legislation which sets out the eligibility criteria for claims under each scheme and the rate of payment. The primary legislation in the area is the Social Welfare Consolidation Act 2005 (as amended) (hereafter referred to as "the SWCA"). Regulations supplement the provisions of this primary legislation (by fleshing out the relevant rules and exceptions).[29] Decisions of the courts provide binding legal statements as to the interpretation of the provisions of the social welfare code.

The SWCA and social welfare regulations also provide for the powers of the Minister and Departmental officials to make decisions concerning entitlement to social welfare payments. Most first-instance decision-making in relation to entitlement to social welfare is undertaken

[27] Mel Cousins & Gerry Whyte, *Social Security Law in Ireland* (3rd Edn, Wolters Kluwer, 2021), p.366.

[28] Department of Social Protection (2022), *Annual Statistics Report 2021*.

[29] Social Welfare (Consolidated Supplementary Welfare Allowance) Regulations 2007 (S.I. 412/2007) (as amended) and Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. 142 of 2007) (as amended).

by Deciding Officers.[30] Applicants may seek an internal review of the decisions of Deciding Officers in relation to their applications.[31]

The appeals process is prescribed by Chapter 2 of Part 10 of the SWCA as well as the Social Welfare (Appeals) Regulations 1998-2011. Decisions of Appeals Officers are also subject to review mechanisms.

Section 327 SCWA provides for a statutory appeal to the High Court of decisions of Appeals Officers and the Chief Appeals Officer. Decisions concerning entitlement to social welfare payments may also be challenged by way of judicial review.

The legislation governing social welfare adjudication was recently considered by the Supreme Court in *McDonagh v Chief Appeals Officer & The Minister for Social Protection*[32]. The decision of Dunne J in that matter reaffirmed the right of applicants to pursue both an appeal and review of a negative decision on their entitlement to a social welfare payment. In reaching her decision, Dunne J held that a "purposive approach" should be taken to the interpretation of the SWCA in light of its status as a "social remedial statute". She noted that the relevant provisions of the SWCA "were drafted in such a way as to ensure that a claimant for an allowance has every possible opportunity to make their case to be entitled to the particular allowance"[33] and held that the legislation had to be interpreted in light of the legislative intention to ensure that the system of social welfare adjudication is "generous and flexible".[34]

1.1.2. Social Welfare Appeals Legislation

Chapter 2 of Part 10 of the SWCA provides for the appointment of Appeals Officers by the Minister for Social Protection[35], as well as the appointment of "one of the appeals officers who

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[30] Section 300(1) SWCA provides that "every question to which this section applies shall, save where the context otherwise requires, be decided by a deciding officer". Section 300(2) SWCA sets out the extensive jurisdiction of Deciding Officers to make decisions in relation to entitlement to payments and disqualifications.

Officers of the Department who make decision on applications for certain payments under the Supplementary Welfare Allowance Scheme are referred to as "designated persons".

In cases involving decisions concerning persons who are the subject of investigation by the Criminal Assets Bureau decisions are made by Bureau Officers (Deciding Officers who are members of the Bureau). In such instances, the SWCA requires Social Welfare Appeals to be directed to the Circuit Court rather than Social Welfare Appeals Office.

[31] The "internal review" mechanism stems from the power of Deciding Officers conferred on them by S.301(a) SWCA "revise any decision of a Deciding Officer" in certain circumstances, including "by reason of some mistake having been made in relation to the law or the facts". Hogan, Morgan and Daly, in *Administrative Law in Ireland* (5th ed., Round Hall, 2019) at [6-110], describe the power of Deciding Officers to revise the decisions of other Deciding Officers as "a most significant jurisdiction by which errors may be readily corrected, frequently because fresh evidence or legal argument comes to light after the original decision has been taken".

[32] [2021] IESC 33.

[33] ibid at para. 65.

[34] ibid at para. 77.

[35] S.304 SWCA.

is an officer of the Minister to be the Chief Appeals Officer" and other such Appeals Officers who are "officers of the Minister" who may act as Deputy Chief Appeals Officer "when the Chief Appeals Officer is not available"[36]. Appeals Officers serve at "the pleasure of the Minister".[37]

Section 311(1) SWCA provides that "… where any person is dissatisfied with the decision given by a deciding officer… the question shall, on notice of appeal being given to the Chief Appeals Officer within the prescribed time, be referred to an appeals officer".[38] Section 311(2) SWCA allows for the introduction of regulations which "may provide for the procedure to be followed on appeals and references under this Part".[39] Under section 330 SWCA, "The Minister may make regulations specifying the procedures to be followed by - … (b) an appeals officer, when deciding questions under sections 303 and 311…".

Section 311(3) SWCA states an "appeals officer, when deciding a question referred under subsection (1), shall not be confined to the grounds on which the decision of the deciding officer or the determination of the designated person, as the case requires, was based, but may decide the question as if it were being decided for the first time". Appeals Officers may take evidence on oath[40] and may require the attendance of "any person" to give evidence[41]. Appeals Officers also have limited powers to award expenses to parties to appeals.[42]

Section 320 SWCA provides that the decisions of Appeals Officers shall be "final and conclusive". However, as mentioned above, such decisions are subject to further review mechanisms – including review by the Chief Appeals Officer.[43]

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[36] S.305 SWCA.

[37] S.304 SWCA.

[38] Further, s.303 SWCA provides: "A deciding officer may, where he or she thinks proper, instead of deciding it himself or herself, refer in the prescribed manner any question to be decided by the deciding officer to an appeals officer".

[39] Section 326 SWCA allows the Minister or persons she designates to direct the Chief Appeals Officer to hold an oral hearing in respect of an appeal where she "considers that the circumstances of a particular case warrant an oral hearing".

[40] S.313 SWCA.

[41] S.314 SWCA.

[42] S.314 SWCA.

[43] Following an appeal, an appellant can also seek to have any decision of an Appeals Officer revised pursuant to section 317(a) SWCA which states that an Appeals Officer may revise a decision made on appeal "where it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to his or her notice since the date on which it was given". Further, the Chief Appeals Officer is empowered by section 318 SWCA to "at any time, revise any decision of an appeals officer, where it appears to [him or her] that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts". Under section, 301(1)(b) SWCA, Deciding Officers may "revise any decision of an appeals officer where…it appears to the deciding officer that there has been any relevant change of circumstances which has come to notice since the decision of the appeals officer was given".

The Chief Appeals Officer may "refer any question which has been referred to an appeals officer… the decision of the High Court".[44] He may also direct that certain appeals should be heard by the Circuit Court.[45] He may appoint an assessor to sit with an Appeals Officer where he considers that their assistance is required.[46] Section 308 SWCA obliges the Chief Appeals Officer to submit an annual report to the Minister on "his or her activities and the activities of the appeals officers". The Minister may direct the Chief Appeals Officer to include certain information in that report and to provide information to her generally.[47]

Section 310 SWCA provides that the "Chief Appeals Officer shall have any other functions in relation to appeals under this Part that may be prescribed" – with functions defined to include "powers, duties and obligations".

1.1.3. Social Welfare Appeals Regulations & Delegated Legislation

The SWCA empowers the Minister for Social Protection to introduce regulations in relation to social welfare appeals, including in relation to time limits, procedures more generally, the process to be followed by Appeals Officers in deciding appeals, and the functions of the Chief Appeals Officer. These matters are dealt with in the Social Welfare (Appeals) Regulations 1998-2011.

Given the context of this submission, it is important to highlight that Ministerial regulations must comply with the standards set by the courts for 'delegated legislation':

A power to introduce regulations cannot be interpreted so as to allow a Minister to introduce regulations which amend or run contrary to the provisions of primary legislation.[48] Further, the doctrine of *ultra vires* prohibits the introduction of regulations which go beyond the scope specified in the primary legislation which empowers the Minister to introduce such regulations.[49] In *Kennedy v Law Society of Ireland*[50], Fennelly J summarised the doctrine of *ultra vires* as follows: "The delegatees of statutory power cannot be allowed to exceed the limits of the statute …".

Significantly, the courts have held that the introduction of such legislation is only constitutionally permissible where the regulations are "giving effect to principles and policies

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[44] S.306 SWCA.

[45] S.307 SWCA.

[46] S.309 SWCA. However, section 315 SWCA provides that such appeals may proceed in the absence of the assessor "with the consent of the parties appearing at the hearing".

[47] S.308 SWCA.

[48] *Cooke v Walshe* [1984] IR 710.

[49] Oran Doyle and Tom Hickey, *Constitutional Law: Texts, Cases and Material*, (2nd Edn, Clarus Press, 2019), pp.186-9.

[50] 2 IR 458.

which are contained in the statute [i.e. the piece of primary legislation empowering the Minister to make the regulations] itself".[51] Delegated legislation can only be valid where there is "sufficient guidance" in the primary legislation.[52]

The Minister's powers under Chapter 2 of Part 10 of the SWCA largely relate to prescribing appeals "procedures". However, the legislation is largely silent as to the principles and policies which should guide her in doing so, and provides very little detail in relation to the nature of the appeal process and the procedures which should be followed. As a result, the Minister has broad discretion in shaping the appeals system and dictating the process to be followed in deciding appeals, including the extent to which appellants' procedural rights are upheld.

The Minister's role in this regard is one of a number of matters which raises concerns around the independence of the Appeals Office (as is discussed in section 1.2.1. below). However, in FLAC's submission, it also raises significant concerns around the constitutionality of the current legal framework underpinning the appeals system in light of the constitutional principles governing the use of powers to introduce delegated legislation - in particular, concerning the need for 'principles and policies' guiding how that power is exercised.

In FLAC's view, the structure of the Appeals Office and the approach it takes to appeals is, at first instance, properly a matter for primary legislation. The matters which should be addressed in that legislation are discussed in further detail below in section 1.2.

1.1.4. Constitutional Right to Fair Procedures & Natural Justice

The courts have recognised the rights of appellants in social welfare appeals to be subject to fair procedures and to natural and constitutional justice. Social welfare appeal regulations must also comply with the standards set by the courts in this regard:

- In *Kiely v Minister for Social Welfare*[53], the right of access to evidence relied on by a Deciding Officer in reaching their decision was recognised as a vital aspect of the right to be heard on appeal. Whyte notes that this remains an important safeguard of a claimant's right to due process.[54]
- The Courts have also recognised that Deciding Officers and Appeals Officers have a duty to give reasons for their decisions. In *National Museum of Ireland v Minister for Social Protection*[55], Murphy J held that such officers must set out all facts on which their decisions are based.

[51] *Cityview Press v. An Chomhairle Oiliúna* [1980] IR 381 [399].

[52] *Naisiúnta Leictreach Contraitheoir Éireann v Labour Court* [2021] IESC 36, Charleton J. [27].

[53] [1971] IR 267.

[54] Gerry Whtye, *Social Inclusion and the Legal System: Public Interest Law in Ireland*, (2nd Edn, IPA, 2015).

[55] [2016] IEHC 135.

- In *Kiely*, Henchy J held that a request for an oral hearing should be granted in any case where there are "unresolved conflicts in the documentary evidence, as to any matter essential to the ruling of the claim". Further, in *Galvin v. Chief Appeals Officer and Minister for Social Welfare*[56], Costello P held that an oral hearing should be held where a conflict of fact requires resolution.

There may also be significant implications for the procedures followed in social welfare appeals arising from the recent landmark decision of the Supreme Court *Zalewski v Adjudication Officer & Ors*[57]. In that decision the Court held that the exercise of powers by WRC Adjudication Officers, while permissible under Article 37 of the Constitution, also constitutes the administration of justice under Article 34. Notably, O'Donnell CJ held that: "The standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34". This is discussed in further detail in section 1.2.1. below.

1.1.5. Human Rights & Equality Standards & Principles

Along with the constitutional right of access to the courts, the constitutional principles of fair procedures (discussed above) are an integral component of the right of access to justice. Those principles are also articulated in the international and regional human rights instruments to which Ireland is subject.[58] 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".

The right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights. Article 6(1) ECHR provides for a right to fair procedures.[59] As is discussed in further detail throughout section 1.2. below, the European Court of Human Rights (ECtHR) has recognised numerous elements of the right to fair procedures under Article 6 ECHR, including:

- the independence of the tribunal and its employees,
- equality of arms between the parties including equal access to information,
- the right to an oral hearing where necessary, and
- The right to legal assistance and representation for appellants.

[56] [1997] 3 IR 240.

[57] [2021] IESC 24.

[58] The implications of those human rights instruments for the social welfare appeals system was considered by FLAC in detail in the *Not Fair Enough* report. See: FLAC (2012), *Not Fair Enough: Making the case for the reform of the social welfare appeals system.*

[59] "In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Section 3(1) of the European Convention on Human Rights Act 2003 provides that "every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions".

Article 47 of the Charter largely mirrors the language of Article 6 ECHR. However, it also specifically provides that: "Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice" (this is discussed further in section 1.2.5. below). Under the EU law principle of effective judicial protection, national law must not undermine an individual's ability to vindicate these rights in any practical sense.[60]

As a member of the European Union, Ireland is obliged to take appropriate measures to ensure fulfilment of its obligations arising out of the Charter in areas falling within the scope of European Union law.[61] In the social welfare context, EU law is clearly engaged in appeals concerning the residence rights of EU workers and their family members under the Citizens' Rights Directive[62] or in appeals that come within the scope of the Equality Directives[63]. Social welfare is also a human right of itself – and it is often essential for the realisation of some of the most basic human rights such as the right to life, dignity and private and family life.[64] Social welfare also plays a significant role in the promotion of equality, and combatting disadvantage, poverty and extreme poverty. Barriers to (and delays in) accessing social welfare payments can have a devastating impact on individuals' and their families' lives – it can result in evictions, and exacerbate or create health issues and debt issues.[65]

Section 42 of the Irish Human Rights and Equality Commission Act 2014 ("the Public Sector Equality and Human Rights Duty") requires public bodies (such as the Department of Social

[60] CJEU, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, 22 December 2010.

[61] Art 4.3 of the Treaty on the Functioning of the European Union.

[62] Directive 2004/38/EC

[63] For example, Directive 2000/43/EC specifically deals with the "progressive implementation of the principle of equal treatment for men and women in matters of social security". Directive 2000/43 (the Race Directive) implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The Race Directive prohibits discrimination on the grounds of racial or ethnic origin in relation to social protection, including social security and healthcare. Further, Directive 2000/43/EC specifically deals with the "progressive implementation of the principle of equal treatment for men and women in matters of social security".

[64] The right to social security is a well-established socio-economic right within the framework of international human rights law, recognised as such by Article 22 of the Universal Declaration of Human Rights and protected by the provisions of Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Articles 12 and 13 of the European Social Charter. Article 1 of the First Protocol to the European Convention on Human Rights provides for "protection of property" and the European Court of Human Rights has held that the right to property extends to social security payments.

[65] The Low Commission (2015), *Getting it right in social welfare law: the Low Commission's follow-up report*; G. McKeever, M. Simpson and C. Fitzpatrick, *Destitution and Paths to Justice* (The Legal Education Foundation and The Joseph Rowntree Foundation, 2018), pp.51-52.

Protection, including the Social Welfare Appeals Office) to have regard to the need to protect human rights, promote equality and eliminate discrimination in the performance of their functions. That duty also applies to the Department in the policy formulation and implementation processes in respect of the new social welfare appeal regulations.

The Irish Human Rights and Equality Commission's (IHREC) current Strategy Statement is explicitly concerned with the right to social welfare.[66] The current proposals are highly relevant in this regard and FLAC would highlight that IHREC may "…of its own volition or on being so requested by a Minister of the Government… examine any legislative proposal and report its views on any implications for human rights or equality".[67]

1.2. Issues in relation to the Current Appeals System

In light of the standards and principle outlined above, this section now addresses the current operation of the appeals system and highlights ongoing issues which should be dealt with in the context of the current proposal to significantly reform that system.

1.2.1. Independence of the Appeals Office

Independence and impartiality are core components of the right to fair procedures. The Courts have held that Appeals Officers perform a quasi-judicial function and are "required to be free and unrestricted in discharging their functions".[68]

However, despite the Department's description of the Social Welfare Appeals Office as an "independent office", this assertion is not reflected in the legislation underpinning the appeals system and the Appeals Office's status as an independent entity is a purely administrative construct. Hogan, Morgan and Daly note that: "The [appeals] system is administered by civil servants working in the Department of Employment Affairs and Social Protection, each of whom (even the Chief Appeals Officer) is appointed at the pleasure of the Minister; whose independence is not guaranteed by law; and who, perhaps, are influenced by departmental policy considerations".[69] In *Dauti v Albania*, the ECtHR found that an Albanian body performing a similar function to the Appeals Office "cannot be regarded as an independent and impartial tribunal as required by Article 6(1) of the Convention" in circumstances where member of the Commission could be removed "at the whim" of "the Ministry of Health, which exercise

[66] One of the objectives of that statement's first strategic priority ("economic equality") is: "Improved protection of the poorest and those experiencing vulnerability so that they are able to live with dignity and in economic security, whether working or in receipt of welfare or a pension". See: IHREC (2021), *Strategy Statement 2022-2024,* at p.11.

[67] S.10(2)(c) of the Irish Human Rights and Equality Commission Act 2014.

[68] *McLoughlin v Minister for Social Welfare* [1958] IR 1.

[69] Hogan, Morgan and Daly, *Administrative Law in Ireland*, (5th ed., Round Hall, 2019) at [6-108].

unfettered discretion": "The position of the Appeals Commission members is therefore open to external pressures. Such a situation undermines its appearance of independence".[70]

FLAC has previously queried "whether an Appeals Officer can be considered to be sufficiently independent from the Department of Social Protection when he or she is appointed by the Minister who heads that department and where that Minister is effectively a party to any social welfare appeal".[71] Indeed, the SWCA explicitly bestows upon the Minister a considerable role in dictating the procedures followed by Appeals Officers.

At present, the question of whether the appeals office functions as (or is perceived as) an independent tribunal (rather than simply a further internal review mechanism) is determined by administrative practice and policy, as well as the provisions of Ministerial regulations.

In FLAC's view, the main benefit of the current approach to social welfare appeals is the accessible, informal and inquisitorial nature of the process. We would highlight that placing the appeals office on a statutory footing as an independent tribunal does not necessarily mean that the benefits of the current informal approach to appeals must be sacrificed. The courts have previously accepted that Appeals Officers are carrying out an "inherently administrative" function (rather than conducting adversarial hearings) while also being bound to act judicially.[72]

The Chief Justice's judgment in *Zalewski* also suggested that the measures required to ensure an appropriate "standard of justice" in quasi-judicial tribunals may be tailored in response to the nature of the "dispute" being dealt with. For example, in relation to the need for hearings in public, he noted that: "There is a justification for calm, quiet, and private resolution of many disputes which may be of particular sensitivity for the participants, and it may even be permissible to have a presumption in favour of private hearings at first instance".[73]

Recent empirical research in the UK has found that an inquisitorial approach is "much in evidence" in the UK's independent Social Security Tribunals: "…generally tribunals show sympathy and understanding towards appellants and there is a high chance of success. There is tribunal justice…".[74]

1.2.2. Appellants' Procedural Rights

As noted above, the courts have recognised a number of procedural rights in the context of social welfare appeals. In relation to access to information, the ECtHR has recognised that

[70] *Dauti v Albania* (2009) App. No. 19206/05.

[71] FLAC (2012), *Not Fair Enough: Making the case for the reform of the social welfare appeals system*, at p.31.

[72] Mel Cousins & Gerry Whyte, *Social Security Law in Ireland* (3rd Edn, Wolters Kluwer, 2021), p.377.

[73] *Zalewski v Adjudication Officer & Ors* [2021] IESC 24 at [143].

[74] Catherine Barnard & Amy Ludlow, *Administrative (in)justice? Appellants' experiences of accessing justice in social security tribunals*, Public Law, 2022, Jul, 406-426.

the principles of "equality of arms" requires that a party to civil proceedings "must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent".[75] In *Salomonsson v Sweden*[76], the ECtHR held that, while an oral hearing may not be required in each case, where there is a dispute on either the facts or the law, the appellant has a right to an oral hearing to ensure that a decision is made in line with fair procedures, unless he or she expressly waives that right.

However, the current appeal regulations and the practices of the Department and the Appeals Office do not necessarily recognise or uphold the procedural rights of appellants.

Under the current regulations Appeals Officers have discretion as to whether an appeal should proceed by way of an oral hearing, and the Department's Notice of Appeal Form (Form SWAO1) does not inform appellants that they may request an oral hearing.

Further, in FLAC's experience the Social Welfare Appeals Office does not always furnish appellants with a copy of the Department's submission in respect of an appeal (and any supporting documents to that submission) until the day an oral hearing is scheduled. Where no oral hearing is held in respect of the appeal, that documentation may not be provided at all. In practice, it is often necessary to request the documentation under section 11 of the Freedom of Information Act 2014 and to request that the Appeals Officer does not reach a decision or schedule an oral hearing until this documentation has been received and the appellant has had an opportunity to respond to it. However, the Notice of Appeal form does not advise appellants that it is open to them to make further submissions and to provide further evidence in support of their appeal (beyond that which was provided in lodging the appeal).

Similarly, while the Department also provides a full copy of an appellants' file to the Appeals Office, that file will not subsequently be provided to the appellant by the Appeals Office unless it has been sought under FOI.

1.2.3. Publication of Appeal Decisions & Precedent

Decisions of Appeals Officers do not form a binding system of precedent and they are only published on a selective basis by the Department as "case studies". IHREC has noted that: "Issues experienced by appellants in addressing legal issues in their appeals are exacerbated by the lack of a publicly accessible database of decisions, resulting in appellants being unable

[75] *Dombo Beheer v The Netherlands* (1994) 18 E.H.R.R. 213 at para.33.

[76] (App. 38978/97), Judgment of 12 November 2002.

to access previous decisions which may be relevant to their appeal".[77] By contrast, tribunals such as the Residential Tenancies Board are obliged to publish their decisions.[78]

In *Atanasov v Refugee Appeals Tribunal*[79], the Supreme Court considered the capability of a quasi-judicial tribunal to ensure consistency in their decisions and to uphold parties' rights to fair procedures. The case concerned the access of asylum applicants to previous decisions of the Refugee Appeals Tribunal. The Court held that the principles of fair procedures were not satisfied where "relevant previous decisions are not available to an appellant". In relation to the importance of consistency of decision-making in such tribunals, Geoghegan J stated: "It is not that a member of a tribunal is actually bound by a previous decision but consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary".

Whyte and Cousins note that: "the *Atanasov* case does suggest that a social welfare appellant would also be entitled to request copies of relevant and material decisions that might be of importance (when such exist) and, more generally, suggests the need for a greater focus on publishing in full all important decisions of the appeals officers on an ongoing basis".[80] However, in the subsequent case of *Jama v Minister for Social Protection*[81], the High Court held that there was no duty in the Department of Social Protection to provide access to (or maintain a database of) previous appeal decisions.

Whyte and Cousins submit that "the analysis of the legal issues in *Jama* may be open to question, and it is not clear that this is the final word on the matter".[82] In his decision in *Jama*, Hedigan J relied (in part) on the anticipated cost of establishing a database of social welfare decisions (stating that "[public] policy in this regard, notably in these straitened times, must surely outweigh a right of access to such information"). This contention (if it was ever sustainable) should be revisited in light of technological innovations in the interim and the improvements to the Appeals Office's IT infrastructure. Further, the judgment in *Jama* seems to underestimate the considerable complexity of the legal issues which may arise in social welfare appeals (which is discussed in further detail below).

1.2.4. Remote Hearings

The Appeals Office has continued to conduct oral hearings remotely since the lifting of restrictions introduced in response to the Covid-19 pandemic. S.I. No. 523/2020 designated

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[77] IHREC (2023), *Submission to the Independent Review of Civil Legal Aid Scheme*, at pp.22-3.

[78] S.123(7) of the Residential Tenancies Act 2004 (as amended).

[79] 101 [2006] IESC 53.

[80] Mel Cousins & Gerry Whyte, *Social Security Law in Ireland* (3rd Edn, Wolters Kluwer, 2021), p.383.

[81] [2011] IEHC 379.

[82] Mel Cousins & Gerry Whyte, *Social Security Law in Ireland* (3rd Edn, Wolters Kluwer, 2021), p.384.

appeals officers as "bodies" who may conduct hearings remotely pursuant to section 31 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

The Department has defended the continued use of remote hearings.[83] However, FLAC has concerns in relation to the absence of any clear policies around when a remote (as opposed to in-person) oral hearing should take place, and how an appellant may assert their preference for an in-person hearing. Section 31(2) of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 strongly suggests that such policies should be in place: "Subsection (1) shall not apply in respect of a particular hearing where the designated body concerned, of its own volition, or following the making of representations by a person concerned, is of the opinion that the application of the subsection to the hearing would be unfair to the person, or would otherwise be contrary to the interests of justice".

Since the pandemic there has been a wealth of research into the challenges posed by the remote administration of justice. This research has found that a move to remote hearings has a disproportionately negative impact on vulnerable people, including people with disabilities, and litigants without legal representation. It has highlighted that the so-called "digital divide" must be considered in the roll of remote hearings.

In 2020, the Nuffield Family Justice Observatory undertook significant empirical research into the use of remote hearings in the English and Welsh family justice system which highlighted: "…concerns chiefly related to cases where not having face-to-face contact made it difficult to read reactions and communicate in a humane and sensitive way, the difficulty of ensuring a party's full participation in a remote hearing, and issues of confidentiality and privacy. Specific concerns were commonly raised in relation to specific groups: such as parties in cases involving domestic abuse, parties with a disability or cognitive impairment or where an intermediary or interpreter is required…".[84]

Similar research undertaken by the Civil Justice Council into the use of remote hearings in civil proceedings more generally found that "the remote nature of hearings plus the difficulties of navigating unfamiliar technology alongside unfamiliar legal processes was felt to compound pre-existing practical and emotional barriers to effective participation by litigants in person [i.e. people without legal representation]".[85]

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[83] The Secretary General of the Department has stated that "remote hearings have proven to be an effective and efficient means to conduct hearings and the data shows that the appeal outcomes are, overall, the same as in-person hearings". See: Opening statement of Mr John McKeon, Secretary General, Department of Social Protection to the Oireachtas Committee on Social Protection, Community and Rural Development and the Islands (9 November 2022).

[84] Nuffield Family Justice Observatory (2020), *Remote hearings in the family justice system: a rapid consultation*, at p. 1.

[85] Civil Justice Society (2020), *Rapid Review: The Impact of COVID-19 on the Civil Justice System Report and*

Research undertaken by the Oireachtas Library and Research Service noted that "participation in remote hearings may be hampered by the 'digital disadvantage'", and that geographic and socio-economic factors have a significant impact on ability to participate in remote hearings in Ireland:

> "According to 2019 statistics from the Central Statistics Office, there is a statistically significant number of people who lack the resources to participate in remote hearings. In the Dublin region 92% of households have access to a fixed broadband connection, compared with the Border and Midland regions, at 71% and 69% respectively. There is a notable difference in fixed broadband connection between deprivation quintiles; 25% of households in the *Second quintile – disadvantaged* deprivation quintile do not have a fixed broadband connection in their home. Further, just over four in every ten (42%) respondents who did not have internet access in their homes reported 'Lack of skills' as a reason for not having household internet access." [86]

In 2021, FLAC made a number of recommendations to the WRC in relation to the use of remote hearings which are equally relevant to the Appeals Office. These included recommendations for:

- The introduction and publication of policies around when a remote (as opposed to in-person) hearing should take place (in the interests of justice and fairness), and how an appellant may assert their preference for an in-person hearing.
- The introduction of measures to pro-actively identify cases where a remote hearing would not be suitable and schedule those matters for in-person hearing.
- The introduction of practical supports and safeguards to ensure meaningful access to remote hearings, including an assisted digital programme designed to help those who are 'digitally excluded' or lack digital skills to engage with remote processes.
- The introduction of an appropriate monitoring mechanisms to oversee the impact of remote hearings on access to and confidence in the tribunal, particularly amongst person with protected characteristics under equality law.

1.2.5. Availability of Legal Assistance

FLAC's submission to the current review of the civil legal aid scheme highlighted a number of access to justice issues in relation to social welfare appeals, and social welfare more generally. That submission noted that the right to access to justice must be vindicated from the time of initial entitlement to payments and during all social welfare adjudication processes.

Recommendations, at p.70.

[86] Oireachtas Library and Research Service (2020), *Remote Court Hearings*, at p.17.

Achieving this requires measures across the continuum of access to justice through the provision of various forms of legal assistance, including legal information and advice regarding welfare rights, advocacy, public education, training and legal representation. Many of the recommendations in that submission in relation to social welfare focus on the role of the Citizens Information Board which exists under the auspices of the Department of Social Protection.

Knowledge of Legal Rights, Entitlements and Services

The vindication of the rights of access to justice in the context of social welfare, requires claimants, applicants and appellants to have knowledge of:

- The payments which are available, the entitlement criteria for those payments, the supporting evidence required to satisfy those criteria, and the application process.
- The ongoing conditions which apply to payments which they are in receipt of, such as requirements to "genuinely seek work" and to provide information and updates to the Department in relation to their circumstances. This also includes information in relation to the potential consequences of failure to satisfy such conditions.
- The various appeal and review options available to them in relation to decisions on their entitlement and how to avail of the various appeal and review mechanisms.
- Their rights while engaging with the Department whether as a claimant, applicant or appellant, such as the right to reasons for decisions.
- The available information, support, advocacy and legal services.

In addition to the frequently amended and complicated primary legislation,[87] the rules in relation to entitlement to social welfare payments and the application and appeals processes are further detailed in regulations which have been described by the Supreme Court as "*extremely complex and almost opaque*"[88].

Through their website, telephone line and a nationwide network of Citizens Information Centres, the CIB provides detailed and accessible information in relation to social welfare payments and the social welfare system. The Citizens Information Service dealt with over 300,000 social welfare queries in 2020 (over 40% of the total queries they had received).[89] The functions of the CIB in this regard are extremely significant in the promotion of access to justice in this context. However, it is a matter of concern that the CIB's mandate is not

[87] The 2005 Act is amended from year to year on foot of budgetary and other legislative decisions that occur during the course of the year.

[88] *PC v Minister for Social Protection* [2017] IESC 63 at para. 20.

[89] Citizens Information Board (2021), *Annual Report 2020*, p.46.

expressly concerned with information in relation to legal rights, including welfare rights, and is instead focussed on information related to access to "social services".[90]

A recent report from two UK access to justice bodies (JUSTICE and the Administrative Justice Council) highlighted the specific need for accessibility of information pertaining to social welfare. It highlighted the significant number of people with disabilities in receipt of social welfare payments, as well as groups who may be particularly affected by the "digital divide".[91]

A recent Private Members Bill sought to create a duty on the Minister for Social Protection to undertake "take-up" campaigns in respect of social welfare payments.[92] Section 6(2) of the Principles of Social Welfare Bill 2021 (which was opposed by the government and defeated by vote) would have compelled the Minister to have regard to the following in providing information in relation to social welfare eligibility:

> "(a) the importance of communicating in a way that ensures that persons who have difficulty communicating (in relation to speech, language or otherwise) can receive information and express themselves in ways that best meet their personal needs,
>
> (b) the importance of providing information in a way that is accessible for persons who have a sensory, physical or mental disability…"

The Social Security (Scotland) Act 2018 provides that "Scottish Ministers are to prepare a strategy to promote take-up…".[93] In preparing that strategy, Ministers must consult "individuals who have received assistance through the Scottish social security system" and "persons who work with or represent individuals living in households whose income is adversely affected, or whose expenditure is increased, because a member of the household has one or more protected characteristics within the meaning of section 4 of the Equality Act 2010".[94]

Advice, Advocacy & Training

Given the complexity (and importance) of the legal issues which may arise in relation to social welfare applications and appeals, the absence of legal advisory and assistance services in this area is a matter of significant concern. FLAC has previously noted that the "information and advice given to an appellant prior to a hearing or when making written submissions can have a significant impact on the outcome of an appeal".[95] Early legal advice may also reduce the likelihood of cases proceeding to the review or appeal stage. In addition to being beneficial to the claimant by reducing delays in accessing payments (the purpose of many of which is to

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[90] S. 7(1) of the Comhairle Act 2000 (as amended)

[91] JUSTICE and the Administrative Justice Council (2021), *Reforming Benefits Decision-Making*, pp.96-101.

[92] See: Principles of Social Welfare Bill 2021.

[93] S.8 of the Social Security (Scotland) Act 2018.

[94] S.8 of the Social Security (Scotland) Act 2018.

[95] FLAC (2012), *Not Fair Enough: Making the case for the reform of the social welfare appeals system*, at p.42.

ensure a basic level of subsistence), the "provision of advice and assistance at the preliminary stages of an appeal could expedite the process as well as being more cost-effective for the State in the long-term."[96]

The recent research by JUSTICE and the Administrative Justice Council notes the "clear role for expert advice in helping people understand their potential social security entitlements and to navigate the application process".[97]

The experience of FLAC's Roma Legal Clinic has consistently illustrated the significant demand for legal advice and advocacy in relation to social welfare (particularly amongst marginalised and disadvantaged groups). It has also demonstrated the complexity of the legal and evidential issues which may arise even at the earliest stages of the social welfare application process. The demand for the services of the CIB in this area is also notable. In addition to the significant number of social welfare queries received by the CIB in 2020, almost 70% of the over 4,000 "advocacy cases" undertaken by Citizens Information Services during that period related to social welfare.[98]

The high rate of success in social welfare appeals also indicates the need for advice and advocacy in relation to social welfare applications and appeals. As noted above, in each of the last five years, almost 60% of appeals have been decided in favour of appellants. The analysis by the Comptroller and Auditor General showed that "significant additional information" was provided in the majority of successful appeals. The Comptroller and Auditor General recommended measures "to ensure claimants are able to supply all necessary information to assess eligibility when they are making a claim".[99] There is clearly a significant role for advocates in assisting claimants to understand the information and evidence needed

[96] FLAC (2012), *Not Fair Enough: Making the case for the reform of the social welfare appeals system*, at p.43.

[97] "Many claimants may require advice and assistance to complete the application as well as understand the evidence that they need to provide to support their application. The need for advice and support is particularly acute for those with certain health conditions and disabilities which may make understanding and completing the forms particularly challenging. Advice and support is also crucial for claimants who have poor literacy rates and/or are non-English speakers and… those who are digitally excluded. However, a lack of, or poor, advice at the application stage may result in delay and/or loss of income… Without advice, people often feel forced to give up, or make errors leading to much slower resolution of their problems. Evidence demonstrates that access to early advice leads to more effective resolution of individuals' problems. Research by Ipsos MORI on behalf of the Law Society found that those 'who did not receive early advice were, on average, 20% less likely to have resolved their issue at a particular point in time (compared to those who did receive early advice).' Given that people often experience 'clusters' of interrelated legal and non-legal issues particularly around social welfare, debt, housing and health, early legal advice also has economic benefits of reducing downstream costs for other public services… Advice is also crucial for helping people understand whether the decision they have received is correct and therefore whether they should challenge it. Advice is also needed so that claimants understand how to go about challenging a decision." See: JUSTICE and the Administrative Justice Council (2021), *Reforming Benefits Decision-Making*, pp.101-2.

[98] Citizens Information Board (2021), *Annual Report 2020*, p.47-8.

[99] Comptroller and Auditor General (2021), *Report on the Accounts of the Public Services 2020*.

to support their application and to assist them in submitting it as early as possible (as well as for Deciding Officers to adopt a more inquisitorial approach).

The CIB have an advice and advocacy mandate which they exercise in the context of social welfare. While it has significant expertise and experience in the area of social welfare advocacy, the CIB does not, and cannot, provide legal advice or assistance. The CIB does seek second-tier legal advice in relation to certain social welfare issues and advocacy cases.[100] However, there is no body specifically mandated to provide such support to the CIB, or to perform a social welfare law and advocacy training function more generally.

Legal Representation

The Legal Aid Board (LAB) cannot provide representation in appeals heard by the Social Welfare Appeals Office.[101] While, in theory, the LAB could provide legal advice to appellants, it does not do so in practice. The LAB also does not provide representation in cases concerning entitlement to social welfare payments heard by the Courts as a matter of practice.

The Social Welfare Appeals Office adopts relatively informal processes. While the support of experienced and trained advocates[102] may suffice in many cases, this does not negate the fact that a significant number of appeals deal with complex issues of national and EU law, evidential issues (including in relation to medical and social care needs) and questions of fair procedures and natural and constitutional justice. Further, oral appeals are often held where there are conflicts of evidence between the appellant and the Department of Social Protection – circumstances which may require cross-examination of departmental officials.

Research in the UK since the 1990s has consistently demonstrated that representation before social security tribunals increases the likelihood of success for appellants.[103]

In 2015, the UN Committee on Economic, Social and Cultural Rights noted its concern at "the lack of free legal aid services, which prevents especially disadvantaged and marginalized individuals and groups from claiming their rights and obtaining appropriate remedies,

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[100] "Advocates in CIS have access to an expert panel, contracted by the Citizens Information Board. When CIS clients face a particularly complex social welfare or employment issue, the CIS can request advice from legal experts. This expert advice was integral to the successful resolution of some of CIS's more complex advocacy cases in 2020". See: Citizens Information Board (2021), *Annual Report 2020*, p.49.

[101] The Minister for Justice may "prescribe" the tribunals in which the Legal Aid Board may provide representation under section 27(2)(b) of the Civil Legal Aid Act 1995 – the SWAO is not so prescribed.

[102] Such as the Citizens Information Services and NGOs such as Crosscare.

[103] "[E]vidence suggests that appellants who are represented before social security tribunals, or at least have access to expert advice prior to the hearing, are likely to have a greater level of success than those who are not. A FOIA request showed that in 2012/13 the overall success rate for appellants in the FTT (SSCS) was 47% and the success rate for those with representation was 63%". See: JUSTICE and the Administrative Justice Council (2021), *Reforming Benefits Decision-Making*, p.119.

See also: FLAC (2012), *Not Fair Enough: Making the case for the reform of the social welfare appeals system*, at p.42.

particularly in the areas of employment, housing and forced evictions, and **social welfare benefits**" (emphasis added). The Committee recommended that Ireland "ensure the provision of free legal aid services in a wider range of areas, including through expanding the remit of the Civil Legal Aid Scheme".[104] In 2019, the UN Committee on the Elimination of Racial Discrimination expressed similar concerns and specifically recommended designating the Social Welfare Appeals Office as a prescribed tribunal under Section 27(2)(b) of the Civil Legal Aid Act 1995.[105]

Further, the ECtHR and the Court of Justice of the European Union have held that the question of whether legal aid is necessary for a fair hearing (in accordance with Article 6 ECHR and Article 47 of the Charter) should be determined on a case-by-case basis taking into account the specific circumstances of an applicant under the established criteria.[106] A requirement to provide legal aid will depend on factors such as:

- the importance of what is at stake for the applicant;
- the vulnerability of the applicant;
- The emotional involvement of the applicant which impedes the degree of objectivity required by advocacy in court;
- The complexity of the relevant law or procedure;
- The need to establish facts through expert evidence and the examination of witnesses;
- The applicant's capacity to represent him or herself effectively;
- The existence of a statutory requirement to have legal representation;
- Where initiating or defending legal proceedings would otherwise be prohibitively expensive.

The current blanket exclusion of all social welfare appeals from the remit of the current scheme of civil legal aid is clearly inconsistent with Ireland's European Human Rights obligations. The vast majority of appellants must navigate the stressful (and often legally complex) appeals process unrepresented. This raises serious concerns as to the effectiveness of those appellants' right to a fair trial as guaranteed by Article 6 ECHR and Article 47 of the Charter.

1.3. Conclusion & Recommendations

Any reforms to the social welfare appeals process should be consistent with the significant constitutional, human rights and equality standards and principles which apply to appeals. In

[104] UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR, at para. 8.

[105] UN Committee on the Elimination of Racial Discrimination (2019) *Concluding observations on the combined fifth to ninth reports of Ireland*. Geneva: OHCHR, para. 43.

[106] See further: FLAC (2023), *Stakeholder Submission to the Review of the Civil Legal Aid Scheme*, Section 3.

particular, the social welfare appeals system must include safeguards for appellants' rights to fair procedures and constitutional justice. These safeguard should include:

- A right to an oral hearing where necessary (including where there is a conflict of evidence),
- A right of access to access to all relevant information, submissions and evidence in relation to an appeal, as well as a right to reply to that information,
- The publication of the decisions of Appeals Officers.

The appeals process should also be consistent with the "flexible and generous" system of social welfare adjudication provided for under the SWCA and appeals should be conducted in an accessible and inquisitorial fashion.

In FLAC's submission, these matters should be provided for in primary legislation which should also provide for the Appeals Office's status as an independent tribunal – with only supplemental details being set out in regulations. At present, the very nature of the appeal process is dictated by Ministerial regulations which raises significant questions around the independence of the Appeals Office, and the constitutionality of the legal framework underpinning it. Regulations in relation to matters of procedure should be guided by principles and policies set out in primary legislation. These principles and policies should include a clear mandate for appeals to be conducted in a fair, accessible and inquisitorial manner. Such regulations should be made by the Chief Appeals Officer rather than the Minister.

In relation to the right to legal representation, legal aid should be available for social welfare appeals. The remit of the Citizens Information Board should be expanded to include specific mandates to provide legal information, advice and advocacy in relation to social welfare. Legislation should also mandate the Department to undertake accessible social welfare take-up campaigns.

The Minister and her Department should introduce policies in relation to the continued use of remote hearings as a matter of urgency, to include

- The introduction and publication of policies around when a remote (as opposed to in-person) hearing should take place (in the interests of justice and fairness), and how an appellant may assert their preference for an in-person hearing.
- The introduction of measures to pro-actively identify cases where a remote hearing would not be suitable and schedule those matters for in-person hearing.
- The introduction of practical supports and safeguards to ensure meaningful access to remote hearings, including an assisted digital programme designed to help those who are 'digitally excluded' or lack digital skills to engage with remote processes.

- The introduction of an appropriate monitoring mechanisms to oversee the impact of remote hearings on access to and confidence in the tribunal, particularly amongst person with protected characteristics under equality law.

Finally, the Minister and her Department should also seek the views of IHREC in relation to the current proposals pursuant to section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014.

2. Analysis of Draft Social Welfare Appeal Regulations

The Department of Social Protection has published draft new social welfare appeal regulations – along with an explanatory document outlining the "change" brought about by each new regulation and the "rationale" for same.[107]

The draft "Social Welfare (Appeals) Regulations 2023" state that the regulations are made pursuant to the Minister's powers under sections 310, 311 and 330(b) SWCA. Draft Regulation 4 would repeal the Social Welfare (Appeals) Regulations 1998-2011.

This section of this submission provides an analysis of each of the Draft Regulations which would bring about substantive changes to the appeals process, and is informed by the matters raised in section 1.

2.1. Draft Regulation 5 - Functions of the Chief Appeals Officer

Draft Regulation 5 provides significantly more detail in relation to the role and functions of the Chief Appeals Officer than currently provided for. It also makes provision for the new role of Deputy Chief Appeals Officers. The functions articulated largely reflect the provisions of the SWCA in relation to the Chief Appeals Officer's role.

However, the Draft Regulation also purports to create a new role for the Chief Appeals Officer in providing guidance to the Department in relation to first-instance decision-making:

> "5. The Chief Appeals Officer shall be responsible for: …
>
> (6) arranging for the preparation and issuing of guidance to the Minister, on the appropriate interpretation and application of statutory provisions with respect to decisions made in accordance with section 300;
>
> (7) providing advice and guidance, at the request of any officer of the Minister at Principal Officer level or higher, with respect to the interpretation of statutory provisions applying to any decision or class of decisions…"

[107] Department of Social Protection (6 April 2023), *Public Consultation on Important Changes to Social Welfare Appeals Regulations*.

The explanatory document published by the Department notes that these provisions "will for the first time formally establish a role for, and assign responsibility to, the CAO in providing feedback and guidance to the Department":

> "[The Regulations provide for] a role for the Chief Appeals Officer to provide feedback and guidance to the Minister and to Department staff on the correct interpretation of statutory provisions relating to decisions.
>
> The rationale for this particular provision is that Appeals Officers are senior staff directly engaged in the interpretation of scheme rules across all schemes on a daily basis.
>
> In practice therefore, issues with regard to the consistency of application of scheme rules are also most apparent in the appeals received by the Appeals Office.
>
> It is therefore important that the Appeals Office is mandated to provide feedback to the Department's scheme area deciding officers. This will help improve the quality and consistency of first instance decision making."

The Department has previously stated that "the reporting line of the Decisions Advisory Office was moved to the Chief Appeals Officer".[108]

In FLAC's view, these developments raise serious concerns in relation to the independence of the Appeals Office and further blurs the lines between first-instance and appellate decision-making within the Department. The distinction between the Appeals Office and first-instance Departmental decision-makers is already a fragile construct based largely on long-standing practice. These measures would only serve to strengthen the perception that the Appeals Office and its staff are agents of the Department and the Minister (which, strictly speaking, they are).

Further, the principles of procedural fairness require decision-makers on appeal to have had no involvement in the decision subject to appeal in the first instance. However, the draft regulations explicitly provide for the Chief Appeals Officer to perform functions relating to "decisions made in accordance with section 300 [which deals with the powers of Deciding Officers]".

FLAC would also query whether the creation of these functions for the Chief Appeals Officer through regulations is within the scope of the Minister's powers under the SWCA. Section 310 SWCA provides that the "Chief Appeals Officer shall have any other functions **in relation to appeals** under this Part that may be prescribed". Mandating the Chief Appeals Officer to perform functions in relation to fist-instance decision-making would appear to exceed the limits put in place by the primary legislation. Similar concerns arise in relation to the Chief Appeals

[108] Social Welfare Appeals Office (2022), *Annual Report 2021*, p.14.

Officer being involved in the management of the Department's Decisions Advisory Office. There is no clear basis under the SWCA for the Chief Appeals Officer to oversee an office of the Department beyond the Appeals Office.

In FLAC's view, the introduction of a duty to publish appeal decisions, along with the publication of more detailed analysis in the Chief Appeals Officer's reports under section 308 SWCA, would be a vastly superior method of supporting the work of the Department's Decisions Advisory Office and its first-instance decision-makers more generally. We would also reiterate our submissions in relation to the reforms which we believe are necessary to the legal underpinning of the Appeals Office.

2.2. Draft Regulation 7 - Submission of appeal and information to be supplied by appellant

Draft Regulation 7 proposes to make a number of changes to the rules and procedures for lodging appeals. At present, regulation 9 provides for a 21 day time-limit for lodging appeals, while also giving the Chief Appeals Officer discretion to accept late appeals.

The Draft Regulation proposes to increase the initial time-limit to 60 days. It also provides that the Chief Appeals Officer may accept a late appeal where "he or she is satisfied that the delay in submitting the appeal is due to exceptional circumstances and, in addition, that there are strong *prima facie* grounds for appeal". It further states that appeals "will not be accepted by the Chief Appeals Officer any time after the expiry of 180 days".

The extension of the initial time-limit to 60 days is a welcome reform. However, the extremely high threshold for accepting late appeals set out in the draft regulations (along with an absolute time-limit of 180 days) is a regressive proposal which is divorced from the reality of many social welfare appellants. The "strong *prima facie* grounds for appeal" requirement essentially provides for the pre-judgement of appeals by the Chief Appeals Officer. Further, the determination of what constitutes "exceptional circumstances" is entirely within his gift. The only means to challenge refusals on the basis of those criteria would appear to be judicial review proceedings - which are expensive and inaccessible to the vast majority of social welfare applicants. The proposals are also entirely inconsistent with the "flexible and generous" system of social welfare adjudication provided for in the SWCA.

In FLAC's submission, the initial time-limit for lodging appeals should be extended to 60 days. Primary legislation should provide for this and afford the Chief Appeals Officer discretion to accept late appeals at any point beyond this, where there is reasonable cause for the delay.

Further, the Draft Regulation provides that:

> "(4) The notice of appeal shall contain a statement of the facts and contentions upon which the appellant intends to rely. This shall include the details of the original

claim submitted to the Minister together with grounds of appeal and any additional information that the appellant considers is relevant to the consideration of his or her appeal.

(5) The appellant shall send to the Chief Appeals Officer, along with the notice of appeal, such documentary evidence as the appellant wishes to submit in support of his or her appeal, and the notice shall contain a list of any such documents."

This places far too great an onus on appellants to prepare and lodge their appeal within a finite period of time and is, again, inconsistent with the "flexible and generous" system of social welfare adjudication provided for in the SWCA. It should be highlighted that access to documentation in relation to first-instance decisions may often only be retrieved via FOI. Further, medical and social care needs reports may be necessary in certain appeals. Appellants may also need to submit documents retrieved from authorities in different jurisdictions. As noted in section 1, the supports available to appellants in preparing for and participating in appeals are extremely limited.

In FLAC's submission, regulations should provide that an appellant *may* set out grounds of appeal and provide documentary evidence in lodging their appeal – but no requirement to do so should be in place. The Appeal Form should advise appellants that further information and submissions may be submitted at a later date. On receiving an appeal, regulations should oblige the Appeals Office to notify the appellant that their appeal has been received and to provide them with information in relation to appeals procedure, rules of evidence and the legal and advocacy supports which are available.

2.3. Draft Regulation 8 - Notification of appeal to Minister and information to be supplied.

Draft Regulation 8 sets a 21 day time-limit for the Department (on being notified of an appeal) to "revise the original decision in favour of the appellant and advise the Chief Appeals Officer accordingly, or furnish or make available to the Chief Appeals Officer all claim forms or other documentation submitted by the appellant and such other evidentiary information considered by the Deciding Officer or the Designated Person, as the case may be, including reports of any assessors or inspectors, when making the decision that is being appealed". The Department may apply for an extension within 18 days of being notified of an appeal and the regulation also provides that: "Where the Minister does not provide the documentation and information within 21 days from the date of notice by the Chief Appeals Officer (or such date as may be specified under sub-article (2), the Chief Appeals Officer shall arrange for the appeal to be determined on the basis of the information provided by the appellant and such further information as may be provided under article 10 of these Regulations".

FLAC welcomes the introduction of a requirement for the Department to promptly respond to the notification of an appeal. However, we would highlight that the proposed new regulation removes the existing requirement for the Department to also provide "a statement from the deciding officer or the designated person or on his or her behalf showing the extent to which the facts and contentions advanced by the appellant are admitted or disputed". It is difficult to understand the rationale for removing this requirement in circumstances where the draft regulations now oblige the Department to review the decision being appealed. Such reviews are currently conducted by the Department and have proven to be an efficient means of rectifying incorrect decisions on the basis of the information provided by the appellant in their notice of appeal (while also mitigating the need for the applicant to go through the appeals process).

The approach under the current regulations (which removes the requirement for a written statement and does not impose a requirement to provide reasons for the review the Department would be mandated to conduct) creates a risk that the "automatic review" mechanism could become a rubber-stamping exercise - where decisions are upheld without any means of interrogating or challenging that finding.

The current requirement for the Department to provide a statement in relation to the appealed decision also encourages better decision-making in the first-instance as decision-makers may subsequently be required to stand over their findings and conclusions.

In addition to the requirement for the Department to provide all "claim forms or other documentation submitted by the appellant and such other evidentiary information… including reports of any assessors or inspectors, when making the decision that is being appealed" within 21 days and to review the decision, FLAC believes that the Department should be obliged to provide a written statement setting out the reasons for the decision reached on review, as well as a statement "showing the extent to which the facts and contentions advanced by the appellant are admitted or disputed". Further, there should be an obligation on the Department and/or the Appeals Office to furnish those documents and statements to the appellant. Similarly, there should be an obligation on the Appeals Office to provide any reports they receive from assessors to the appellant.

As discussed in section 1, such rights should largely be provided for in primary legislation – with regulations giving effect to those provisions, if necessary.

2.4. Draft Regulation 10 - Further information to be supplied and amendment of pleadings

Draft Regulation 10 provides for more detailed rules in relation to the submission of further arguments and evidence to Appeals Officers. It allows for "the amendment of any notice of appeal, statement, or particulars at any stage of the proceedings". It also provides that an

Appeals Officer may issue a "notice for further particulars" to "the appellant or any other person appearing to the appeals officer to be concerned". The regulations provide that the "return date" for responding to such a notice shall be "no more than 21 days". The Appeals Officer has a discretion to extend that time-limit for reply if an "application for extension shall only be considered if it is received at least 3 days prior to the return date specified in the notice" and "[in] exercising their discretion, the Appeals Officer shall consider if the reason sought for the extension is in all the circumstances reasonable". Finally the Draft Regulation provides:

> "(3) Where the notice for further particulars was directed to the appellant (or a person representing the appellant) and a response is not received by a date 7 days after the designated return date, the appeal will be deemed to be withdrawn and all parties to the appeal shall be notified accordingly.
>
> (4) Where the notice for further particulars was directed to a person other than the appellant (or a person representing the appellant) and a response is not received by the designated return date, the Appeals Officer shall proceed to determine the appeal in the absence of the information requested."

Unlike the current regulation (Regulation 12), which give Appeals Officers discretion in relation to the time-limits for providing further submissions, the draft regulations sets strict and unrealistic time-limits with harsh penalties attached. By contrast with the current regulation, the draft provisions makes no specific reference to an obligation for Deciding Officers to provide further information.

This draft regulation, if introduced, would constitute a regressive formalisation of the appeals process which is out of step with the reality of the lives of many appellants, and which is inconsistent with the regime provided for in the SWCA.

The initial 21 time-limit is out of step with the complexity of the matters dealt with in many social welfare appeals (in relation to which appellants may need to seek legal assistance), and the difficulties faced by appellants in obtaining certain forms of documentation (as discussed above). There is no justification for the draconian penalty (the deemed withdrawal of the appeal) for failure to comply with this unrealistic time limit. It is notable that where the Department fails to comply with the 21 day time-limit imposed on it for responding to a notification of appeal, the Draft Regulations still provide for the appeal to be considered and determined by the Appeals Officer.

In FLAC's submission, no change should be made to the procedures provided for under the current regulations and we reiterate our submissions that the Appeal Form should apprise appellants of their right to make further submissions and provide further evidence, and that there should be duty on the Appeals Office to do likewise on receipt of an appeal.

2.5. Draft Regulation 11 - Determination of appeals

Draft Regulation 11 provides for an explicit reference to the fact that appeals "shall be determined by an Appeals Officer as if it was being decided for the first time".

We would note that section 311(3) SWCA states an "appeals officer… **may** decide the question as if it were being decided for the first time" (emphasis added). Draft Regulation 11 appears to attempt to fetter the discretion of Appeals Officers in this regard and the scope of the Minister's powers to introduce regulations cannot be interpreted so as to allow her to amend primary legislation.

As noted in section 1 of this submission, primary legislation should provide for the general approach to conducting appeals and should provide for an accessible and inquisitorial process.

2.6. Draft Regulation 12 - Decisions involving an assessment of capacity to work or requirements for care

Draft Regulation 12 creates a new requirement for any appeal relating to a person's capacity to work or requirement for care to be heard by an appeals officer who is a registered medical practitioner or, if not, for the appeals officer to seek the advice of a medical assessor. Further, where an appeals officer "required in accordance with sub-article (1), to seek the advice of a medical assessor, makes a decision contrary to the medical opinion of the medical assessor, he or she shall advise and set out in writing to the appellant, and any other parties concerned, the rationale for his or her making a determination contrary to the advice of the medical assessor".

FLAC would query whether this provision is consistent with the social model of disability contained in the UN Convention on the Rights of Persons with Disabilities (UNCRPD) which has been ratified by Ireland. Similarly, the approach suggested is potentially inconsistent with the fact that decisions "involving an assessment of capacity to work or requirements for care" turn on factors other than medical diagnoses and are context specific (i.e. one form of injury or disability may hinder one person's ability to work based on their level of education, qualification, training or literacy but not another). The medicalisation of such decisions may lead to the social element of the assessment being overlooked. FLAC would note that there are already concerns in relation to the Department's overreliance on the opinion of medical assessors and, specifically, in relation to Deciding Officers "[abdicating] his/her decision-making functions" to such assessors.[109]

[109] Mel Cousins & Gerry Whyte, *Social Security Law in Ireland* (3rd Edn, Wolters Kluwer, 2021), p.373.

In FLAC's view, Appeals Officers should have a discretion to seek the opinions of medical assessors where they deem it necessary and an appellant should have the right to access and respond to any such opinions.

2.7. Draft Regulations 13, 14 & 15 - Summary Appeals & Oral Hearings

Draft Regulation 13 provides that: "Where the written information, including grounds for appeal and supporting material or other documentation and supplementary material requested by, and available to, the Appeals Officer, is, in his or her view, sufficient to enable an informed decision, the Appeals Officer shall set out his or her rationale accordingly, and determine the appeal based on this information and without recourse to a hearing". By contrast with the current regulation, the Draft Regulation creates a requirement for the Appeals Officer to provide a written rationale for making a decision on a summary basis.

Draft Regulation 14 provides that an appellant may request an oral hearing and that "the Appeals Officer shall consider this request and, if he or she decides not to proceed with a hearing, the Appeals Officer shall advise the appellant and other parties concerned setting out the reasons why he or she considers a hearing of the appeal to be unnecessary". The current regulations simply provide that the Appeals Officer has discretion to hold an oral hearing.

Draft Regulation 15 provides for the powers of Appeals Officers to fix a date for an oral hearing and requires them to "give reasonable notice of the said hearing to the appellant".

As discussed in section 1, FLAC believes the right to an oral hearing where there is conflict of evidence should be enshrined in primary legislation. In this regard, regulations should impose a pro-active duty on Appeals Officers to determine if an oral hearing should be offered to the appellant on that basis. Further, the regulations should provide that the Appeals Office is obliged to notify the appellant of their right to request an oral hearing (and such a right should also be enshrined in primary legislation).

2.8. Draft Regulation 16 - Persons who may appear at hearing

No change is proposed to the provisions concerning persons who may appear at hearings. However, FLAC would note that the existing provisions state that: "The appellant may, with the consent of the Appeals Officer, be represented at the hearing by any other person". While this does not create an issue in practice, FLAC would note that the consent of an Appeals Officer should not be required for an appellant to appoint a legal representative.

2.9. Draft Regulation 19 - Procedure at hearing

Draft Regulation 19 would replace the provision of the current regulation which allows Appeals Officers to "postpone or adjourn the hearing as he or she may think fit" with the following: "An Appeals Officer shall make best efforts to expedite the conclusion of an appeal, and

postponements or adjournment of hearings shall only be granted in exceptional circumstances".

In FLAC's submission this proposal is unnecessary and inconsistent with the inquisitorial approach whereby, following engagement with the Appeals Officer, an appellant may be required to prepare submissions on certain points, gather evidence or seek the attendance of a witness. It is unclear whether such circumstances can be considered (exceptional).

2.10. Draft Regulation 21 - Method of sending documents

Draft Regulation 21 provides that the Appeals Office may communicate with parties by electronic means. FLAC would reiterate its comments from section 1 of this submission is relation to digital disadvantage and exclusion. The regulations should provide that appellants may choose to receive communications by post and this option should be provided for on the Appeal Form.