



FLAC Submission to the Oireachtas Special Committee on COVID -19 response.

September 2020

About FLAC:

FLAC (Free Legal Advice Centres) is one of Ireland's oldest civil society organisations. It is a voluntary, independent, legal and human rights organisation which for the last fifty years has been promoting access to justice. Our vision is of a society where everyone can access fair and accountable mechanisms to assert and vindicate their rights.

FLAC works in a number of ways:

- Operates a telephone information and referral line where approximately 12,000 people per annum receive basic legal information
- Runs a nationwide network of legal advice clinics in 71 locations around the country where volunteer lawyers provide basic free legal advice to approximately 12,000 people per annum
- Is an independent law centre that takes cases in the public interest, mainly in the area of homelessness, housing, discrimination and disability
- Operates a Roma legal clinic and has established a dedicated legal service for Travellers.
- Operates the public interest law project PILA that operates a pro bono referral scheme that facilitates social justice organisations receiving legal assistance from private practitioners acting pro bono.
- Engages in research and advocates for policy and law reform in areas of law that most affect marginalised and disadvantaged

FLAC's submissions most relevant to the subject matter of this committee include

- FLAC Submission to the "Workplace Relations Commission on the Consultation Paper on Remote hearing and Written Submission Dealing with Adjudication Complaints During the period of Covid-19 Related Restrictions"
- FLAC Submission to the Joint Oireachtas Committee on Justice and Equality: Access to Justice & Costs
- FLAC Submissions to the Review of Administration of Civil Justice February and June 2018
- FLAC Submission to the Courts Service Statement of Strategy 2018-2020, October 2017
- FLAC Submission on High Court Practice Direction 81.

You can access FLAC's policy papers at:

<https://www.flac.ie/publications/category/policy/>

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Introduction

FLAC welcomes the opportunity to make a submission to the Oireachtas Special Committee on COVID -19 response. We are happy to clarify any point or expand on the contents of this submission and attend at the Special Committee in person or by video conference or otherwise.

FLAC's response to the Covid-19 Crisis

Our Telephone Information and Referral Line remains open. Our Phone line team is determined to provide quality information to callers during this crisis and we have taken steps to reinforce the phone line service to seek to ensure quality. However it is extremely difficult to meet and respond appropriately to the level of demand that the phone line is experiencing. In addition the calls are more complex and are taking longer due to ongoing changes in regulations policies and practices and the lack of usual supports and somewhere to refer callers to.

Our Phone line provides a snapshot into the acute and stressful situations that people are facing as a result of the lockdown and the lifting of restrictions and the re-imposition of some restrictions. The nature of the calls has change over the last six months. They include queries about Social welfare, access, domestic violence, people who have been made unemployed, people who cannot get the Covid payment, people who are afraid of being evicted, people who are worried about their capacity to pay the arrears in mortgage, people who have been unable to get legal aid for divorce proceedings, people who are nervous going into Court because of Covid, and a wide range of employment law related queries which are described below.

Phone legal advice clinics.

In response to the Government issued guidelines, FLAC closed all of our free legal advice clinics around the country for the safety of our volunteers and service users. FLAC have organised Phone Legal Advice Clinics in response to the urgent need for legal advice in the areas of family law and employment law.

FLAC have also produced a series of 'FLACsheets' to provide information on rights during the current, including a FLACsheet on Employment Law Rights during Covid-19 outbreak. We ran webinars on employment rights and family law rights during Covid. As part of a series of webinars for charities on the law and Covid-19, PILA & TrustLaw hosted a webinar on Employment Law.

Benefit take up campaign on rent supplement

Flac published an information sheet outlining the details of the newly extended rent supplement scheme which was designed to assist those

struggling to pay rent in private accommodation during the Covid-19 pandemic.

Although this scheme was expanded to meet Covid-19 demands in March, there was relatively low uptake because not many people were unaware that they may qualify under the new criteria. FLAC wanted to ensure that people who are struggling to make their rent are aware of the rent supplement support so that they can apply for assistance. In the absence of this information being widely circulated by the Department of Social Protection, many people were unaware that they may qualify for this assistance since the scheme was expanded in March. We urged people to apply as soon as possible as the scheme was now been extended.

FLAC has been asked to address the following matters:

1. how the State's legislative framework contributed to an effective response to the current crisis;
2. how this compares to the use of statutory frameworks in other jurisdictions;
3. how the legislative framework might be improved upon to deal with similar major events in the future and the constitutional/legal risks that should be considered in this context;
4. how well statutory Instruments/regulations, as opposed to guidelines and public health advice, were communicated to those who needed to be aware of them, the methods used and how this compares to the practice in other jurisdictions?

Given the limited time available it has not been possible to address all of the queries raised and carry out the requisite research into other jurisdictions. In making this submission we have drawn on our experience in the information lines and phone advice clinics, our policy work to date, our work with Travellers and Roma, our experience in litigation as well as the queries received through PILA.

1. Human Rights Context:

In considering the State's legislative framework and the extent to which it contributed to an effective response, our work to date, has shown how human and equality rights can play a valuable and practical role as a safeguard during the pandemic. FLAC would like to draw the Committee's attention to relevant Human Rights and equality framework.

All states in Europe, whether they are members of the Council of Europe or European Union, have committed to upholding human rights, democracy and the rule of law, including under the European Convention on Human Rights, EU Charter of Fundamental Rights and UN treaties. The State has specific obligations under Irish equality legislation as an employee and a service provider which apply in normal times and a pandemic. *"Times of crisis can exacerbate existing inequalities and render people more vulnerable. COVID-19 has a disproportionate impact on certain groups in society, for example older people, people with disabilities, minority ethnic groups and women."*¹

The Siracusa principles

The Un Commission on Human Rights, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28th September 1984² set out that while human rights can be curtailed in a public health emergency, these curbs must be placed in legislation, subject to regular review, and offer redress, alongside being proportionate and no more than what is required to meet the emergency.

ENNHRI Statement

ENNHRI, the European Network of National Human Rights Institutions issued a Statement 23rd April with the following principles which have been summarized. The full text of the Statement is in [appendix 1](#).

1. Human rights remain in force in a time of crisis
2. Measures must be legally-based, proportionate and time-limited
3. Measures cannot have any discriminatory impacts
4. Situations of vulnerability must be addressed
5. Broad public debate is as important as ever
6. Parliaments must hold governments to account
7. Judicial independence must be protected
8. Restrictions on democratic rights must be kept in check
9. States should engage with their NHRIs

¹ IHREC guidance on COVID-19 and the Public Sector Equality and Human Rights Duty

² <https://www.refworld.org/docid/4672bc122.html> [accessed 31 August 2020]

COVID-19 and the Public Sector Equality and Human Rights Duty.

IHREC has produced a guidance note on the Public Sector Equality and Human Rights Duty. Section 42 of the 2014 IHREC Act places a legal obligation on all public bodies, in their daily work, to have regard to the need to: eliminate discrimination; promote equality of opportunity and treatment for staff and persons to whom it provides services; and protect the human rights of staff and service users.

The guidance note sets out key questions to consider in relation to developing responses, implementing responses, consultation, communication, and assessing/monitoring impact. FLAC submits that these questions are key question for the work of this committee.

Developing responses

- Have you taken action to ensure that special measures or changes in service delivery introduced in response to COVID-19 are non-discriminatory?
- Have you considered the specific needs of people protected under the equality legislation: gender, civil status, family status, age, sexual orientation, disability, race, religion, membership of the Traveller community; and people at risk of poverty and social exclusion?
- Are there are specific targeted measures you need to consider to ensure that all persons are covered and no-one is left behind?
- Have you identified specific steps to make reasonable accommodation for people with disabilities?

Implementing responses

- Have you equality proofed any legislation, regulation or policies in terms of their impact across the grounds of the Equal Status Acts?
- Have you scrutinised any legislation, regulation or policies in terms of their impact on human rights; civil, political, economic, social and cultural rights?
- Have you reflected on your legal obligations as employers under the Employment Equality Acts to ensure any decision or policy you make in response to COVID-19 does not directly or indirectly discriminate against employees on any of the nine grounds protected under that legislation?

Consultation

- Have you consulted with civil society organisations, representatives of the equality grounds, and with staff and/or their representatives when a decision, plan or programme is at draft stage, seeking to involve everyone in your response?

- Have you consulted and coordinated planned action with other key actors and stakeholders working on the response to the issues identified?

Communication

- Are you proactively ensuring that all sections of the community have access to information, considering how traditional communication methods have been impacted by COVID-19?
- Have you taken any measures to adapt communications to target certain audiences, e.g. children?
- Is the language you use inclusive, recognises and respects diversity, and avoids prejudice and stigma directed to particular communities?

Assessing/monitoring impact

- Are you gathering and reviewing disaggregated equality data and information on the impact of COVID-19, for example gender, age, disability, sexual orientation, and ethnicity?
- Have you put in place a mechanism to monitor the impact of decisions, policies and plans on different groups, through feedback or complaint mechanisms?
- Have you in place a regular review process whereby your policies and plans are living documents that can be adapted based on emerging evidence from groups experiencing inequality and discrimination?"

Access to up to date accurate information about changes to the law.

FLAC stress the importance of access to up to date information, especially where there are changes to the existing law. However, it has not always been possible to get access to legally binding measures before they come into force or immediately after they came into force, in order to carry out appropriate scrutiny or to become informed as their content and consequences for ordinary citizens

In some cases, there has been uncertainty as to whether particular measures are legally binding or merely advice/guidance – this leads to significant uncertainty for ordinary citizens and it is important that there is clarity around this issue. In a recent comparative example the New Zealand High Court recently found that Government and police had presented advice during the first nine days of lockdown as legally binding measures³

Recommendations

FLAC recommends that the Committee in its consideration would have regard to the human rights and equality infrastructure, the equality

³ Borrowdale v. DG Health [2020] NZHC 2090

legislation and the role of the state as employer and service provider, the Siracusa Principles, the ENHRI statement of principles, and the key question set out in the IHREC guidance on COVID-19 and the Public Sector Equality and Human Rights Duty.

FLAC recommends that it is vital that there is up to date accurate information made available about changes to the law.

2. Issues arising from the Social Welfare Schemes and Legislation introduced in response to the Covid-19 Pandemic

Overview of Social Welfare Legislation introduced in response to the Covid-19 Pandemic

1. In response to the social and economic upheaval arising from the Covid-19 pandemic, the Minister for Employment Affairs and Social Protection introduced a number of Statutory Instruments to amend the rules relating to entitlement to existing social welfare schemes. Four such Statutory Instruments were signed by the Minister for Employment Affairs and Social Protection on 30 March 2020:
 - Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 2) (Emergency Measures In The Public Interest-Jobseeker's Allowance) Regulations 2020 (S.I. No. 94/2020)
 - Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 3) (Emergency Measures in the Public Interest-Jobseeker's Benefit) Regulations 2020 (S.I. No. 95/2020)
 - Social Welfare (Increase for Qualified Adult) Regulations 2020 (S.I. No. 96/2020)
 - Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 4) (Illness Benefit Payments Arising from Covid-19) Regulations 2020 (S.I. No. 97/2020)
2. Statutory Instruments No. 94/2020 and No. 95/2020 suspend the provisions of the Social Welfare Consolidation Act 2005 which disentitle claimants to Jobseeker's Allowance and Jobseeker's Benefit during the first three days of a period of unemployment. The 2005 Act specifically allows for such suspensions by way of regulation with the consent of the Minister for Public Expenditure and Reform (who also signed the relevant Statutory Instruments). The period of these suspensions have since been extended numerous times by way of Statutory Instrument, most recently by Statutory Instruments No. 309/2020 and No. 310/2020. These subsequent Statutory Instruments provide that the suspensions will remain in place until 17 September 2020.
3. Statutory Instrument No. 96/2020 provided for the Increase for a Qualified Adult in respect of claims for Jobseeker's Benefit, Jobseeker's Benefit (Self-

Employed), and Illness Benefit to be raised to €147 (bringing the rate of these payments in line with the Covid Pandemic Unemployment Payment for those in receipt of such an increase). Statutory Instrument No. 308/2020 has extended the period to which these increases apply into September 2020.

4. Statutory Instrument No. 97/2020 provided for an enhanced scheme of Illness Benefit in respect of those unable to attend work due a diagnosis or suspected diagnosis of Covid-19 which necessitated a period of self-isolation. The Statutory Instrument inserted a new chapter into the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (S.I. No. 142/2007) which set out the eligibility criteria for the new scheme.
5. The Minister signed a further Statutory Instrument on 10 July 2020. The Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 9) (Absence from the State) Regulations 2020 (S.I. No. 242/2020) amended the “Holiday Rules” for Jobseeker’s Benefit and Jobseeker’s Benefit (Self-Employed) set out in article 217(d) of S.I. No. 142/2007. The rules, which previously allowed a claimant to continue to receive their payment during a two-week annual holiday from job-seeking, were amended to disentitle claimants to the payments where any such holiday was taken in a manner contrary to “the Covid-19 General Travel Advisory in operation by the Department of Foreign Affairs”.
6. Notably, on 10 July 2020, a Departmental Circular was issued (Circular 35/20) which purported to suspend the statutory and administrative holiday rules in relation to Jobseeker’s Benefit, Jobseeker’s Benefit (Self-Employed), Jobseeker’s Allowance, Supplementary Welfare Allowance and the Covid Pandemic Unemployment Payment. That circular provided that claimants for those payments would not be entitled to their payments during any period of travel abroad to a non-“Green List” country. It further provided that, where a claimant was required to “genuinely seek work” to claim such a payment, this criterion would not be satisfied in circumstances where they were advised to self-isolate following their travel abroad:

“[If] it comes to the Department’s attention that a person has continued to travel abroad, their claim should be suspended from payment for the duration of the period abroad and an additional 14 days. An overpayment can be considered if necessary.”
7. The only primary legislation enacted in response to the social welfare issues arising from the Covid-19 pandemic is the Social Welfare (Covid-19) (Amendment) Act 2020. The 2020 Act was signed into law on 5 August 2020 and provided a statutory basis for the Covid Pandemic Unemployment Payment (which was introduced by the Department of Employment Affairs and Social

Protection on 13 March 2020). The 2020 Act provides that, subsequent to its enactment, the Covid Pandemic Unemployment Payment (hereafter “the Covid PUP”) is to be paid pursuant to the newly inserted Chapter 12B of Part 2 of the 2005 Act.

Issues Arising

8. FLAC has published a number of papers highlighting our concerns with the administrative and legislative response of the Department of Employment Affairs and Social Protection to the Covid-19 pandemic. The following such papers are included with this submission:
 - A. A paper in response to Circular 35/20 which highlights that the Department cannot introduce “Holiday Rules” for social welfare payments which are contrary to the rules in relation to absences from the State and entitlement to payments set out in legislation. The paper also raised concerns about the actions of the Department at ports and airports and highlighted that the power of Social Welfare Inspectors in such settings is subject to strict limits under the 2005 Act.[\(appendix 2\)](#)
 - B. A paper in relation to the Covid PUP Scheme introduced by the Department on 13 March 2020 which highlighted the absence of a clear legislative basis for the scheme until the enactment of the Social Welfare (Covid-19) (Amendment) Act 2020. The paper also addressed issues around the eligibility criteria for the scheme and raised concerns about the Department retrospectively introducing such criteria without any notice to claimants for the payment.[\(appendix 3\)](#)
 - C. A paper in relation to the Social Welfare (Covid-19) (Amendment) Act 2020 which highlighted the eligibility criteria for the payment under that legislation. The paper also raised concerns about the absence of regulations in relation to eligibility for the payment during absences from the State and in relation to the process for determining when a claimant is considered “genuinely seeking work” while in receipt of the payment. The paper also raised concerns about the imposition of a requirement for claimants for the payment to be “genuinely seeking work”.[\(appendix 4\)](#)
9. A number of issues highlighted in these papers remain active concerns for FLAC. These outstanding concerns will be highlighted in this submission which should be read in conjunction with the papers attached.

Absence of a Clear Legislative Basis and Clear Eligibility Criteria for the Covid Pandemic Unemployment Payment between 13 March 2020 and 5 August 2020

10. In March 2020, the Department of Employment Affairs and Social Protection introduced the Covid Pandemic Unemployment Payment (hereafter “the Covid PUP”) in response to the Covid-19 Pandemic. The Department has since extended the period during which the Covid PUP will be paid until April 2021 and has announced that it will accept applications for the payment until 17 September 2020.
11. On 5 August 2020, the Social Welfare (Covid-19) (Amendment) Act 2020 was signed into law. The Act replaces the existing Covid-PUP scheme with a statutory scheme by amending the Social Consolidation Act 2005 to make specific provision for the payment. It is notable that the 2020 Act refers to the previous Covid PUP Scheme as “the payment known as the pandemic unemployment payment paid under section 202 in respect of that week”. Section 202 of the 2005 Act forms part of the Supplementary Welfare Allowance schemes and allows for the payment of Urgent Needs Payments. This is the first reference to the Covid PUP having been paid under the SWA scheme and, indeed, to the any legislative basis for the scheme during the period 13 March 2020 to 5 August 2020.
12. Prior to the introduction of the 2020 Act, no previous information published by the Department made any reference to a legislative basis for the scheme. The only information published by the Department in relation to the eligibility criteria for the scheme were on the application form for the payment and on the webpage in relation to the payment on www.gov.ie.
13. Between 19 March 2020 and 5 August 2020 (when the payment was placed on a statutory footing by the 2020 Act), the section of the webpage on gov.ie in relation to the eligibility criteria for the Covid PUP was amended at least seven times. Most notably, in late July 2020, the page was amended to State that applicants are only eligible for the payment if they “are genuinely seeking work” and, further, to state that “Holiday entitlements rules are the same as those for Jobseeker's Payments”. No information previously published by the Department indicated that this was an eligibility criterion for the payment or informed claimants that there were specific rules in relation to entitlement to the payment during absences from the State (save that they were required to be residents of Ireland when claiming the payment).

14. A full analysis of the eligibility criteria for the Covid PUP between 13 March 2020 and 5 August 2020 is contained in FLAC's note on the topic, attached to this submission at Appendix 3. In FLAC's submission, these additional eligibility criteria cannot properly be considered as having applied to the Covid PUP scheme during the period 13 March 2020 to 5 August 2020.
15. The paper at Appendix 3 also examines whether the Covid PUP can be properly considered as having been paid under section 202 of the 2005 Act during the period 13 March 2020 to 5 August 2020. It notes that payments under section 202 are subject to section 189 of the 2005 Act which requires any such payment to be means-tested. The Covid PUP was never subject to any form of means testing.
16. It is worth noting in this regard that all payments previously made by the Department under section 202, such as Urgent Needs Payments awarded by Community Welfare Officers, are only paid once it has been established that claimant's means are not such as to enable them to meet an urgent expense. Indeed, the Humanitarian Assistance Scheme, which provides financial assistance to households to meet their essential needs in the aftermath of flooding, and which is paid pursuant to section 202, is subject to a means test in order to establish that the claimant does not have the means to meet their essential needs.
17. In circumstances where claims for the Covid PUP scheme were not means tested in any sense, it seems that it could not have been paid pursuant to the SWA Scheme and that the Covid PUP scheme, during the period 13 March 2020 to 5 August 2020, should properly be considered as having been paid pursuant to a non-statutory, administrative scheme.
18. The lack of clarity in relation to the legislative basis and eligibility criteria for the Covid PUP during this period is regrettable of itself in that it potentially caused confusion among potential claimants as to their entitlement to the payment. Further, the lack of clarity exacerbated other issues in relation to the Covid PUP scheme which will be examined below.

Actions of the Department of Social Protection at Ports and Airports

19. Beginning in June 2020, significant concerns arose around about the actions the Department of Social Protection at Ports and Airports. FLAC's note on the issue of holiday rules for social welfare payments (attached to this submission at Appendix 2) highlighted the limits on the Department's powers in this regard under the 2005 Act.

20. While section 250(16B) of 2005 gives Social Welfare Inspectors certain powers in respect of questioning persons at airports, these powers may only be exercised where that Inspector has some “reasonable grounds” of suspicion for questioning a specific person. Accordingly, the 2005 Act does not provide a legal basis for a policy of “blanket” questioning at airports whereby all individuals are questioned before boarding a specific flight or where individuals are questioned without the Inspector having a reasonable grounds for believing that they may be committing a breach of the social welfare code.
21. It is notable that while the 2005 Act provides for specific procedures in relation to the provision of information to Social Welfare Inspectors from Financial Institutions, Employers and Landlords, there is no provision in the Act in respect of the provision of information by ports, airports or airlines.
22. FLAC welcomes the decision of the office of the Data Protection Commissioner to instigate an investigation in relation to the actions of the Department in this regard. However, FLAC has outstanding concerns in relation to the suspension of social welfare payments on foot of unlawful airport checks conducted by the Department. As well as the concerns around data protection which arise in this regard, FLAC has concerns about the Department adopting a blanket policy of suspending certain social welfare payments during absences from the State in circumstances where there may be no basis for such a policy pursuant to the relevant primary legislation.

Suspension of Social Welfare Payments due to Absences from the State

23. FLAC’s note on the issue of holiday rules for social welfare payments (attached to this submission at Appendix 2) highlighted that there is no legislative basis for suspending claims for Jobseeker’s Allowance and Supplementary Welfare Allowance during absences provided that those absence are not such as to support a finding that the claimants are no longer normally resident in Ireland. This was similarly the case in relation to the Covid PUP during the period 13 March 2020 to 5 August 2020.
24. In the case of Jobseeker’s Benefit and Jobseeker’s Benefit (Self-Employed) regulations have been put in place to disentitle claimants to the payment during absences from the State which are not in compliance with “the Covid-19 General Travel Advisory in operation by the Department of Foreign Affairs”. No such regulations have been put in place for the Covid PUP scheme under the 2020 Act and it is therefore the case that that payment is not payable during any absence from the State.

25. The contents of Departmental Circular 35/20 are indicative, however, of a Departmental policy of suspending claims for Jobseeker's Allowance, Supplementary Welfare Allowance and the Covid PUP (prior to the enactment of the 2020 Act) on foot of any absence from the State which do not comply with the Department of Foreign Affairs travel advice. As noted above, by contrast to Jobseeker's Benefit and the Covid PUP scheme under the 2020 Act, there is no legislative basis for adopting this policy by way of circular or otherwise.
26. Further, it appears that in some instances such suspensions were put in place on foot of unlawful airport checks at no notice to the claimant. Such a policy represents a flagrant breach of claimants' rights to be subject procedures and, specifically, their right to respond to any allegation that they were acting in a manner which disentitled them to a social welfare payment.
27. While the Minister for Social Protection, on 29 July 2020, committed to a review of all social welfare claims which were stopped on foot of airport checks, FLAC is aware of a number of cases where person's (whose claims were stopped on foot of airport checks, in circumstances where there was no legal basis for suspending their claims due to an absence from the State) claims have not been restored or where the person is yet to receive a back-payment for the period of unlawful suspension.
28. FLAC is also concerned that the strict holiday rules were being implemented by the Department (as reflected in Circular 35/20) represent an arbitrary and punitive imposition of travel restrictions on those who are in receipt of certain social welfare payments. While "the Covid-19 General Travel Advisory in operation by the Department of Foreign Affairs" exists only as guidance for the majority of the population, the same advice was being enforced with harsh, punitive effect against persons who are in receipt of certain social welfare payments.
29. Finally, FLAC is concerned that the Department has adopted a policy to the effect that, where claimants are in receipt of a payment which requires them to "genuinely seek work", this criteria cannot be satisfied during the two-week period of self-isolation advised following claimant's return from certain countries. Given the proliferation of online working and recruitment, the basis for this policy is questionable. Further, many citizens may need to self-isolate for any number of reasons aside from having recently engaged in international travel; however, the Department has not published anything to suggest that claimants of Jobseeker's Benefit should withdraw their claim for the payment while self-isolating for other reasons. It is thus worth questioning whether the proposition that those who are self-isolating after travelling abroad are unavailable for work or not seeking work is sustainable.

Absence of regulations in relation to absences from the State and the Covid PUP and the requirement to “Genuinely Seek Work” while in receipt of the Covid PUP

30. The Social Welfare (Covid-19) (Amendment) Act 2020 provides welcome clarity as to the legislative basis for the Covid PUP and as to the eligibility criteria which attach to the payment. However, FLAC would note concerns in relation to the absence of regulations to give effect to the new scheme.
31. Section 249(1) of the 2005 Act disentitles claimants to the Covid PUP in all circumstances except “where regulations otherwise provide”. No regulations have been made by the Minister to provide for entitlement to the payment during holidays or absences from the State for essential purposes.
32. Article 217(d) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (Statutory Instrument 142 of 2007) provides that claimants for Jobseeker’s Benefit and Jobseeker’s Benefit (Self-Employed) shall not be disentitled to their payments under Part 2 of the 2005 Act while they are “on holiday, in accordance with the Covid-19 General Travel Advisory in operation by the Department of Foreign Affairs, in respect of the first two weeks of any such absence in a calendar year”. The Department runs an administrative scheme in relation to claims for Jobseeker’s Allowance and Supplementary Welfare Allowance which allows claimants for those payments to remain in payment while on holidays to the same conditions (however, as noted above, there does not appear to be a legislative basis for applying such strict “holiday rules” in respect of those payments which are not subject to section 249(1) of the 2005 Act).
33. In addressing the Dáil on 29 July 2020, the Minister for Social Protection stated:

“As I am currently bringing legislation through the Oireachtas to put PUP on a statutory basis, I intend to sign regulations that will bring the PUP payment in line with Jobseeker’s.

That will mean persons on PUP can travel to Green List countries and their payment will not be impacted. As with Jobseeker’s, persons travelling to countries outside the Green List can only do so for essential reasons.”

The Minister has yet to sign any such regulations and as a result it does not appear that the Covid PUP is payable to claimants during any absences from the State regardless of the reason for such travel or however short its duration.

34. FLAC has further concerns in relation to the absence of regulations giving effect to the requirement to “genuinely seek work” while in receipt of the Covid PUP. Section 68L(1) of the 2005 Act (as amended by the 2020 Act) provides that, in order to be eligible for the Covid PUP, a person must be “genuinely seeking, but is unable to obtain, employment suitable for him or her having regard to his or her age, physique, education, normal occupation, place of residence and family circumstances”. Further, section 68L3 of the 2005 Act provides that a person is disentitled to the payment if he or she:

“(c) has refused an offer of suitable employment,

(d) has failed or neglected to avail himself or herself of any reasonable opportunity of obtaining suitable employment”

35. Unlike other payments where claimants are required to “genuinely seeking work”, the Minister has not introduced any regulations in relation to how claimants are to be assessed as “genuinely seeking work” whilst in receipt of the Covid PUP

Requirement to “Genuinely Seek Work” while temporarily laid-off

36. Further, FLAC has concerns about the imposition of a requirement for claimants to “genuinely seek work” whilst in receipt of the Covid PUP. Although, the 2020 Act those not propose to apply the condition retrospectively, the condition may have an adverse impact on many claimants eligibility for the payment following its enactment.

37. The “eligibility notice” for the Covid PUP on the application form for the payment has always stated (and still states) that the payment is available to those who have been “have been temporarily laid-off from work”. Many employees and owners of businesses which are currently closed but intend to reopen are currently in receipt of the Covid PUP. It seems unreasonable to expect such claimants to seek alternate work in circumstances where they have every expectation of resuming employment imminently. Further, employees who have been laid off may have to forego statutory redundancy payments from their original employer if they take up other employment elsewhere. The right of an employee to pro-actively claim a redundancy lump sum where they have been on lay-off for four or more continuous weeks was temporarily removed for the duration of the Covid crisis by section 29 of the Emergency Measures in the Public Interest (Covid 19) Act 2020. Thus, if such a person did find another job because, they would have to forego all statutory redundancy as well as minimum notice entitlements.

38. Further, those who have no access to child care services due to the pandemic may be unable to seek work while in receipt of the Covid PUP and their entitlement to same may therefore be prejudiced.

Conclusion

39. As already noted, many of the issues which arise in the context of the Covid PUP were exacerbated by the absence of clarity as to eligibility criteria for the scheme and its legal basis. Unlike the enhanced Illness Benefit scheme introduced by the Department at the onset of the Covid-19 pandemic, the Covid PUP scheme was only belatedly provided with a clear legislative basis. While the 2020 Act purports that the payment was made under section 202 of the 2005 Act between 13 March 2020 and 5 August 2020, this proposition does not stand up to legal scrutiny. Further, section 202 of the 2005 Act does not provide a legal basis for the additional eligibility criteria for the scheme the Department sought to retroactively impose during that period.

40. It should also be noted that in introducing social welfare legislation and regulations in response to the Covid-19 pandemic, the Department remains under a duty, pursuant to section 42 of the Irish Human Rights and Equality Act 2014, to consider the human rights and equality impact of their policies. It is notable in this regard that the Department's amended "holiday rules" in respect of social welfare payments, including the Covid PUP, may have a disproportionate impact on migrant workers who are entitled to such payments. Further, the imposition of a requirement to "genuinely seek work" while in receipt of the Covid PUP may disproportionately impact families who presently have limited access to child care services. Finally, it should be noted that during the period 13 March 2020 to 5 August 2020, those in Direct Provision had no access to the Covid PUP.

Recommendations

- ***The Department of Social Protection should review the activities of Social Welfare Inspectors at ports and airports and ensure any such activities are carried out in a manner compliant with the significant restrictions on their powers in such settings under the 2005 Act. The Department must also ensure that any person who provide information to Social Welfare Inspectors in such settings are subject to fair procedures which respect their rights to natural and constitutional justice.***
- ***The Department should review its administrative "Holiday Rules" for all payments and ensure that the rules applied in respect of each payment are reflective of the conditions in respect of absences from the State arising from primary legislation and not***

more restrictive. Any such review should include a review of Departmental Circular 35/20 including the policy contained therein to the effect that persons cannot be considered to be “genuinely seeking work” during periods when they are advised to self-isolate.

- *The Department should review all claims for social welfare payments which were suspended on foot of airport checks with a view to ascertaining whether the checks were carried out lawfully, whether any suspension arising from the checks was allowed under primary legislation in relation to the relevant payment and whether the claimants subject to such checks were afforded fair procedures or given any notice before a suspension was put in place. The Department should lift any suspensions which were imposed arising from unlawful airport checks or which were imposed in circumstances where the relevant primary legislation did not allow for a suspension on the basis of an absence from the State alone. Further claimants subject to suspensions under such circumstances should be awarded back payments for the period of any unlawful suspension.*
- *The Minister for Employment Affairs and Social Protection should urgently introduce regulations allowing claimants of the Covid PUP to take holidays/leave the State, in a likewise manner to claimants for Jobseeker’s Benefit.*
- *The Department should review the imposition of a requirement to “genuinely seek work” while in receipt of the Covid PUP. At the very least, regulations should be introduced setting out how this criteria is to be applied to claimants for the payment which take into account the fact that many claimants have limited access to childcare and, further, that many claimants for the payment are temporarily laid-off and have every expectation of resuming their previous employment or self-employment.*
- *FLAC recommends that in the event that in the event of a resurgence of Covid-19 or in the event of another similar major occurrence requiring the introduction of emergency social welfare measures that any such measures are introduced by way of primary legislation so as to provide a clear legislative basis for any such measures and to provide clarity as to who is eligible to avail of any new social welfare scheme. Further, in introducing any such emergency measures the Department should be*

cognisant of its duty, pursuant to section 42 of the Irish Human Rights and Equality Act 2014, to consider the human rights and equality impact of their policies.

3. Employment law

FLAC has seen a steady increase in employment law over the last few years but there has been a definite jump since the pandemic. Our information line is receiving calls from distressed people with urgent complex queries on employment law. Between March 2020 and August 2020, employment law queries increased by 58.7 per cent compared to same period in 2019. For the first time at the end of May employment law queries were the top queries on our phone line overtaking Family law for the first time in FLAC history. (This is not in any way to in any way take away from the seriousness and urgency of the issues arising in family law queries which have increased by 18.1 in the period between March to August 2020).

The queries include people who are being forced back to work with no childcare or who feel it is unsafe for them to return to work, queries from employees who have been told to come back by a specified day or to resign. Some callers have a disability which may come within the risk categories and are concerned that there is insufficient Health and Safety precautions been taken. Some callers are concerned that if they go into work they will be putting a child with a disability or a cocooning parent at risk when they return home. They may be reluctant or unable to use public transport and may not have a car. Other queries concern employees who wished to take annual leave to take care of their children during the pandemic and employees who were being required to take annual leave during the pandemic

Over the past six months the range and number of employment related queries received on FLAC's Telephone Information and Referral line and in FLAC's legal advice clinics arising in the context of the Covid crisis illustrates the need for dedicated services to assist employees with often very difficult queries, a review of existing legislative standards and a potential programme of law reform in the area of employment rights.

Advice for employees affected

It is apparent to FLAC that the system of access to information/advice/advocacy legal representation/assistance on employment rights issues in Ireland requires review and improvement. The crisis has been marked by the absence of any State service to assist employees with advice to deal with some very specific queries, particularly for employee who are not members of trade unions and who do not have access to legal advice.

There are many websites where information on rights and entitlements can be sourced and these are of course helpful, but in a crisis situation where people are feeling deeply insecure about their jobs and where there is unfortunately

so much scope for exploitation, people seek more than information. They want to talk about their personal situation, the application of the law to their particular circumstances, how their employer is treating them, what can and what should be done about it and how it will work out if they take a particular course of action. Many of these questions are of course very difficult to answer, but it is the difficult things and the hard questions that people seek answers to in a crisis, and you won't find these on a website.

Enforcement of employment rights

We must also look further down the line to the scenario where the fall out of Covid results in significant numbers of people seeking a remedy for the alleged breach of their employment rights, particularly around dismissal on grounds of redundancy. In many workplaces, the difficult decisions have yet to be made and in many others, we have encountered significant short changing of employee's rights in decisions affecting their livelihoods.

As FLAC has also frequently stated in the past, civil legal aid is simply not available for employment related complaints before the Workplace Relations Commission and the Labour Court and this has an adverse impact on both the bringing of complaints and their outcomes. In turn, the remedies available and provided to those whose complaints are upheld does not always adequately reflect the gravity of the conduct of the employer or improve outcomes for those who are struggling on low incomes.

Improvements to legislation

The particular features of the Covid-19 crisis has also shone a light on some aspects of current employment legislation and practice that are unclear and are in need of review and amendment. Some examples here include:

Issues concerning lay-off

Lay-off is provided for under the terms of the redundancy payments acts but there is still a question over whether an employer has a legal right under the legislation to put an employee on lay-off and, if so, whether the employer has to first substantiate his/her decision.

Notable also here is the absence of a legal obligation on employers to use a mandatory procedure in writing to place employees on lay-off from their jobs and to use a specific written procedure to notify employees that their lay-off was coming to an end and of the date when they would be expected to return to work.

Thus, for example, many employers have ignored the RP9 form recommended for lay-off purposes with the result that many laid off employees had no documentation or written proof of the date of lay-off. This has resulted in instances where some employees have been in a 'lay-off limbo', unsure when they will be called back to work or even if they will ever be called back. We have had callers who are dismayed that some of their colleagues have returned to work but they have not. We have had callers who have reported that they have been replaced by new employees.

An ironic twist here perhaps is that the right of an employee who has been 'laid off or kept on short-time for four or more consecutive weeks or, within a period of thirteen weeks, for a series of six or more weeks' to claim a redundancy lump sum was temporarily removed for the duration of the Covid crisis by virtue of s.29 of the Emergency Measures in the Public Interest (Covid 19) Act 2020 (March 27th). It provided that:

29. *The Redundancy Payments Act 1967 is amended by the insertion of the following section after section 12:*

12A. *(1) Section 12 shall not have effect during the emergency period in respect of an employee who has been laid off or kept on short-time due to the effects of measures required to be taken by his or her employer in order to comply with, or as a consequence of, Government policy to prevent, limit, minimise or slow the spread of infection of Covid-19.*

The fact that an employee cannot pro-actively claim a redundancy lump sum (even if s/he has found another job, which happened with at least one of our callers) but must wait, in some cases interminably, for the return to work, is deeply unfair. Although the PUP payment of €350 per week may have mitigated this somewhat, it does not take away from the fact that many employees have suffered a significant loss of earnings while on lay off.

Although the majority of employers have done the best they could for their staff in difficult circumstances, it would not have been difficult to forecast that some employers would take advantage of the Covid crisis to make some changes that would ordinarily have been considered unacceptable from an employment rights perspective. Safeguards could and should have been put in place to mitigate against this.

Requests for and impositions of annual leave

There is ambiguity concerning how requests for statutory annual leave from employers by employees and impositions of annual leave by employers on employees are to be decided and by whom and these concerns have been amplified during Covid.

According to Section 20 of the Organisation of Working Time Act, it is the employer's decision, having regard to work requirements, when an employee can take annual leave. However, there are some important restrictions to this right. The employer must take into account the employee's *'need to reconcile work and family responsibilities'* and *'the opportunities for rest and recreation available to the employee'*. In practice it can be argued that this means that annual leave should not be imposed on an employee at a time that is completely unsuitable. However, in an emergency situation like Covid 19, an employer may argue that its work requirements are a matter of priority.

A further important obligation on the employer under the section is to consult with the employee or his/her trade union at least one month before the first day of the leave is due to begin. An employee who works 1365 hours or more in a leave year is entitled to at least four weeks annual leave or 1.33 days annual leave for each month where at least 117 hours is worked. Once the leave has been accrued through the service of the employee and one month's notice has been given, the employer can request employees to take annual leave. However, the Covid 19 crisis has seen some employers request employees to take annual leave that has not yet been earned through the employee's service. Some employees were not happy about this as they felt it would deprive them of future entitlements to annual leave at a time when it may be most needed.

The Covid crisis would suggest that Section 20 of the OWT Act 1997 should be subject to a review, with the purpose of framing a section that would at least attempt to put in place rules that are more precise in terms of reconciling what might be considered to be the competing rights of employers and employees. A helpful reform perhaps would be making it mandatory for employers to have a written policy on annual leave with a written request mechanism on both sides and rights to adequate notice, consultation, appeal and associated measures.

Parental leave/Childcare issues

Child care issues have clearly loomed large for many employers and employees during the lockdown and while the return to school may help with some of these difficulties, the needs of pre-school children and children requiring care after school still have to be met. The difficult financial position

that the childcare sector finds itself in and the cost of childcare for parents has arguably exacerbated these difficulties.

Apart from annual leave, Parental Leave has been used to solve of these difficulties but it is a form of leave taken at the employee's expense and there are notice requirements for employees to provide and postponement rights for employers, all of which can limit its value. Reflecting this, we have received queries to our phone line where an employer is insisting that an employee present for work as set out in her/his contract of employment but where a parent simply cannot do so due to childcare obligations and where the dismissal of the employee is threatened if s/he does not comply with the instruction.

At present, it would appear that there is no explicit legal protection is available to employees who cannot attend at work due to a lack of childcare provision, although it has been suggested that employees might conceivably be protected by the 'family status' ground in the employment equality legislation, though the extent of this protection has not been tested.

Though all of this is far from clear cut, the Covid crisis has underlined that there is a need to look at providing more certainty and clarity in this area. For example, there may be potential for extending the paid *force majeure* leave rights of employees under the parental leave legislation to cover emergency situations not solely consisting of illness or injury but otherwise clearly beyond the employee's control, such as what is perhaps the ultimate *force majeure* event - a global pandemic.

Issues of health and safety at work

The return to work, particularly for non-office workers, has led to a particular focus on employee health and safety and the exposure of many employees to the virus, for example in the meat and other food processing operations, has been the subject of much media attention recently. Similarly, the position of healthcare workers in both residential and hospital settings was and continues to be of much concern as numbers of cases resurge.

In terms of the work of the Health and Safety Authority (HSA), there has been some concern expressed about two particular issues – the resources available to the HSA at a time when their workload has substantially increased and the reputed practice of the pre-announcement of inspections of workplaces. Much emphasis is placed in the legislation on health and safety on the necessity for co-operation between employers and employees in ensuring safe workplaces and this is a good thing. However, it would be naïve

to believe that there are not some employers taking short cuts on health and safety matters for financial reasons and decisive enforcement action is required to counteract this.

What legal rights therefore do employees who believe that their workplace may currently be a risk to their health and safety have to object to attending for work? On this question, as far as we can see, there has been little public discussion or information. It is perhaps not that widely publicised for example that under s.27 of the Safety, Health and Welfare at Work Act 2005, an employee who has raised a health and safety concern at work (as defined) and has been penalised (as defined) by his/her employer is entitled to make a complaint to the Workplace Relations Commission and obtain appropriate compensation. However, it is clearly the case that this is a difficult thing for any employee to take on and many employees will be afraid of the potential repercussions.

Strengthening this section by providing specifically for a reinstatement remedy and even an injunction mechanism should be considered, in addition to broadening the range of health and safety matters covered by the section to specifically include raising Covid or pandemic concerns. Ultimately, this must be accompanied by swift and robust enforcement of health and safety laws by the State.

4. Evictions and Part 2 of the Emergency Measures in the Public Interest (Covid-19) Act 2020

Part 2 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 (the “**2020 Act**”) made provision for the suspension of the normal operation of the Residential Tenancies Act 2004 (the “**2004 Act**”) with regard to the termination of tenancies and increases in rent. Part 2 also contained provisions purporting to suspend other legislative measures which could have been used to effect an eviction of tenants who did not fall within the application of the 2004 Act. It is those latter provisions that this submission addresses.

While the 2004 Act offers some legal protection to tenants to whom it applies, many individuals who approach FLAC have housing situations outside of its scope. This may be because, *inter alia*, they are persons who are homeless or at risk of homelessness requiring emergency accommodation or social housing support or because they are members of the Traveller community who wish to reside in culturally appropriate accommodation the provision of which by local authorities was authorised by the Housing (Traveller Accommodation) Act 1998 (the “**1998 Act**”).

Therefore, in assessing the government’s response to the crisis caused by covid-19, what is effectively being considered is the success of a legislative effort to sustain a system already in crisis. It is FLAC’s submission that the failures of successive governments to address a worsening housing and homelessness crisis and to ensure the provision of culturally appropriate accommodation to members of the Traveller community must be factored into any consideration of the success or failure of the State’s legislative response to covid-19 and the opportunity used to reconsider and reimagine the State’s approach to these issues.

It should also be remembered that in relation to evictions, the European Committee on Social Rights⁴ found that Ireland violated the Charter by failing to provide safe and adequate accommodation to Travellers and also found that there were violations of Article 16 of the Charter on the grounds that Part II A of the Criminal Justice (Public Order) Act 1994 and section 10 of the Housing Act 1992 provide inadequate safeguards for Travellers threatened with eviction. As these findings relate specifically to accommodation provision and protection from arbitrary eviction of Travellers

⁴ ERRC v Ireland; Complaint 100/2013. Decision on the Merits published 16 May 2016

Section 5(7) of the 2020 Act

Section 5(7) of the 2020 Act – which was deleted by section 23 of the Residential Tenancies and Valuation Act 2020 - made provision for protecting tenancies outside of the scope of the 2004 Act. It provided:

(7) (a) Notwithstanding any of the provisions in this section, all proposed evictions in all tenancies in the State, including those not covered by the Act of 2004, are prohibited during the operation of the Emergency Measures in the Public Interest (Covid-19) Act 2020.

(b) For the avoidance of doubt, this section applies to all Local Authority and Approved Housing body dwellings.

(c) For the avoidance of doubt, all Travellers who are currently resident in any location should not during this crisis be evicted from that location except where movement is required to ameliorate hardship and provide protection and subject to consultation with the Travellers involved.

On its face section 5(7) extended the prohibition on evictions under the 2004 Act to all tenancies, as well as prohibiting the forced movement of members of the Traveller community. However, it is FLAC's submission that the section lacked clarity and suffered from ambiguities which hindered its effectiveness.

Referable periods

One such ambiguity was the referable period during which section 5(7) was intended to apply. The earlier parts of section 5, which related to the 2004 Act, were stated to apply during "*the emergency period*". The emergency period was defined in section 3 of the 2020 Act as being for a period of 3 months from commencement and was capable of being extended by the Minister for Housing, Planning and Local Government after consultation with the Minister for Health and the consent of the Minister for Public Expenditure and Reform. The emergency period was last extended by the Emergency Measures in the Public Interest (Covid-19) Act 2020 (Section 4) (No. 2) Order 2020 until 1 August 2020. As the emergency period has now expired, the prohibition on notices of termination and rent increases under the 2004 Act, have also lapsed.

By distinction, the application of section 5(7)(a) and section 5(7)(c) was not tied to the emergency period.

Section 5(7)(a), which prohibited "*all proposed evictions*" was stated to apply "*during the operation of the Emergency Measures in the Public Interest (Covid-19) Act 2020*" and section 5(7)(c) was stated to apply "*during this crisis*".

Although the referable period in section 5(7)(a) was capable of being understood by reference to an objective standard, *i.e.*, the currency of the 2020 Act, it appeared to create a conflict with the earlier provisions of section 5 which were expressed to be determined according to the emergency period. This is

because section 5(7)(a) was stated to apply to “*all proposed evictions in all tenancies*”. Accordingly, this would bring in tenancies under the 2004 Act. Although this ambiguity was resolved by the deletion of section 5(7) of the 2020 Act on the same day as the end of the emergency period, the interpretative conflict it created made the provision of clear legal advice difficult.

The referable period for the application of section 5(7)(c) of “*during the crisis*” suffered principally from a failure to define “*the crisis*”. It was not clear whether the crisis was commensurate to the emergency period or whether it was longer or shorter. As with section 5(7)(a) this issue was largely resolved by the deletion of section 5(7) on the same day as the end of the emergency period but it created similar difficulties in providing clear legal advice.

Interpretative issues/ failure to define terms

Further ambiguities arose in determining the relationship between section 5(7)(a) and section 5(7)(c) and in interpreting the wording of section 5(7)(c). Section 5(7)(a) provided for a prohibition on “*all proposed evictions in all tenancies in the State*”. Section 5(7)(c) appeared to either clarify or add to the prohibition insofar as it concerned members of the Traveller community by providing “*all Travellers who are currently resident in any location should not during this crisis be evicted*”.

The extent to which these provisions were intended to be read together or separately was unclear. Section 5(7)(c) began with the words “*for the avoidance of doubt*” which suggested that it was clarifying what had been stated already, however, where section 5(7)(a) limited its prohibition on evictions to “*tenancies*”, section 5(7)(c) appeared to extend the prohibition on evictions to Travellers resident in “*any*” location. Thus it appeared intended to apply to Travellers pursuing a nomadic way of life who were resident on the roadside but not what one would typically describe as a “*tenancy*”.

A further ambiguity arose in interpreting the meaning of section 5(7)(c) which was said to apply to “*all Travellers who are currently resident in any location*” (emphasis added). On one interpretation, it might suggest that as a precondition to accessing the protection against eviction, Travellers must have been in-situ at the date of the commencement of the 2020 Act. However, a separate interpretation of s.5(7)(c) is that “*currently*” should not have been read as a point-in-time marker but should have been applied to cases as they arose. On such an interpretation, a local authority could not move to evict a Traveller family solely on the basis that they had taken up a new place of residence during the currency of the crisis.

In FLAC’s experience, local authorities continued to use legislative measures such as section 69 of the Roads Act 1993 and section 10 of the Housing

(Miscellaneous Provisions) Act 1992 (as amended) to require Travellers to move from a particular location despite an apparent prohibition on the eviction of Travellers in section 5(7)(c). It is submitted that the interpretative ambiguities in section 5(7) allowed for this eventuality.

Conclusions

FLAC submits that section 5(7) of the 2020 Act contained numerous interpretative ambiguities that deprived those who ostensibly should have been protected by its provisions of any means to resist an eviction or seek a remedy.

Recommendations

- **FLAC recommends that in the event that similar provisions are required due to a resurgence of covid-19 or in the event of another similar, major occurrence requiring the limitation of movement and a reduction in economic activity, that the State should put in place comprehensive protections from evictions for the entire population and not just those covered by the 2004 Act. Any such protections must be precise, unambiguous and inclusive.**
- **The legislative framework governing evictions in any event need to be reviewed in the light of the decision of the European Committee of Social Rights**

5. Debt

The fallout from Covid-19 and the ensuing recession is unfortunately likely to worsen the problem of over-indebtedness in Ireland. The position of a number of people whose financial difficulties arising from the last recession have never been resolved, may be exacerbated. To these may be added others who were just keeping their heads above water but who may now find themselves in a position of personal insolvency following loss of employment or business failure, particularly when payment breaks, moratoria on evictions, income support measures and associated strategies are reduced or even phased out.

It is notable that the proposed measures relating to debt announced in the recent programme for government do not seem to anticipate this threat, as they largely reflect existing policy that has yet to be acted upon rather than any new initiatives. Thus they may lack the urgency required to effectively deal with a new set of debt problems that may arise in the post-Covid landscape. These measures were to:

- Introduce the necessary reforms to our personal insolvency legislation and ensure that sufficient supports are in place for mortgage holders with repayment difficulties.
- Assess the Code of Conduct on Mortgage Arrears, including the available suite of alternative repayment arrangements, and ensure it has full legal effect. -
- Strengthen the Mortgage to Rent Scheme and ensure that it is helping those who need it.

Payment breaks

Recent research conducted by the Central Bank⁵ provides some helpful detail on payment breaks.

'91,555 payment breaks have been approved for household borrowers, representing €16 billion of loans. Almost all of household loans fall into either mortgages or consumer loans. In this context, the number of household payment breaks are split almost evenly across mortgage and consumer lending.

In terms of value, mortgages account for over 90 per cent of household payment breaks at €14.5 billion, representing over 10 per cent of the

⁵ Central Bank of Ireland (2020). COVID-19 Payment Breaks – who has needed them? A paper by Allan Kearns, Andrew Campbell, David Duignan, Darren Greaney and Grace McDonnell, July 2020. Dublin: Central Bank of Ireland. See: <https://www.centralbank.ie/statistics/statistical-publications/behind-the-data/covid-19-payment-breaks-who-has-needed-them>

value of outstanding mortgages (Table 1). Focussing on Irish borrowers, 9.6 per cent of the total value of mortgages have approved payment breaks. Within this group, approved payment breaks for households with principal dwelling mortgages (PDHs) represent 9.7 per cent of the value of outstanding mortgages. The equivalent ratio for buy-to-let (BTL) mortgages is marginally lower at 8.9 per cent.

Consumer loans account for almost half the number of approved household payment breaks but account for less than 10 per cent of the value at €1.3 billion. These payment breaks represent 6.6 per cent of loans to Irish resident consumers (i.e., calculated for Irish Retail Banks and Credit Unions only).’

This Paper refers to payment breaks as the need to achieve the provision of credit to solvent, but cash-strapped borrowers. Thus, it is conceivable that the payment breaks captured in the Central Bank’s research are intended to cover temporary financial difficulties over a limited period that do not threaten the solvency of the relevant borrowers in the medium to long term. Thus, what may be suggested is that these borrowers were solvent and broadly speaking did not have financial difficulties before the pandemic occurred.

Turning to the payment breaks themselves, their scale is quite significant over a short period of approximately three months. Even though the amount involved in respect of secured loans dwarfs that of unsecured debt by a factor of nine to one, it is also notable that half of the breaks in number concern unsecured loans.

Approved payment breaks for households with principal dwelling mortgages (PDHs) represent 9.7 per cent of the value of outstanding mortgages. Despite the dominance of mortgage difficulties in the narrative around payment breaks over the course of the pandemic and in the general discourse around debt over the last decade, it is also notable that close to 100,000 arrangements have been put in place in respect of loans representing close to 7% of unsecured (or what the research refers to as consumer) loans issued by ‘Irish Retail Banks and Credit Unions’ only.

Existing debt cases

Apart from borrowers who have only recently run into difficulty and availed of payment breaks, we also know, in terms of both mortgages and unsecured debt obligations, that many borrowers have had alternative repayment arrangements in place that involve payments below the notional contractual amounts well before the problems posed by Covid began and many of these are clients of the Money Advice and Budgeting Service (MABS).

It is not immediately clear how these payment arrangements have fared during Covid but there must be much concern about this. To add further context to these concerns, it is clear that even before the beginning of the Covid crisis, payment arrangements put in place on a significant number of restructures were not being maintained. For example, in the area of family home mortgage arrears alone, the CBI suggests in its latest available Q.1 2020 report that 81,255 such mortgages are classified as restructured, with 17,492 being classified as still being in arrears. Approximately 90% of these restructures are long term in nature and the failure rate in terms of compliance with the terms of these arrangements is close to 11,000 (or about 15% of the total number restructured).

The key question here is, quite apart from determining therefore who has developed a new debt problem arising from the Covid 19 crisis, whose debt problems have worsened as a result of it, and to what degree?

Covid financial supports

Our understanding is that the income supports put in place by the government, principally in the form of the Temporary Covid 19 Wage Subsidy Scheme and the Covid Pandemic Unemployment (PUP) payment, are in place for a limited period. The former was replaced by a new Employment Wage Subsidy Scheme (EWSS) at the end of August, 2020 which is (currently) due to run until April 2021.⁶ Under this scheme, employers and new firms in sectors impacted by COVID-19 whose turnover has fallen by 30% receive a flat-rate subsidy of up to €203 per week per employee, including seasonal staff and new employees. Thus, it is in principle substantially less favourable than the current scheme. Insofar as it concerns the PUP payment, new applications will not be accepted after September 2020, and the rates will be further adjusted on February 1st and April 1st 2021 respectively.⁷

At that point, many difficult decisions related to the ceasing of the operation of businesses or making employees compulsorily redundant will likely be made, in addition to cases where the decision has already taken place. Many borrowers will fall victim for a second time to recessionary events beyond their control and will have financial obligations in train that they simply will not be able to meet. Thus, many payment breaks will not be made up and many existing payment arrangements short of the original contractual obligation may fail. The implications for the legal system and the personal insolvency regime are considerable.

⁶ See: <https://www.revenue.ie/en/corporate/communications/stimulus/employment-wage-subsidy-scheme.aspx>

⁷ See: <https://www.gov.ie/en/service/be74d3-covid-19-pandemic-unemployment-payment/>

What will be the response of wider credit industry to this and what approach will the regulator – the Central Bank of Ireland – take to it? What is evolving government policy on what has all the appearance of a new consumer debt crisis? Insofar as it concerns plans disclosed in the public domain, it is hard to know at present.

The last major consumer debt crisis in this country eventually led to the adoption of the Central Bank's Code of Conduct on Mortgage Arrears (CCMA), effective from January 1st 2011 (and updated in 2013), with its introduction of a compulsory Mortgage Arrears Resolution Process (MARP) that was in our view procedurally flawed. This was eventually followed by a much delayed Personal Insolvency Act 2012 (effective from autumn 2013) which required significant amendment in late 2015 to try to boost arrangement numbers, and whose review is overdue since 2017.

Two key lessons may be learned in our recent history of handling over-indebtedness in Ireland. We have a tendency to be indecisive and act too slowly and we sometimes fail to understand that all the debts of the person in difficulty – secured and unsecured - must be considered together in the search for a resolution. The framework of information, advocacy, legal advice and legal aid for debtors also needs to be reviewed. A Covid debt code to deal with legacy mortgage arrears, new mortgage arrears and unsecured debt needs to be considered.

6. Access to justice, access to legal aid and access to the Courts and tribunals

FLAC has a longstanding commitment to promote human rights and equal access to justice. Access to justice is a fundamental human right.⁸ Access to justice is both a process and a goal, and is crucial for individuals seeking to benefit from the large range of statutory rights which are adjudicated upon by the Courts and quasi-judicial bodies like the Workplace Relations Commission and the Social welfare appeals office. While it has no single precise definition, core elements of access to justice include effective access to information, advice, legal aid, access to the courts, access to an effective hearing, access to a decision in accordance with substantive law, and access to an effective remedy.

Socially excluded groups within the general population are more likely to suffer justiciable problems (meaning problems for which there is a potential legal remedy within a civil and/or criminal justice framework)⁹ and the lack of effective and accessible mechanisms for resolving legal disputes prevents individuals from protecting and asserting their rights. Unless the right of access to justice (in all spheres of law) is vindicated, the risk of social and economic exclusion particularly for marginalised or vulnerable communities is greatly increased.

FLAC's concern throughout this unprecedented pandemic has been to support those who are most vulnerable to access legal advice and information. In addition to large scale illnesses and loss of life, COVID-19 has impacted upon every aspect of people's lives, including their ability to access justice. Individuals and communities that are marginalised, vulnerable and already experiencing disadvantage are impacted negatively when faced with precarious employment or unforeseen financial stresses. This can be compounded when living in poor or insecure housing conditions, or in situations of abuse or domestic violence.

Access to justice can play a major role in restoring social cohesion and confidence in the institutions of the State. There is a need for rapid action to ensure that those who are most at risk and have the least access to legal support, are able to access the forums where their legal issues may be

⁸ Access to justice is recognised as such under a range of regional and international instruments including the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and the International Covenant on Civil and Political Rights.

⁹ A Buck, NJ Balmer and P Pleasence, 'Social Exclusion and Civil Law: Experience of Civil Justice problems among Vulnerable Groups' (2005) 39 *Journal of Social Policy and Administration*, 302-320.

addressed. Access to justice should be positioned alongside provision of access to healthcare, housing, social welfare supports, debt resolution options, and employment support in government responses. The need for this recognition in the context of COVID-19 is even more acute. Failing to do so further embeds inequalities and there is a need to ensure that individuals are not further disadvantaged as a result of COVID-19.

Legal Aid and COVID-19.

During Covid 19 Legal Aid Board Law Centres, moved to remote operation for some of their work and are now in the process of reopening. The Legal Aid Board continued to provide some services to individuals throughout the pandemic using phone consultations. The Legal Aid Board have said that they expect a surge in demand for their services once normal practices resume in the Courts.¹⁰ There is currently no way of predicting the extent of demand that the Board may be faced with in applications for Civil Legal Aid once the Courts resume normal practice.

Prior to the pandemic, the Legal Aid Board Services were overstretched beyond capacity, with waiting lists of over 6 months in some places, according to the most up to date figures available from June 2020. In one rural law centre, ten of the 47 people on the waiting list for a first consultation were deemed to be a “priority.”¹¹

FLAC has raised the matter of insufficient budgetary allocations for the Legal Aid Board before with members of the Oireachtas and have asked for a root and branch review of the matter of civil legal aid system and increased funding commensurate with required levels to provide the service that is needed.

The many complex legal issue that FLAC encounters in its phone line and phone legal advice clinics are largely excluded from the remit of the `Legal Aid Board. There is no legal aid available for claims before the Workplace Relations Commission and Social welfare Appeals office no matter how complex the issue may be and how vulnerable the claimant may be. In addition there is a perception that legal aid is not available for housing issues.

Legal aid is also subject to a very strict means test. It is likely that there will be many people who find themselves in the position now that although their sole

¹⁰ Meeting of External Consultative Panel to the Legal Aid Board 15.07.20 (Minutes not yet published).

¹¹ Legal Aid Board, Statistics on Waiting Times, June 2020 Accessible here: <https://www.legalaidboard.ie/en/our-services/legal-aid-services/waiting-times/june%202020.pdf>

income may come from a COVID-19 social protection payment, the manner in which their income is assessed could mean that even if they do meet the means threshold, they will have to pay a significant amount in order to access legal advice or information from a Legal Aid Board solicitor.

At a minimum, FLAC has previously called for the financial eligibility criteria to be measured annually against national poverty proofing standards and for the publication of the underlying analysis by the Department of Justice and Equality. There are no provisions to index link the allowance or income criteria or to provide for increases in the cost of living or in the cost of legal services. Indeed, the new threshold and allowance figures for means test qualification is in drastic need of review.

The Joint Oireachtas Committee on Justice and Equality in its review of the family law system in 2019 recommended a review of the legal aid system. Given the impact of COVID-19 this is more important now than ever before.

Access to the courts

Access to justice also involves access to the courts and tribunals.

During COVID-19 the Courts remained open for urgent business only, and the majority of claims before the Courts and Workplace Relations commission and Social Welfare Appeals office were adjourned. The Social Welfare Appeals Tribunal is currently not holding oral hearings at all for those who may wish to appeal a decision of the Department of Employment Affairs, and while there are still appeals processes in place for such cases, the lack of access to a hearing is a hindrance to access to justice.

While FLAC acknowledges the challenges posed by the restrictions in place in response to the Covid-19 crisis, FLAC submits that the Courts and quasi-judicial bodies should assess whether – and, if so, when – it is possible to continue hearings safely within the existing physical infrastructure. In this regard it is noted that the Courts are continuing to operate on an albeit limited basis so, subject to appropriate safeguards being in place. It may well be possible for other quasi-judicial bodies to continue to operate safely with face to face hearings, at least as the restrictions are eased in the coming months.

While FLAC welcomes the enactments of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 which provides for video links and remote hearings in civil and criminal proceedings, these will only be suitable in certain types of cases. In addition older people, persons for whom English is not a first language, persons with physical or intellectual disability, homeless people and the more marginalised and disadvantaged are all less likely to have access to these facilities. There would be a very significant difficulty for the Courts and

quasi-judicial bodies in ensuring equal access to justice and tackling the existing digital divide in these circumstances

The Courts Services and the Legal Aid Board are an essential part of the administration of justice and the rule of law and need to be resourced accordingly and priority needs to be given to ensuring that they continue to function as effectively as possible during Covid 19. The ability to respond flexibly and quickly during the pandemic has been important, however it is clear now that there will be difficulties going forward as we begin to live with the virus and continue to have the same, if not more, needs. In addition, legal service providers including the Courts Service, and quasi-judicial bodies like the Workplace Relations Commission will be faced with increased waiting lists and workloads as they begin to address the non-emergency cases that were postponed for the duration of the pandemic.

FLAC is very concerned at the difficulties vulnerable claimants will face in accessing legal aid and this will be compounded by the inevitable growing delays in the Courts and Tribunal system.

Recommendations

- ***Access to justice should be a core consideration of the work of this committee***
- ***FLAC has consistently campaigned for a root and branch review of the entire civil legal aid system, and specifically requests that the Oireachtas Committee examine specifically the legal needs of vulnerable and individual groups as they relate to employment issues, housing, family law, and debt issues; and how these may be negatively impacted by COVID-19***
- ***The Courts Services as a key part of the administration of Justice need to be resourced adequately to deal with the growing delays which will be greatly exacerbated as a result of Covid 19.***
- ***FLAC recommends that the Committee examine the challenges for ensuring accessibility of legal and justice services beyond the immediate period of COVID-19 and ensure that the protection of fundamental rights, and procedural rights, are guaranteed.***
- ***FLAC recommends that increased support is allocated to provision of basic legal services, including the Legal Aid Board and other service providers who are providing services to those engaging with the justice system.***
- ***FLAC recommends that technology is maximised to facilitate access to legal services in a manner that increases access but does not exclude participation by those who do not have the ability***

to utilise new methods (whether that is due to disadvantage of literacy, geographic location, lack of service provision etc.).

Appendix 1

<http://ennhri.org/wp-content/uploads/2020/04/ENNHRI-Statement-on-COVID-19-23-April-2020.pdf>

Now is the time for solidarity on human rights. The need for human rights in COVID-19 responses in Europe

23 April 2020

The novel coronavirus disease (COVID-19) pandemic has put states across the world to a test like none before, and not least in Europe. As the outbreak rapidly develops, governments have taken broad and strict measures to reduce the virus' spread, prevent a breakdown of healthcare systems and save lives. In these responses, all human rights must be kept at the heart, as they can help us in overcoming this public health challenge while protecting our dignity and democratic freedoms.

We, National Human Rights Institutions (NHRIs) in Europe, have monitored our states' reactions since the pandemic began, while advising our governments and parliaments on human rights standards and informing the public about their rights during this crisis. We will continue doing so, individually and collectively, fulfilling our mandate under the UN Paris Principles to promote and protect human rights.

All states in Europe, whether they are members of the Council of Europe or European Union, have committed to upholding human rights, democracy and the rule of law, including under the European Convention on Human Rights, EU Charter of Fundamental Rights and UN treaties. We are calling for solidarity at all levels to ensure that these standards are respected, helping us see this pandemic through while staying true to our democratic values.

In particular, we underline the following principles.

1. Human rights remain in force in a time of crisis

Human rights continue to apply, even when a state declares a state of emergency or a derogation from its human rights obligations. States can only derogate to the extent strictly required by the situation and must announce their intention to do so in a timely manner. The prohibition of torture and inhuman or degrading treatment, as well as the prohibition of discrimination, cannot be derogated from at all.

2. Measures must be legally-based, proportionate and time-limited

Measures must have a legal basis, be proportionate and be time-limited. Decisions should be continually re-evaluated with a rebalancing of the rights involved, especially since they have to be made with limited knowledge about the virus, including the conditions under which it can be lethal, the lack of therapies and vaccinations, and the scarcity of tests and protective gear. In this uncertain context, the longer restrictions on human rights are in place, the more negative impacts they have. States must consider that what is proportionate at the start of the pandemic may become disproportionate over time, and if this is the case, the measure should be mitigated or abolished.

3. Measures cannot have any discriminatory impacts

Government measures in response to COVID-19 must protect the rights of all people and cannot discriminate. The impacts of measures on the human rights of particular groups, including women, older people, people with disabilities, children, migrants, people seeking asylum and people living in poverty or homelessness, must be assessed beforehand. Should people belonging to such groups be disproportionately affected, mitigation measures need to be put in place. This is required by the prohibition of discrimination.

4. Situations of vulnerability must be addressed

While protecting everyone's human rights, states must particularly assess and address situations of vulnerability caused or exacerbated by its measures. These can include: women and children facing violence at home due to curfews and overcrowding at shelters; homeless people unable to access an indoor place to stay; migrants unable to self-isolate due to limitations at reception centres; people in long-term care or hospitals suffering mental health problems due to visitation prohibitions; and children living in poverty unable to access online schooling or a space to learn.

5. Broad public debate is as important as ever

Since the COVID-19 pandemic and government responses deeply impact on all people and their human rights, broad public debate and consultation are essential. The state must fully ensure media freedoms and a safe space for civil society and human rights defenders to engage in their activities. These are means for the public to ensure that their governments make decisions that are in the interest of everyone, especially in this context of high uncertainty. Also, measures should be clearly communicated in accessible ways to ensure that all people, including people with disabilities and ethnic and linguistic minorities, can participate in public debate.

6. Parliaments must hold governments to account

Given that all legislation and executive regulations must respect human rights, parliaments should regularly assess the human rights impacts of COVID-19 measures, including through appropriate powers of the opposition (in accordance with each state's constitutional structure) for effective parliamentary oversight. The parliament must not cede its responsibility to the government, and the government must not prevent parliament from fulfilling its legislative and supervisory roles.

7. Judicial independence must be protected

During a crisis, governments and parliaments should be particularly vigilant in protecting the independence of the judiciary so that courts can scrutinise laws, as well as their implementation, for human rights compliance. Fair procedures and the enforcement of judgements are also essential elements in this regard, helping to ensure that rights and freedoms are protected during the crisis.

8. Restrictions on democratic rights must be kept in check

If freedom of assembly limitations are put in place to contain COVID-19, a blanket ban must be speedily replaced by other measures that achieve this objective. If surveillance measures are installed to tackle further spread of COVID-19, they should respect the right to privacy of each individual. Governments should avoid making decisions in highly-contested areas or calling elections, as long as such restrictions on democratic rights are in place. If elections must go ahead, parliaments should make sure that opposition parties have equal access to the people, that election laws are not amended (unless supported by the parliamentary opposition), and that voters can take part in elections in practice.

9. States should engage with their NHRIs

States should work with NHRIs in their efforts to combat COVID-19. As independent, pluralistic institutions mandated by the state, we monitor and provide credible advice on the human rights implications of state measures. We are well-placed to advise on the legality of human rights derogations due to our expertise in international human rights standards. We also handle individuals' complaints and work with civil society and human rights defenders to raise the voices of all affected people, including the most vulnerable, such as by reporting to national and international bodies.

A call for solidarity

Respect for human rights during the COVID-19 pandemic calls for solidarity at all levels. Within states, measures to combat the pandemic should be motivated by the conviction of all people to contribute to preventing the virus' spread, while states must stand by those most at risk. As the pandemic knows no borders, states need to collaborate in their efforts, and the Council of Europe and European Union should mutually reinforce each other to help states align their actions with human rights.

This pandemic is a test for the commitment of states to human rights. It is a test for the Council of Europe as the conscience of Europe, and for the European Union on whether it is indeed a community based on common values and fundamental rights. As European NHRIs, we are committed to promoting and protecting human rights, democracy and the rule of law and stand ready to act in solidarity with all to advance human rights during this crisis and beyond.

ENNHRI is the European Network of National Human Rights Institutions. We bring together over 40 National Human Rights Institutions (NHRIs) across Europe to enhance the promotion and protection of human rights in the region. Our network provides a platform for collaboration and solidarity in addressing human rights challenges and a common voice for NHRIs at the European level.

Appendix 2

Re: Departmental Circular No. 35/20 and Entitlement to certain Social Welfare Payments while Abroad

Summary

The Department of Employment Affairs and Social Protection has adopted a policy, by way of a Departmental Circular, which purports to allow for the suspension of certain social welfare payments in circumstances where a claimant leaves the State.

While the legislation in relation to Jobseeker's Benefit has been amended in order to allow for the implementation of the said policy, these amendments do not apply to the other payments purportedly effected by the circular. The primary legislation in relation to Jobseeker's Allowance and Supplementary Welfare Allowance, allow claimants to remain in payment provided that they remain normally resident in the State. That primary legislation does not empower to Minister to make further regulations in relation to eligibility for the payment in circumstances where claimants are absent from the State. As a result, it appears that, in relation to Jobseeker's Allowance and Supplementary Welfare Allowance, the Department's policy is contrary to the Social Welfare Consolidation Act 2005. Any decision on behalf of the Department to suspend those payments where claimants, who are residents of Ireland, take holidays abroad would be open to challenge.

Similarly, the eligibility criteria for the Covid Pandemic Unemployment Payment (an administrative scheme which is not grounded in primary legislation) makes no references to entitlement to the payment being suspended during absences from the State. As with JA and SWA, the relevant criteria for access to that payment is that the applicant be resident in the State.

The Department's policy also implies that those who have to self-isolate following their return from travel abroad are not entitled to payments where there is an obligation to be available for work during the self-isolation period. Firstly, no such obligation exists in the context of SWA and it is questionable whether such an obligation exists in relation to the Covid PUP. Secondly, it is doubtful that all social welfare claimants who have to self-isolate for a period can be automatically deemed to be unavailable for work or to be not genuinely seeking work.

Introduction - Circular 35/20

1. On 30 June 2020, the Department of Employment Affairs and Social Protection issued Circular 35/20 to its Divisional Staff and Branch Managers. The circular, entitled "Updated Holiday Procedures for JA/JB/JBSE, SWA and related Payments including Pandemic Unemployment Payment", took immediate effect and the "description", included below its title, reads as follows:

“This circular updates RDO Circular 71/10 and specifically suspends the provision of Article 217 of SI 142 of 2007 which allows customers to take two weeks holidays outside the State each year.”

2. The first section of the circular, entitled “Purpose”, provides a more detailed description of its intended effects:

“This circular is being issued to update current holiday application processes as set out in Circular 71/10 and 13/16 for JA/JB/JBSE, SWA and related payments including the Pandemic Unemployment Payment.

Current Covid-19 public health advice and foreign travel regulations require that anyone coming into Ireland, apart from Northern Ireland, are required to self-isolate for 14 days. This means that any jobseeker who travels abroad will be unable to fulfil the GSW and availability requirements for a jobseekers payment for the period abroad and the self-isolation period on their return i.e. for up to four weeks.

On a temporary basis and as a consequence of the continuing COVID-19 pandemic the terms of the Circulars 71/10 and 13/16 have been suspended for all travel abroad and consequently at present will not apply to those wishing to take holidays outside the island of Ireland. Please note that Article 217 of SI 142 of 2007 is being amended.

In time, if the self-isolation requirements are lifted for people arriving into Ireland from specific countries, then the suspension of the Holiday application procedures will be reviewed and further notification will issue. Notification of such locations should be checked against the most up to date lists available on www.dfa.ie or www.hse.ie.”

3. Section 4 of the circular provides that there is no change to the administrative rules regarding the taking of holidays within the State by those in receipt of payments relevant to the circular. Accordingly, a claimant of one of the relevant payments may continue to receive their payment while holidaying in Ireland for a period of up to two weeks in accordance with previous circulars. Sections 2 and 3 of the circular, however, impose additional restrictions in relation to the circumstances where a claimant of Jobseeker’s Benefit, Jobseeker’s Allowance, a payment under the SWA scheme or the Covid PUP may continue in payment while holidaying abroad.
4. Section 2 of the circular pertains to “Jobseeker Holiday procedure” while section 3 deals with payments under the SWA scheme. Section 2 provides that those in receipt of a payment in respect of their status as a jobseeker should,

when informing the Department of their intention to take a holiday, provide information as to where they will be holidaying. The circular provides that such applicants should fill out a revised version of the Form UP30 (used to inform the Department of a claimant's intention to take a holiday) which requires them to provide information in relation to their holiday destination. It seems that this revised form is yet to be published. Where a claimant has already informed the Department of their intention to take a holiday, section 2 states that such claimants should be contacted by Department staff to ascertain their holiday destination.

5. Where a claimant, on foot of Departmental enquiries or having filled out the revised UP30, has stated an intention to holiday abroad, section 2 of the circular states that the following procedure applies:

“If an application is received for holidays outside the State and to a location where self-isolation restrictions apply for people arriving in the State from, the customer should be advised that they are not entitled to a payment for that period and that if they continue to leave the country they will not be entitled to a payment for the duration of the absence from the State, nor will they be entitled to payment for the 14 day quarantine period upon their return.

All such applications should be refused and the customer advised that if it comes to the Department's attention that a person has continued to travel abroad, their claim should be suspended from payment for the duration of the period abroad and an additional 14 days. An overpayment can be considered if necessary.”

6. Section 3 of the circular provides as follows in relation to the holiday procedures for payments under the SWA scheme:

“For SWA schemes there is an administrative arrangement that payment may be allowed for up to two weeks per year while a claimant is on holidays, in line with the provisions for Jobseeker's Allowance.

The amendments to holiday procedures also apply to Basic SWA claims where there is a GSW requirement.”

7. It would seem that, in light of the above, the revised rules in relation to holidays abroad set out in section 3 of the circular apply to payments under the SWA scheme, while the latter paragraph purports to extend these requirements to the Covid Pandemic Unemployment Payment (Covid PUP).

Issues Arising in relation to Circular 35/20

8. First, it should be noted that, despite the “description” contained in the circular as to its purported effect, a Departmental Circular cannot “suspend” the

provisions of a Statutory Instrument. Such circulars do not constitute legislation and, accordingly, they may only operate within the parameters of the existing legislative regime. The fact that Article 217 of Statutory Instrument 142 of 2007 has since been amended (as will be discussed later below) is indicative of the fact that it is still in effect and takes primacy over the provisions of the circular.

9. Secondly, a number of issues also arise as to whether Circular 35/20 is compliant with the legislation relevant to social welfare payments for jobseekers, the SWA scheme and the Covid PUP. In particular, questions arise as to whether the circular accords with the provisions of the Social Welfare Consolidation Act 2005 in relation to eligibility for jobseekers and SWA payments during absences from the State. Further, the “purpose” section of the Circular 35/20 provides that, where the relevant travel guidelines provide for a period of self-isolation on return to Ireland, a person subject to those guidelines after returning to the country will not be entitled to receive a payment which requires them to be “genuinely seeking employment” and “available for employment” during any such period of self-isolation.
10. The relevant legislative provisions for each of the payments referenced in the circular in relation to absences from the State and availability for work will be set out in turn below, together with an analysis of whether the circular is compliant with the primary legislation in relation to eligibility for the payments.

Jobseeker’s Benefit

11. The Jobseeker’s Benefit Scheme is set out under Part 2 of the Social Welfare Consolidation Act 2005. Section 249(1) of that Act provides:

“Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit under Part 2 (including any increase of benefit) for any period during which that person—
(a) is absent from the State”

Accordingly, the primary legislation provides that a claimant cannot continue to claim Jobseeker’s Benefit for any period during which they are absent from the State, unless such a period is provided for by way of regulation. The only regulation that allows for any such absence is the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (Statutory Instrument 142 of 2007). Article 217(d) of that Regulation was recently amended by Statutory Instrument 242 of 2020 to read as follows:

“Notwithstanding section 249, a person who is absent from the State shall not be disqualified for receiving –
(d) Jobseeker’s benefit or jobseeker’s benefit (self-employed), (including any increase thereof) for any period during which that person, or his or her qualified adult, is absent from the State –

(i) on holiday, in accordance with the Covid-19 General Travel Advisory in operation by the Department of Foreign Affairs, in respect of the first two weeks of any such absence in a calendar year.”

12. The “General Travel Advisory in operation by the Department of Foreign Affairs” currently advises against non-essential travel to all countries overseas with the exception of fifteen countries on the so-called “green list”. It also states as follows in relation to the requirement to self-isolate on entering the State:

“The Irish Authorities require anyone coming into Ireland, apart from Northern Ireland and individuals arriving in Ireland from locations with a security rating of ‘normal precautions’ (“green”), to restrict their movements for 14 days, and this includes citizens and residents returning to Ireland. Restricting your movements means staying indoors in one location and avoiding contact with other people and social situations as much as possible.”

13. Article 217(d) of the 2007 Regulations must be read in light of EU law which allows worker to move within the EU to seek work. Such workers are entitled to retain entitlements to benefits for three months after moving to another member State.

14. The legislation would therefore appear to allow for absences from the State for purposes of a holiday to a country on the so-called “green list” and, perhaps, for the purpose of essential travel to any other location.

15. A strict reading of section 2 of Circular 35/20 appears to accord with this legislation. The circular calls for the suspension of payments in circumstances where a claimant for Jobseeker’s Benefit travels outside the State “and to a location where self-isolation restrictions apply for people arriving in the State”.

16. However, in light of the legislation, the circular should not be interpreted by the officers of the Department in a manner that would suspend payments in circumstances where claimants travel abroad in a manner consistent with the DFA Advice.

17. Section 62(5)(a) of the 2005 Act provides that a claimant for Jobseeker’s Benefit must be “available for employment” and “genuinely seeking” same. The question of whether a claimant meets these criteria is decided in accordance with the 2007 Regulations.

18. Regulation 15 of the 2007 Regulations deals with the question of availability for work and provides in full as follows:

“(1) Subject to sub-article (2), a person shall, for the purposes of Chapters 12 and 12A133 of Part 2 and Chapter 2 of Part 3, be regarded as being available for employment, if he or she can show to the satisfaction of the Minister, that he or she is willing and able, at once, to take up an offer of suitable full-time employment.

(2) Subject to sub-article (4), a person shall not be regarded as being available for employment if he or she imposes unreasonable restrictions on –

- (a) the nature of the employment,
- (b) the hours of work,
- (c) the rate of remuneration,
- (d) the duration of the employment,
- (e) the location of the employment, or
- (f) other conditions of employment he or she is prepared to accept.

(3) In determining what constitutes suitable full-time employment for the purposes of sub-article (1), regard shall be had to the following

–

- (a) the skills, qualifications and experience of the person concerned,
- (b) the period for which the person has been unemployed, and
- (c) the availability of employment vacancies within travelling distance of his or her residence.

(4) For the purposes of sub-article (2)(e), employment as a retained fire fighter shall not be regarded as an unreasonable restriction where that person is available for –

- (a) employment which is additional to his or her employment as a retained fire fighter and which would not necessitate cessation of the employment as a retained fire fighter, and/or
- (b) alternative employment which would necessitate cessation of the employment as a retained fire fighter.”

19. Regulation 16 of the 2007 Regulations deals with the question of whether a person is generally seeking employment and provides in full as follows:

“(1) For the purposes of Chapter 12 and 12A of Part 2 and Chapter 2 of Part 3, a person shall be regarded as genuinely seeking employment if he or she can show, to the satisfaction of the Minister, that he or she has, in the relevant period, taken reasonable

steps which offer him or her the best prospects of obtaining employment.

(2) For the purpose of sub-article (1) "steps" shall include –

(a) applications for employment made to persons –

- (i) who have advertised the availability of employment, or
- (ii) who appear to be in a position to offer employment,

(b) seeking information on the availability of employment from –

- (i) employers,
- (ii) advertisements,
- (iii) persons who have placed advertisements which indicate that employment is available, or
- (iv) employment agencies,

(c) availing of reasonable opportunities for training which is suitable in his or her circumstances,

(d) acting on advice given by an officer of the Minister or other placement service concerning the availability of employment, and

(e) taking steps towards establishing or re-establishing himself or herself in self-employment.

(3) For the purpose of this article, the taking of one step on a single occasion during the relevant period shall not be sufficient unless taking that step on that occasion, in that period, is all that is reasonable for the person concerned to do.

(4) In determining for the purposes of this article whether, in a relevant period, a person has taken the steps which are reasonable in his or her case, regard shall be had to his or her circumstances, including in particular –

- (a) his or her skills, qualifications and experience,
- (b) the steps which he or she has taken previously to seek employment,
- (c) the availability and location of vacancies for employment,
- (d) the duration of his or her period of unemployment, and

(e) his or her family circumstances.

(5) For the purposes of this article, “relevant period” means the period in respect of which the person concerned has made a declaration in accordance with articles 52, 52G and 118.”

20. It would appear to be on the basis of the above requirements that the circular implies that those in self-isolation after a period of travel abroad are not entitled to claim Jobseeker’s Benefit. Given the proliferation of online working and recruitment, this is a questionable conclusion. Further, many citizens may need to self-isolate for any number of reasons aside from having recently engaged in international travel; however, the Department has not published anything to suggest that claimants of Jobseeker’s Benefit should withdraw their claim for the payment while self-isolating for other reasons. It is thus worth questioning whether the proposition that those who are self-isolating after travelling abroad are unavailable for work or not seeking work is sustainable.

21. In addition, the intention behind the travel abroad might be to seek work in another EU State; per EU law, those travelling for that reason should be considered as “genuinely seeking work” for the period of the travel, provided such period does not exceed three months.

Jobseeker’s Benefit (Self-Employed)

22. The provisions of section 249(1) of the 2005 Act and article 217(d) of the 2007 Regulations apply in an identical manner to the Jobseeker’s Benefit (Self-Employed) payment.

23. Section 68C(2) of the 2005 Act provides that, for the purposes of the eligibility criteria for that payment, “the Minister shall make regulations specifying the circumstances in which a person is or is not to be regarded as being available for and genuinely seeking employment”.

24. Article 52A(1) of the 2007 Regulations provides that a claimant shall not be entitled to the Jobseeker’s Benefit (Self-Employed) payment during a week where he or she “fails to prove to the satisfaction of the Minister that he or she is not engaged in self-employment, is capable of work and is available for employment”. Regulations 15 and 16 of the 2007 Regulations also apply to the Jobseeker’s Benefit (Self-Employed) payment for the purposes of assessing whether a claimant is available for and genuinely seeking employment.

25. Given that the same primary legislation applies, the above analysis in relation to the circular and Jobseeker’s Benefit applies to the application of the circular to claims for the Jobseeker’s Benefit (Self-Employed) payment.

Jobseeker's Allowance

26. Section 249(6) of the 2005 Act provides as follows:

(6) A person shall be disqualified for receipt of jobseeker's allowance, pre-retirement allowance, supplementary welfare allowance, disability allowance or farm assist (including any increase in such allowance or assistance) while he or she is—

(a) resident, whether temporarily or permanently, outside the State”

It should be noted that the 2005 Act does not empower the Minister to make regulations further to the provisions of section 249(6).

27. By contrast to Jobseeker's Benefit, there is no legislative prohibition on claiming Jobseeker's Allowance while absent from the State, provided that the extent of the absence isn't such to render the claimant “temporarily resident” abroad. Accordingly, the circular creates a far-reaching prohibition on international travel for claimants of Jobseeker's Allowance, which is contrary to the primary legislation in relation to eligibility for the payment. It is arguable that the Departmental Circulars in relation to holidays abroad which pre-dated Circular 35/30 were also contrary to the provisions of the 2005 Act, in limiting claimants to two weeks holidays abroad per annum while in receipt of the payment and imposing a stricter regime than that allowed for under the primary legislation.

28. The relevant primary legislation does not prohibit claims for Jobseeker's Allowance during absences from the State, provided the claimant remains resident therein. It would appear, then, that suspensions during such absences, in light of the circular, would be without legislative basis.

29. Section 141(4) of the 2005 Act provides that a claimant for Jobseeker's Allowance must be “available for employment” and “genuinely seeking” same. Regulations 15 and 16 of the 2007 Regulations also apply to Jobseeker's Allowance for the purposes of assessing whether a claimant is available for and genuinely seeking employment. The analysis set out above at paragraphs 20 and 21 is therefore also applicable in the context of Jobseeker's Allowance.

Supplementary Welfare Allowance

30. The provisions of section 249(6) of the 2005 Act (set out above at paragraph 24) also apply in relation to Supplementary Allowance claims. Accordingly, the circular also imposes a travel restriction which is far more prohibitive than that envisioned by the primary legislation on claimants of Supplementary Welfare Allowance. As with Jobseeker's Allowance, the legislation does not prohibit claims for SWA during absences from the State, provided that the claimant cannot be deemed “temporarily resident” abroad. It would appear, then, that

suspensions during such absences, in light of the circular, would be without legislative basis.

31. Neither the 2005 Act nor the 2007 Regulations impose a requirement for claimants of SWA to be available for work or genuinely seeking work. Accordingly, there is no legislative basis for suspending claims for SWA during periods when the claimant is self-isolating following travel abroad.

Covid Pandemic Unemployment Payment

32. There is no primary or secondary legislation in relation to Covid PUP. It appears to be operating as a purely administrative scheme.
33. The criteria for accessing the payment, as set out in the claim form, makes no reference to a requirement to remain in the State, rather it requires claimants to be “resident” in Ireland. It would be absurd to suggest that a person ceases to be resident in Ireland during an absence from the State for as little as two weeks. It therefore appears to be contrary to the terms of the scheme to apply the terms of the circular which disentitle claimants to the payment during brief holidays abroad.
34. The Department’s website in relation to the payment states that “Holiday entitlements rules are the same as those for Jobseeker’s Payments”. The meaning of this statement is wholly unclear in that that is no one set of rules governing entitlements to take holidays when in receipt of a jobseeker’s payment. As noted above, the only such set of rules on a legislative basis are those which apply to Jobseeker’s Benefit and the legislation specifically provides that those rules apply only to that scheme. In addition, this criteria is additional to the criteria which applied when the scheme was initially introduced. It is not permissible for the Department to now attempt to apply this criteria retrospectively.
35. Circular 35/20, then, appears to imply the existence of additional criteria to the scheme which have not been published and which claimants may not be aware of. Further, it does not appear that claimants for the Covid PUP have been requested to inform the Department of their intention to travel abroad. It appears unreasonable and irrational, then, to suspend claims where the Department learns a claimant has travelled abroad in circumstances where claimants have not been formally told that such travel may affect their entitlement to the payment.
36. The Department’s website in relation to the payment has been recently amended to indicate that claimants must be “genuinely seeking work”. However, the regulations in relation to assessing whether claimants are available for or seeking work have not been amended to reflect this. As noted

above, regulations 15 and 16 of the 2007 Regulations explicitly only apply to jobseekers payments and so there is no question of a claimant for Covid PUP or SWA being assessed by reference to those regulations. Further, the other criteria for accessing the Covid PUP suggest that it is available to those experiencing a temporary layoff due to the pandemic. It is therefore unclear whether such claimants are expected to seek alternative work while waiting for their regular employment to resume. It is also notable that the application form for the payment has not been updated to include this additional eligibility criterion.

Enforcement of the Circular

37. Finally, issues arise as to how the Department intends to enforce the provisions of Circular 35/20. The powers of the Department in this regard are governed by the Social Welfare Consolidation Act 2005. The 2005 Act provides for how and when the Department may take certain actions at airports and ports.

38. Section 250(16B) of 2005 Act provides as follows in relation to the powers of Social Welfare Inspectors at such locations:

“Where, while attending at any port for the purposes of ensuring compliance with this Act, a social welfare inspector—

(a) has reasonable grounds to believe that there has been a contravention of this Act, and

(b) is accompanied by—

(i) a member of the Garda Síochána,

(ii) an officer of Customs and Excise, or

(iii) an immigration officer,

the social welfare inspector concerned may, on production of his or her certificate of appointment—

(i) question and make enquiries of a person who is a passenger at the port and is preparing to embark, or is embarking, from, or has landed in, the State in relation to any matter that concerns compliance with this Act, and

(ii) request such person to produce to that inspector any documents or other information as that inspector may reasonably require for the purposes of establishing the identity, and, where appropriate, the habitual residence, of that person.”

39. While the above section gives Social Welfare Inspectors broad powers in respect of questioning persons at airports, it should be noted that Social Welfare Inspectors must have some “reasonable grounds” of suspicion before

using these powers. Further, it is arguable that this power is further limited by section 250(2) of the 2005 Act which states that such Inspectors shall investigate questions “referred to him or her by the Minister”. The question thus arises as to whether an Inspector can engage their powers under section 250(16B) in respect of a claimant whose entitlement has not been questioned and referred to the Inspector.

40. It is notable that while the 2005 Act provides for specific procedures in relation to the provision of information to Social Welfare Inspectors from Financial Institutions, Employers and Landlords, there is no provision in the Act in respect of the provision of information by ports or airports.

Conclusion

41. The above analysis focuses on whether the circular accords which the legislative schemes for each of the payments to which it applies. It appears that, with the exception Jobseeker’s Benefit, the circular does not have a sound legislative basis. In the context of each of the other payments, it appears the circular creates an eligibility criteria in relation to presence in the State which is not provided for in the primary legislation and, as a result, cannot be considered enforceable. There are further questions as to whether the eligibility criteria provided for in the primary legislation in relation to availability for work can be considered as providing a legislative basis for suspending payments during periods of self-isolation.

42. Further issues do arise, however, in relation to whether the circular unlawfully interferes with claimants constitutional right to travel and their rights as EU workers to freedom of movement within the European Union and/or in relation to whether the circular is in breach of Equality legislation in that it may have a greater impact on non-Irish nationals than Irish nationals.

43. Nothing further occurs.

Free Legal Advice Centres

28th of June 2020

Appendix 3

Re: **Eligibility Criteria for the Covid Pandemic Unemployment Payment & the Power of the Department to Assess Overpayments in respect of supposed Breaches of those Criteria.**

Introduction – The Covid Pandemic Unemployment Payment

1. In March 2020, the Department of Employment Affairs and Social Protection introduced the Covid Pandemic Unemployment Payment (hereafter “the Covid PUP”) in response to the Covid-19 Pandemic. The payment was described as follows by the Department on its introduction:

“This new payment will be available to all employees and the self-employed who have lost employment due to a downturn in economic activity caused by the COVID-19 pandemic. Students will also be able to avail of the payment if they lose their income due to their workplace closing as a result of the COVID-19 pandemic.

The payment has a simple one–page application form and will be paid for a period of 6 weeks at a flat rate payment of €203 per week for jobseekers. It is designed to quickly deliver a social welfare payment to the unemployed and provide income security during this 6-week period.”

2. On 26 March 2020, the Department announced that the Covid-PUP would be paid for a twelve week period at a flat rate of €350 per week. The Department has since extended the period during which the Covid PUP will be paid until April 2021 and has announced that it will accept applications for the payment until 17 September 2020.
3. In the week ending 5 May 2020, approximately 598,000 people were in receipt of the Covid PUP. As of 10 August 2020, 262,500 people remained in receipt of the payment. The rate of the payment has since been split into two bands, €350 per week and €203 per week. The rate of the payment is determined by reference to a claimants earnings in 2019 or in January and February 2020 (whichever is the higher); those with average earnings of above €200 for either period are entitled to the higher rate of the payment.
4. On 5 August 2020, the Social Welfare (Covid-19) (Amendment) Act 2020 was signed into law. The Act replaces the existing Covid-PUP scheme with a statutory scheme by amending the Social Consolidation Act 2005 to make specific provision for the payment. It is notable that the 2020 Act refers to the previous Covid PUP Scheme as “the payment known as the pandemic unemployment payment paid under section 202 in respect of that week”. Section 202 of the 2005 Act forms part of the Supplementary Welfare Allowance schemes and allows for the payment of Urgent Needs Payments. This is the first reference to the Covid PUP having been paid under the SWA scheme. As

will be addressed further below, it unclear whether section 202 of the 2005 Act can properly be considered as providing a legislative basis for the Covid PUP scheme or whether claims for the payment should be considered as having been paid pursuant to a purely administrative scheme.

5. Save for provisions in relation to the attribution of PRSI contributions, the 2020 Act does not purport to have retrospective effect. Accordingly, during the period from March 2020 to 5 August 2020, the Covid PUP scheme was not paid pursuant to the 2020 Act and the provisions of the 2020 Act cannot be applied to claims for that payment during that period. The eligibility criteria set out in the 2020 Act, then, only apply to apply to claims for the Covid PUP from 5 August 2020 onwards. For ease of reference, this note will refer to the payment paid by the Department during the period from March 2020 to 5 August 2020 as the “old” Covid PUP.
6. Per a press release issued by the Department on 27 July 2020, the Department has initiated a series of “post payment checks for the COVID-19 Pandemic Unemployment Payment” to include “integrity checks” for the purpose of “[verifying] if a person is who they claim to be and that they are entitled to claim payment”.
7. It is therefore the case that the Department is reviewing payments made on foot of claims for the old Covid PUP by reference to the eligibility criteria for that payment. However, the Department has not provided any information in relation to the exact eligibility criteria by reference to which they are reviewing claims. This note will attempt to discern what eligibility criteria can be said to have applied to the old Covid PUP and what powers are available to the Department in relation to reviewing claims for the payment.

Sources of Eligibility Criteria for the old Covid PUP

8. As mentioned above, the first reference to a statutory basis for the old Covid PUP scheme arose in the Social Welfare (Covid-19) (Amendment) Bill 2020 which referred to the payment as having been “paid under section 202 [of the 2005 Act]”. No previous information published by the Department made any reference to a legislative basis for the scheme. The only information published by the Department in relation to the eligibility criteria for the scheme were on the application form for the payment and on the webpage in relation to the payment on www.gov.ie. Claimants for the payment could therefore have only been aware of the eligibility criteria as set out on that webpage and on the application form itself. In the absence of any indication as to the statutory basis for the scheme, no claimant could possibly have been aware of what, if any, additional eligibility criteria for the scheme arose from statute.

Application Form for the old Covid PUP

9. The application form for the Covid PUP, published in March 2020, required applicants to sign the following declaration in order to confirm their eligibility for the payment:

“• I declare that I am not being paid by my employer at the moment.
• I state that I will inform the Department if there are any changes in my circumstances which may affect my entitlement to payment.
• I know that it is an offence to provide false information or to withhold information to qualify for this payment.”

10. At least two further versions of the application form have since been published by the Department, one bearing the footnote “Edition: April 2020” and another with the footnote “Edition: April 2020”.

11. The first line of the declaration on the application form was amended in the April 2020 version to read as follows:

“• I declare that I am fully unemployed, have lost my income and am not being paid by my employer at the moment due to COVID-19.”

12. Further, a second page was added to the April 2020 version of the application form under the heading “Eligibility Notice for Covid-19 Pandemic Unemployment Payment”. That notice contains the following information:

“The COVID-19 Pandemic Unemployment Payment is an emergency payment of €350 per week introduced by the Government. It is available to employees and the self-employed who have lost their employment and income on (or after) 13 March due to the COVID-19 (Coronavirus) pandemic.

You are eligible to apply for the COVID-19 Pandemic Unemployment Payment if...

- You were in employment or self-employment immediately before Friday 13 March, and
- You have been temporarily laid –off from work or asked to stay at home from work, and
- Your employer is not in a position to retain you on their payroll, and
- You are not in receipt of any employment income, and
- You are between 18-66 years of age, and
- You are resident in the Republic of Ireland.

You are not eligible to apply for the COVID-19 Pandemic Unemployment Payment if...

- You were not in employment immediately before Friday 13 March, or
- You were not laid-off from work by your employer, or
- You are continuing to receive income from your employment, or
- You voluntarily left your employment.

Do not claim the COVID-19 Pandemic Unemployment Payment if your employer has not laid you off, or if you were not previously in employment, or if you are still in receipt of employment income, or if your employer takes you back on their payroll.

If you think you inadvertently applied for the COVID-19 Pandemic Unemployment Payment, or if your employer has re-employed you under the new Temporary Wage Subsidy Scheme, you must close your COVID-19 Pandemic Unemployment Payment claim now. Claims can be closed via the Department's online portal at www.MyWelfare.ie under the COVID-19 payment section.

The Department will review all claims. It is engaging with Revenue Commissioners to identify those workers not eligible to avail of the COVID-19 Pandemic Unemployment Payment and will take steps to recover any incorrect payment. Any person who knowingly claims the payment in circumstances where they are not entitled to the payment will be prosecuted."

13. The only amendment to the notice on the August 2020 version of the application form was to remove the reference to the payment being paid at a rate of €350. The declaration on the August 2020 version of the form is in identical terms to the declaration on the April 2020 version.
14. No version of the application form, including the August 2020 version, includes any reference to there being any eligibility criteria for the scheme (or where those criteria are set out), nor has any version of the form ever included a reference to a legislative basis for the payment (which may give rise to additional eligibility criteria).

Information published on Gov.ie

15. In March 2020, a webpage providing information in relation to the Covid PUP was published on www.gov.ie. A "How to Qualify" section was added to that webpage on 19 March 2020 which purported to provide information as to circumstances in which a prospective claimant satisfied the eligibility criteria for the scheme.
16. Between 19 March 2020 and 5 August 2020 (when the payment was placed on a statutory footing by the 2020 Act), the "How to Qualify" section was amended

at least seven times. The amendments to the section are set out below in full at the Appendix attached to this document titled, [Appendix to FLAC Note – Information published on Gov.ie re the Eligibility Criteria for the “old” Covid PUP](#)

17. The information on the various versions of the “How to Qualify” section of the Covid PUP webpage implied the existence of numerous other eligibility criteria for the scheme which are not reflected on the application form for the payment.
18. At some point between 21 April 2020 and 6 May 2020, the information published in that section was amended to state that applicants are only eligible for the payment if they “worked in the Republic of Ireland or were a cross border frontier worker”. The application form for the payment has never stated that it is a condition of the scheme that claimants have previously worked in the Republic of Ireland, or even that they were resident in Ireland during their previous employment. Further, no information published by the Department ever suggested a requirement for claimants to have previously paid PRSI contributions in respect of employment in the State.
19. Between 22 July 2020 and 27 July 2020, the text of the “How to Qualify” section was amended to state that applicants are only eligible for the payment if they “are genuinely seeking work”. Again, no information previously published by the Department before that date suggested that this was an eligibility criterion for the scheme.
20. The application form for the Covid PUP has always stated that claimants for the payment must be “resident in the Republic of Ireland”. The “How to Qualify” section of the Covid PUP webpage originally stated that applicants could “apply for the Covid-19 Pandemic Unemployment Payment if [they]... live in the Republic of Ireland”. However, by late April 2020, this was amended to state that applicants could “apply for the Covid-19 Pandemic Unemployment Payment if [they are]... currently living in the Republic of Ireland”.
21. Between 22 July 2020 and 27 July 2020, the following sentence was added to the “How to Qualify” section:

“Holiday entitlements rules are the same as those for Jobseeker's Payments.”

However, on 30 July 2020, this sentence was removed. No information previously published by the Department made any reference to the existence of specific rules governing eligibility for the payment during absences from the State or a necessity to comply with the “Holiday Rules” which apply to Jobseeker’s payments.

Section 202 of the 2005 Act and the Eligibility Criteria for the old Covid PUP

22. As noted above, the Social Welfare (Covid-19) (Amendment) Bill 2020 refers to the Covid PUP as (prior to its enactment) having been “paid under section 202 [of the 2005 Act]”. It is thus worth examining what, if any, eligibility criteria for the “old” Covid PUP may arise from section 202 and whether section 202 provides a statutory basis for the eligibility criteria for the payment which were published on gov.ie but not on the application form for the payment.
23. Section 202 of the 2005 Act allows the Department to grant payments in cases of urgency even where the claimant does not satisfy certain eligibility criteria for receipt of other payments under the SWA scheme.
24. Section 195(b) of the 2005 Act provides that a payment made pursuant to the SWA scheme (including under section 202) may be awarded on the pre-condition that the claimant is genuinely seeking work. It follows that such a condition does not generally apply to a claim for SWA unless the Department specifically imposes the pre-condition before it grants a payment under the scheme and such a condition cannot be retrospectively applied to a claim under the scheme.
25. Further, section 249(6) of the 2005 Act states as follows in relation to the residency requirements for entitlement to a payment under the SWA scheme:

“A person shall be disqualified for receipt of jobseeker’s allowance, pre-retirement allowance, supplementary welfare allowance, disability allowance or farm assist (including any increase in such allowance or assistance) while he or she is—

 - (a) resident, whether temporarily or permanently, outside the State”

As FLAC has previously noted, section 249(6) does not create an absolute prohibition on claiming payments under the SWA scheme while absent from the State, provided that the extent of the absence is not such as to render the claimant “temporarily resident” abroad.
26. Payments made under the SWA scheme (including payments under section 202 of the 2005 Act) constitute social assistance payments. Claimants for such payments are not required to have made any PRSI contributions in order to be eligible for receipt of such payments.
27. No provision in section 202 of the 2005 Act, or indeed in the 2005 Act as a whole, has the effect of disentitling a claimant to a payment under that section, or indeed any social assistance payment, on the basis that they were not previously employed by an Irish employer.

28. Finally, it should be noted that it is also arguable that the Covid PUP was not paid pursuant to section 202 of the 2005 Act at all. Section 189 of the 2005 Act provides as follows:

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

It is therefore the case that, in order for the Department to award a payment under the SWA scheme (including a payment under section 202), they must have conducted a means test prior to awarding the claim which established that a claimant’s means are insufficient to meet their needs. The Covid PUP was never subject to any form of means testing nor were claimants ever asked to declare that their means were insufficient to meet their needs.

29. While there is no prescribed form of means testing which must be conducted for an SWA payment to be awarded, it appears that some form of means test, specific to an individual claimant, must be conducted before a payment may be awarded pursuant to section 202. Section 202 allows for the Department to award payments where they are urgently needed without reference to many of the usual eligibility criteria for payments under the SWA scheme, but it does not allow for such payments to be made in the absence of means-testing.

30. It is worth noting in this regard that all payments previously made by the Department under section 202, such as Urgent Needs Payments awarded by Community Welfare Officers, are only paid once it has been established that claimant’s means are not such as to enable them to meet an urgent expense. Indeed, the Humanitarian Assistance Scheme, which provides financial assistance to households to meet their essential needs in the aftermath of flooding, and which is paid pursuant to section 202, is subject to a means test in order to establish that the claimant does not have the means to meet their essential needs.

31. The arguments advanced by the Minister for Social Protection as a Respondent in *C.A. v The Minister for Justice and Equality, The Minister for Social Protection & Others* [2014] IEHC 532 are also notable in this regard. In that matter, the Applicants argued that Direct Provision Allowance constituted a payment under the SWA scheme (and was, on that basis, *ultra vires* the powers of the Minister under the 2005 Act which prohibits the making of social assistance payments to asylum seekers and those seeking subsidiary protection). The Respondents, in arguing that Direct Provision Allowance was paid pursuant to an administrative scheme rather than as an SWA payment, made the following

argument (as summarised at paragraph 13.8 of the judgment of MacEochaidh J):

“[Direct Provision Allowance] cannot be a Supplementary Welfare Allowance payment as it is not means tested. Counsel notes that to qualify for the Supplementary Welfare Allowance an individual must show that his/her means are insufficient to meet his/her needs and those of dependents. The DPA depends on a person's status in the State as an applicant for protection and not their means.”

32. It is similarly the case that qualification for the old Covid PUP was based on a person's status as having been laid off from their employment immediately prior to 13 March 2020 and not their means. While MacEochaidh J did not rule on the arguments raised in that case in relation to the correct classification of Direct Provision Allowance (having held that the Applicants did not have standing in relation to this element of their challenge to the Direct Provision System), he did hold (at paragraph 13.20 of his judgment) that the Executive does have the power to make cash payments pursuant to administrative schemes and is not prohibited from “using the systems used for social welfare payments” to administer those payments.
33. In circumstances where claims for the Covid PUP scheme were not means tested in any sense, it is therefore arguable that they could not have been paid pursuant to the SWA Scheme (more specifically, under section 202 of the 2005 Act) and that the Covid PUP scheme instead constituted a purely administrative, non-statutory scheme. In that case, no eligibility criteria for the scheme can be said to arise from the 2005 Act.

Information provided to Claimants re the Eligibility Criteria for the old Covid PUP

34. Prior to the publication of the 2020 Act as a Bill, no previous information published by the Department in relation to the old Covid PUP indicated that the scheme was operating pursuant to section 202 of the 2005 Act. Similarly, no information to this effect was directly provided to claimants.
35. Notwithstanding the information published in the “How to Qualify” section of the Covid PUP webpage on gov.ie, it does not appear that claimants were ever advised by the Department of changes to the eligibility criteria for the payment or as to how such changes may affect their ongoing entitlement to the payment.
36. More specifically, save from the updated version of the “How to Qualify” section of the Covid PUP webpage published on gov.ie between 21 April 2020 and 6 May 2020, no information was ever provided to claimants to the effect that eligibility for the payment was predicated on their having been previously employed in the Republic of Ireland. No information at all was ever published

by the Department to the effect that eligibility for the payment was predicated on claimant's having previously paid PRSI contributions.

37. Save from the updated version of the "How to Qualify" section of the Covid PUP webpage published on gov.ie between 22 July 2020 and 27 July 2020, claimants for the old Covid PUP were never informed that their continued eligibility for the payment was predicated on them "genuinely seeking work". No information previously published by the Department indicated that this was an eligibility criterion for the payment.
38. It does not appear that claimants for the Covid PUP were ever formally advised by the Department that absences from the State, whether for holidays or other purposes, would disentitle them the payment.
39. In June 2020, claimants for the payment were asked to confirm their continued eligibility for the payment through mywelfare.ie by 13 July 2020 (this deadline was subsequently extended). The online form for confirming continued eligibility asked claimants to confirm what country their previous employment had been based in. It also asked claimants to agree to a declaration to the effect that they are currently living in the Republic of Ireland and not receiving any income from employment or self-employment.
40. The online form did not explicitly state that a claimant declaring that they had been previously employed outside the State would disentitle them to the payment. As originally published, the form did not make any reference to a requirement to be genuinely seeking work or ask claimants to confirm that they were seeking work.
41. The webpage on gov.ie which provided information in relation to the process of confirming continued eligibility for the payment originally stated as follows:

"To continue receiving this payment you must be:

- fully unemployed - permanently or temporarily, as a result of COVID-19
- or, if self-employed, your trading income has been significantly reduced
- living in the Republic of Ireland"

However this was subsequently amended to state that continued eligibility was also contingent on the claimant "genuinely seeking work". It is unclear whether the online form for confirming eligibility was ever updated so as to ask claimants to confirm that they are seeking work.

Eligibility Criteria for the old Covid PUP

42. All information published by the Department in relation to the old Covid PUP since March 2020 has specified that in order to be eligible for the payment a claimant must be a resident of the Republic of Ireland; aged between 18 and 66; have been employed or self-employed immediately prior to 13 March 2020; have been temporarily laid off; and must not be in receipt of any income from employment.
43. References to additional eligibility were belatedly and sporadically added to information page in relation to the payment on gov.ie. These supposed additional criteria include:
- A requirement to be genuinely seeking work.
 - A requirement to have been previously employed in the Republic of Ireland.
 - A requirement to comply with the existing “Holiday Rules” which apply to Jobseeker’s payments.
44. None of these supposed additional criteria were ever added to the application form for the payment nor were those who were already in receipt of the payment ever informed of a need to comply with the criteria in order to continue to be eligible for the payment.
45. Claimants were never informed that the old Covid PUP was paid pursuant to section 202 of the 2005 Act. Even if the payment could properly be considered as having been paid pursuant to the SWA scheme, that would not automatically give rise to any of the above supposed additional eligibility criteria applying to claims for the old Covid PUP.
46. In light of the fact that claimants were not made aware of these criteria, and that they cannot be considered as having automatically arisen as criteria for the scheme by merit of its legislative basis, it is submitted that the additional criteria, set out above at paragraph 43, cannot and should not be considered as part of the scheme governing eligibility for the old Covid PUP.

Departmental Reviews of claims for the Old Covid PUP

47. Since April 2020, the application from the Covid PUP has stated that “[the] Department will review all claims. It is engaging with Revenue Commissioners to identify those workers not eligible to avail of the COVID-19 Pandemic Unemployment Payment and will take steps to recover any incorrect payment. Any person who knowingly claims the payment in circumstances where they are not entitled to the payment will be prosecuted”. The press release of 27 July

2020 indicates that the Department has begun the process of reviewing claims for the payment

48. The statement on the application form in relation to reviews appears to envision a review of claimant's eligibility for the payment in line with the criteria for same set as set out thereon. As noted above, the application form for the payment states that residents of the Republic of Ireland, who are between the ages of 18 and 66, who were employed or self-employed immediately prior to 13 March 2020 and who have been temporarily laid off and are in receipt of no income from employment, are eligible for the payment.
49. It is clear then, that claimants for the payment were aware that their claim was subject to certain eligibility criteria, that the Department intended to review all claims to ensure that they satisfied those criteria, and that the Department may seek to recover any monies paid to claimants who do not satisfy the criteria. However, the above analysis of the information published by the Department in relation to the eligibility criteria for the scheme, also indicates that many claimants would not have been aware of a number of purported additional eligibility criteria for the payment which were not set out on its application form or that their claim would be reviewed by reference to those supposed additional criteria.
50. As well as reviewing claims for the payment in order to establish that claimants were eligible for the payment when applying for it, the Department has also asked claimants to provide information in order to confirm their continued entitlement to the payment. As noted above, the online form used for this purpose asks claimants to confirm that they remain unemployed and in receipt of no employment income. It also asks claimants to provide details of their employment, including the details of what country that employment was based in.
51. Neither the warning on the application form for the Covid PUP (in relation to the Department's intention to review all claims) nor the information provided to claimants in relation to the need to confirm their continued eligibility for the payment give rise to the implication that there are any eligibility criteria for the payment save for those criteria set out on its application form. Just as claimants were never directly or formally advised by the Department of the existence of additional eligibility criteria for the payment, claimants were never informed that their claim would be reviewed by reference to those additional criteria.

Power of the Department to Revise Decisions to award payment of the Covid PUP and pursue Overpayments

52. Section 301(a)(i)(I) of the 2005 Act empowers Deciding Officers to revise decisions previously made (including decisions to award payments) in circumstances where it appears to them that that decision was incorrect “in the light of new evidence or new facts which have been brought to his or her notice since the date on which the decision was given”.
53. Section 335 of the 2005 Act provides that, in circumstances where the effect of a revised decision is to disentitle a claimant to a payment for a period during which they were in payment, the payments made to the claimant during that period become repayable to the Department. The 2005 Act and S.I. 142 of 2007 provide for the processes by which the Department may pursue the recovery of such overpayments.
54. As noted above, it is unclear whether the old Covid PUP can properly be considered as having been paid pursuant to section 202 of the 2005 Act. This raises doubts as to whether Deciding Officers have the power to revise decisions and assess overpayments in relation to claims for the Covid PUP (in circumstances where the original decision to award those claims may not have been a decision made pursuant to the 2005 Act).
55. It is the case, though, that the application form for the payment did inform applicants that claims for the payment would be subject to review and that they would be liable to repay claims paid to them in circumstances where they did not satisfy the eligibility criteria for the payment.
56. However, in light of the above analysis of the eligibility criteria for the scheme, it is submitted that any such review process should only be concerned with claimants’ compliance with the eligibility criteria for the old Covid PUP as set out on its application form. In circumstances where criteria such as a requirement to have been employed in the Republic of Ireland, to comply with the “Holiday Rules” for Jobseeker’s payments and a requirement to be genuinely seeking work cannot properly be said to form additional eligibility criteria for the old Covid PUP, a failure to comply with these criteria cannot be said to disentitle claimants to the payment. Further, a failure to comply with these criteria should not give rise to a revised decision disentitling claimants to the payment retrospectively and/or assessing an overpayment against them.

Appendix to FLAC Note – Information published on Gov.ie re the Eligibility Criteria for the “old” Covid PUP

1. As of 19 March 2020, the “How to Qualify” of the Covid PUP webpage on gov.ie read as follows:

“Both employees and self-employed people can apply for the new COVID-19 Pandemic Unemployment Payment.

You can apply for the payment if you:

- are aged between 18 and 66 years AND
- you have lost employment due to the COVID-19 (Coronavirus) pandemic

This includes people who have been put on part-time or casual work.

Students who have lost employment can also apply.”

2. By 22 March 2020, the text in “How to Qualify” section had been replaced with the following:

“Both employees and self-employed people can apply for the new COVID-19 Pandemic Unemployment Payment.

You can apply for the payment if you are aged between 18 and 66 years and

- you have lost employment due to the COVID-19 (Coronavirus) pandemic
or
- you are a non EU/EEA worker over 18 who has lost employment due to the COVID-19 (Coronavirus) pandemic
or
- you are a student over 18 who has lost employment due to the COVID-19 (Coronavirus) pandemic
or
- you are a non-EU/EEA student over 18 who has lost employment due to the COVID-19 (Coronavirus) pandemic
or
- you are a part time worker over 18, earn less than €203 per week and have lost employment due to the COVID-19 (Coronavirus) pandemic”

3. Between 24 March 2020 and 29 March 2020, the text in “How to Qualify” section was replaced with the following:

“You can apply for the new COVID-19 Pandemic Unemployment Payment if you:

- are aged between 18 and 66 years old and
- live in the Republic of Ireland and
- have lost your job due to the COVID-19 pandemic or
- if you are self-employed and have ceased trading due to the pandemic

If you are an employee and have:

- lost your job
- been temporarily laid off
- asked to stay at home
- not getting any money from an employer

The payment also applies to:

- non EU/EEA workers who have lost employment due to the COVID-19 (Coronavirus) pandemic
- students (and non-EU/EEA students) who have lost employment due to the COVID-19 (Coronavirus) pandemic
- part-time workers

If you voluntarily left your employment or self-employment or do not meet the above criteria, you cannot claim the Covid-19 Pandemic Unemployment Payment”

4. The next day (30 March 2020), the above was amended to include the following beneath the text as set out above:

“If you are a Cross Border Frontier Worker and effected by COVID-19 pandemic.”

5. Between 1 April 2020 and 3 April 2020, the following further addition was made to the text in the “How to Qualify” section of the Covid PUP webpage on gov.ie:

“The Department of Employment Affairs and Social Protection wishes to confirm that there are no plans in place to share any data we receive as part of an immigrant’s application for a Covid-19 Pandemic Unemployment Payment with GNIB or the Department of Justice and Equality.”

6. On 4 April 2020, the “How to Qualify” section was again amended to read, in full, as follows:

“You can apply for the new COVID-19 Pandemic Unemployment Payment if you:

- are aged between 18 and 66 years old and
- live in the Republic of Ireland and
- have lost your job due to the COVID-19 pandemic or
- have been temporarily laid off due to the COVID-19 pandemic

The payment also applies if you are:

- self-employed and your trading income has ceased due to COVID-19

- a non EU/EEA workers who have lost employment due to the COVID-19 (Coronavirus) pandemic
- a student (and non-EU/EEA students) who have lost employment due to the COVID-19 (Coronavirus) pandemic
- part-time worker

If you voluntarily left your employment or self-employment or do not meet the above criteria, you cannot claim the COVID-19 Pandemic Unemployment Payment.

If you are a Cross Border Frontier Worker and affected by COVID-19 pandemic.

The Department of Employment Affairs and Social Protection wishes to confirm that there are no plans in place to share any data we receive as part of an immigrant’s application for a Covid-19 Pandemic Unemployment Payment with GNIB or the Department of Justice and Equality.”

7. Between 21 April 2020 and 6 May 2020, the “How to Qualify” section was again amended to read, in full, as follows:

“You can apply for the COVID-19 Pandemic Unemployment Payment if you:

- are aged between 18 and 66 years old and
- currently living in the Republic of Ireland and
- have lost your job due to the COVID-19 pandemic or
- have been temporarily laid off due to the COVID-19 pandemic and
- worked in the Republic of Ireland or were a cross border frontier worker and
- are not in receipt of any employment income

The payment also applies if you are:

- self-employed and your trading income has ceased due to COVID-19
- a non EU/EEA worker who has lost employment due to the COVID-19 pandemic
- a student (or a non-EU/EEA student) who has lost employment due to the COVID-19 pandemic
- part-time worker

If you voluntarily left your employment or self-employment or do not meet the above criteria, you cannot claim the COVID-19 Pandemic Unemployment Payment.

The Department of Employment Affairs and Social Protection wishes to confirm that there are no plans in place to share any data we receive as part of an immigrant's application for a COVID-19 Pandemic Unemployment Payment with GNIB or the Department of Justice and Equality."

8. Between 12 July 2020 and 22 July 2020, the following was added to the text of the "How to Qualify" section as set out above:

"If you have been temporarily placed on a shorter working week, you may qualify for Short Time Work Support."

9. Between 22 July 2020 and 27 July 2020, the text of the "How to Qualify" section was again amended to read, in full, as follows:

"You can apply for the COVID-19 Pandemic Unemployment Payment if you:

- are aged between 18 and 66 years old and
- are currently living in the Republic of Ireland and
- have lost your job due to the COVID-19 pandemic or
- have been temporarily laid off due to the COVID-19 pandemic and
- worked in the Republic of Ireland or were a cross border frontier worker and
- are not in receipt of any employment income and
- are genuinely seeking work

The payment also applies if you are:

- self-employed and your trading income has ceased due to COVID-19
- a non EU/EEA worker who has lost employment due to the COVID-19 pandemic
- a student (or a non-EU/EEA student) who has lost employment due to the COVID-19 pandemic
- a part-time worker

Holiday entitlements rules are the same as those for Jobseeker's Payments.

You must inform the Department if your circumstances change.

If you voluntarily left your employment or self-employment or do not meet the above criteria, you cannot claim the COVID-19 Pandemic Unemployment Payment.

If you have been temporarily placed on a shorter working week, you may qualify for Short Time Work Support.

The department can confirm that there are no plans in place to share any data we receive as part of an immigrant's application for a COVID-19 Pandemic Unemployment Payment with GNIB or the Department of Justice and Equality."

10. On 30 July 2020, the reference to the "holiday entitlement rules" for the Covid PUP being the same as for Jobseeker's payments was removed from the "How to Qualify" section.

11. Between 2 August 2020 and 10 August 2020, the following addition was made to the "How to Qualify" section beneath the heading "The payment also applies if you are":

"living in Direct Provision and have lost employment due to the COVID-19 pandemic"

12. No further amendments have been made to the "How to Qualify Section" as of 14 August 2020.

Appendix 4

Re: The Social Welfare (Covid-19) (Amendment) Act 2020 and the Covid Pandemic Unemployment Payment

1. On 5 August 2020, the Social Welfare (Covid-19) (Amendment) Act 2020 was signed into law. The Act replaced the existing Covid PUP scheme with a statutory scheme by amending the Social Consolidation Act 2005 to make specific provision for the payment. The 2020 Act provides that, subsequent to its enactment, the Covid Pandemic Unemployment Payment (hereafter “the Covid PUP”) is to be paid pursuant to the newly inserted Chapter 12B of Part 2 of the 2005 Act. Specifically, the 2020 Act amends the 2005 act to state as follows at section 68L(4):

“Subject to this Act, a person who was, immediately before the coming into operation of section 11 of the Social Welfare (Covid-19)(Amendment) Act 2020, in receipt of the payment known as the pandemic unemployment payment paid under section 202 [of the 2005 Act], shall, subject to this Chapter, be paid the Covid-19 pandemic unemployment payment.”

2. The amendments to the 2005 Act provided for in the 2020 Act provide a specific statutory basis for the eligibility criteria for the Covid PUP. This note will set out the criteria for the payment which arise from the 2020 Act and highlight a number of concerns arising from same.
3. As noted above, the 2020 Act refers to the Covid PUP having, prior to its enactment, having been paid pursuant to section 202 of the 2005 Act. FLAC’s note on the so-called “old Covid PUP” (the payment made under the same name during the period 13 March 2020 to 5 August 2020) addresses in detail whether the payment can properly be considered as having been paid under section 202 of the 2005 Act during this period. Given that payments under section 202 must be means-tested, and the Covid PUP was not, it seems that the payment should be properly referred to as having been paid pursuant to an administrative scheme during this period.

Eligibility for the Covid Pandemic Unemployment Payment from 5 August 2020

4. The newly inserted Chapter 12B of Part 2 of the 2005 Act consists of sections 68L to 68P which set out the eligibility criteria for the Covid PUP under that Act. Section 68L(1)(a) states that the Covid PUP is payable to a person who “has attained the age of 18 years and has not attained pensionable age”. Further,

section 68L(1)(b) provides that “on or after 13 March 2020” such persons must have been:

- “(i) an employed contributor in the week immediately before he or she ceased to earn an income from the employment concerned and lost his or her employment as a direct consequence of Covid-19 (including the adverse effects of Covid-19 on the business of his or her employer and the adverse effects of measures required to be taken by his or her employer in order to comply with, or as a consequence of, Government policy to prevent, limit, minimise or slow the spread of infection of Covid-19), or
- (ii) in insurable self-employment in the week immediately before the date on which he or she can demonstrate to the Minister that the reckonable income or reckonable emoluments ceased, or reduced, as a direct consequence of Covid-19 (including the adverse effects of Covid-19 on such self-employment and the adverse effects of measures required to be taken by him or her in order to comply with, or as a consequence of, Government policy to prevent, limit, minimise or slow the spread of infection of Covid-19), to the extent that he or she would be available to take up full-time employment”

Further, section 68L(1)(b) provides that, in order to be eligible for the payment, such persons must not be:

- “(i) an employed contributor whose employer is, or was, in receipt of the temporary wage subsidy, or
- (ii) an employed contributor referred to in section 38C(1)(f) whose employer was, before the coming into operation of Part 7 of the Act of 2020, in receipt of a subsidy referred to in section 38C(1)(f)”

Finally, section 68L(1) provides the following further eligibility criteria for the payment:

- “(d) the person is not engaged in insurable employment,
- (e) the person satisfies the contribution conditions in section 68M,
- (f) he or she is capable of work,
- (g) he or she is genuinely seeking, but is unable to obtain, employment suitable for him or her having regard to his or her age, physique, education, normal occupation, place of residence and family circumstances, and
- (h) the person was not in receipt of the payment known as the pandemic unemployment payment paid under section 202 in respect of that week.”

5. Section 68L(3) of the 2005 Act sets out specific circumstances in which persons will be deemed to not satisfy the criteria for the payment set out at section

68L(b)(i) (which provides that a claimant must have lost their employment as a result of the Covid-19 pandemic in order to be entitled to the payment):

“The conditions specified in subsection (1)(b)(i) will not be satisfied where a claimant—

- (a) has lost the employment concerned through his or her own misconduct or has voluntarily left his or her employment,
- (b) refuses an offer to return to the employment concerned,
- (c) has refused an offer of suitable employment,
- (d) has failed or neglected to avail himself or herself of any reasonable opportunity of obtaining suitable employment, or
- (e) has failed or neglected to avail himself or herself of any offer of support from, or proposed by, the Minister to enable himself or herself to improve his or her prospects of obtaining employment.”

Section 68L(5) empowers the Minister to make similar such regulations in relation to the entitlement to the payment of the self-employed and employers.

6. Section 68M of the 2005 Act sets out the PRSI contribution conditions for the Covid PUP:

“(a) in the case of a person referred to in section 68L(1)(b)(i), he or she has qualifying contributions in respect of not less than one contribution week in the 4 weeks immediately before claiming the Covid-19 pandemic unemployment payment, or
(b) in the case of a person referred to in section 68L(1)(b)(ii), he or she is a self-employed contributor.”

7. Section 68O of the 2005 Act provides that “the weekly rates of the Covid-19 pandemic unemployment payment shall be the amounts corresponding to the amounts set out in Part 6 of Schedule 2 or such weekly rates as may be prescribed in regulations under this section”. Section 68O further provides that the Minister may make regulations in relation to the rate of the payment and the manner in which persons average weekly income shall be calculated in order to calculate which rate they are entitled to. Part 6 of Schedule 2 to the 2005 Act provides for two rates of the payment:

“(a) Band A: €203 in the case of a person whose average reckonable weekly income was less than €200, or
(b) Band B: €350 in the case of a person whose average weekly reckonable income was €200 or more.”

8. The 2020 Act also amends section 241 of the 2005 Act to provide that the Covid PUP is not payable for periods before a claimant makes an application for the payment.
9. Finally, it should be noted that as a payment under Part 2 of the 2005 Act, section 249(1) of that Act applies to the payment. That section provides as follows:

“Except where regulations otherwise provide, a person shall be disqualified for receiving any benefit under Part 2 (including any increase of benefit) for any period during which that person—

(a) is absent from the State”

Issues arising from the eligibility criteria for the Covid PUP under the 2005 Act

10. The 2020 Act provides clarity as to the legislative basis for the Covid PUP and as to the eligibility criteria which attach to the payment. However, FLAC would note concerns in relation to a number of the eligibility criteria for the payment under the legislation.

Absences from the State

11. Section 249(1) of the 2005 Act disentitles claimants to the Covid PUP in all circumstances except “where regulations otherwise provide”. No regulations have been made by the Minister to provide for entitlement to the payment during holidays or absences from the State for essential purposes.
12. Article 217(d) of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (Statutory Instrument 142 of 2007) provides that claimants for Jobseeker’s Benefit and Jobseeker’s Benefit (Self-Employed) shall not be disentitled to their payments under Part 2 of the 2005 Act while they are “on holiday, in accordance with the Covid-19 General Travel Advisory in operation by the Department of Foreign Affairs, in respect of the first two weeks of any such absence in a calendar year”. The Department runs an administrative scheme in relation to claims for Jobseeker’s Allowance and Supplementary Welfare Allowance which allows claimants for those payments to remain in payment while on holidays to the same conditions (however, FLAC has previously noted that there does not appear to be a legislative basis for applying such strict “holiday rules” in respect of those payments which are not subject to section 249(1) of the 2005 Act).
13. In addressing the Dáil on 29 July 2020, the Minister for Social Protection stated:

“As I am currently bringing legislation through the Oireachtas to put PUP on a statutory basis, I intend to sign regulations that will bring the PUP payment in line with Jobseeker’s.

That will mean persons on PUP can travel to Green List countries and their payment will not be impacted. As with Jobseeker’s, persons travelling to countries outside the Green List can only do so for essential reasons.”

The Minister has yet to sign any such regulations and as a result it does not appear that the Covid PUP is payable to claimants during any absences from the State regardless of the reason for such travel or however short its duration.

Requirement to “Genuinely Seek Work”

14. Section 68L(1) of the 2005 Act provides that, in order to be eligible for the Covid PUP, a person must be “genuinely seeking, but is unable to obtain, employment suitable for him or her having regard to his or her age, physique, education, normal occupation, place of residence and family circumstances”.

15. Further, section 68L3 of the 2005 Act provides that a person is disentitled to the payment if he or she:

“(c) has refused an offer of suitable employment,

(d) has failed or neglected to avail himself or herself of any reasonable opportunity of obtaining suitable employment”

16. A number of issues arise in relation to the imposition of these criteria on the Covid PUP. The first is that it is materially different to the conditions for payment in place when the payment was introduced. The “eligibility notice” for the Covid PUP on the application form for the payment has always stated (and still states) that the payment is available to those who have been “have been temporarily laid-off from work”.

17. Although, the 2020 Act does not propose to apply the condition retrospectively, the condition may have an adverse impact on many claimants eligibility for the payment following its enactment. Many employees and owners of businesses which are currently closed but intend to reopen are currently in receipt of the Covid PUP. It seems unreasonable to expect such claimants to seek alternate work in circumstances where they have every expectation of resuming employment imminently. Further, employees who have been laid off may have to forego statutory redundancy payments from their original employer if they take up other employment elsewhere. The right of an employee to pro-actively claim a redundancy lump sum where they have been on lay-off for four or more continuous weeks was temporarily removed for the duration of the Covid crisis

by section 29 of the Emergency Measures in the Public Interest (Covid 19) Act 2020. Thus, if such a person did find another job because, they would have to forego all statutory redundancy as well as minimum notice entitlements.

18. Further, those who have no access to child care services due to the pandemic may be unable to seek work while in receipt of the Covid PUP and their entitlement to same may therefore be prejudiced.
19. Finally, unlike other payments where claimants are required to “genuinely seeking work”, the Minister has not introduced any regulations in relation to how claimants are to be assessed as “genuinely seeking work”.