



# **Pre-Budget Submission 2019**

**A submission by FLAC to the Department of  
Employment Affairs and Social Protection**

**FLAC, July 2018**

## About FLAC

FLAC (Free Legal Advice Centres) is a non-governmental, voluntary organisation which exists to promote the fundamental human right of access to justice. As an organisation, FLAC focuses on the use of law as a tool for social change and on the right of equal access to justice for all. We work particularly on the protection of economic, social and cultural rights. FLAC is an affiliate member of the FIDH.

In our work, we identify and make policy proposals on how the law excludes marginalised and disadvantaged people, principally around social welfare law, personal debt & credit law and civil legal aid. We advance the use of law in the public interest and we co-ordinate and support the delivery of basic legal information and advice to the public for free and in confidence. We also engage in strategic litigation.

## FLAC Policy

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

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

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## Summary of Recommendations

- The preparation for Budget 2019 is a key instance of strategic planning and pursuant to Section 42 of the Irish Human Rights and Equality Commission Act 2014, the Department should seek to implement effectively the public sector duty to have regard to the need to eliminate discrimination, promote equality of opportunity and protect human rights during the preparation of and implementation of Budget 2019.
- FLAC urges the Department to provide adequate human and financial resources to the Appeals Office to ensure further reductions in processing times for social welfare appeals and timely access to essential payments.
- The Social Welfare Appeals office should be resourced to establish an anonymous, searchable database of appeals decisions and make it available to the public.
- The Social Welfare Appeals Office should be placed on a statutorily independent footing.
- Robust standards for first tier decision-making should be identified, established and maintained. The DSP should invest greater resources in training and monitoring of decision-makers at first instance.
- Payments should only be terminated/ suspended after a thorough investigation of the claim and where the claimant has the full benefit of fair procedures before a final determination is made.
- Ensure the Department informs claimants in cases of overpayments that they can apply to have it varied or reduced, or cancelled and introduce clear, fair procedures to deal with overpayments.
- Consideration should be given to a limitation period such that where if the Department have not attempted to recover an overpayment they may not do so because of the resulting unfairness to claimants arising from significant delays.
- The Department should ensure when recovering social welfare overpayments that a person's income is not reduced below a figure which would have a negative impact on their fundamental rights to an adequate standard of living and social security, in this instance the basic rate of Supplementary Welfare Allowance.

- **There needs to be a comprehensive review of the scope and administration of the SWA scheme, including how vulnerable claimants can access so called exceptional needs payments, to ensure that it operates as a safety net and that claimants do not have to rely on charity for basic essentials. The budgetary allocation in respect of ENPs needs be resourced and restored to meaningful levels as a priority.**
- **The Minister for Justice and Equality should designate the Social Welfare Appeals Office as a “prescribed” tribunal for the purposes of Section 27(2)(b) of the Civil Legal Aid Act 1995**
- **Review the adequacy of existing rates of social welfare payments in order to guarantee a basic level of income and an adequate standard of living for everyone.**
- **Amend Schedule 2 of the Social Welfare Act 2016 to provide for equal treatment for under 26s in relation to Job Seekers Allowance and Supplementary Welfare Allowance.**
- **FLAC recommends that a targeted use of Mortgage Interest Supplement be restored to assist people with a short-term mortgage arrears problem.**
- **Undertake a review of the Habitual Residence Condition so as to establish whether it has a discriminatory impact on access to social welfare, particularly among Travellers and Roma.**
- **All persons in direct provision who gain the right to work should have access to social welfare for themselves and their dependents on the same footing as others with entitlement to social welfare supports, including training and reskilling.**
- **The Department should seek to identify those in direct provision who have experienced inordinate delay in having their application for international protection determined with consequential delays in obtaining social welfare, in particular child benefit, and compensate them accordingly.**
- **We recommend One Parent Family Payment be fully restored. We further recommend that a social impact assessment of the changes to the One Parent Family Payment be carried out in order to determine the extent to which changes to the scheme have had a detrimental impact on one parent households.**

## Introduction

Free Legal Advice Centres (FLAC) welcomes the opportunity to contribute to the Department of Employment Affairs and Social Protection's Pre Budget consultation.

### **I. Duty to promote equality of opportunity and protect human rights**

FLAC has long advocated for a human rights and equality based approach to budgetary decision-making. The Programme for a Partnership Government contains a commitment to equality and gender proofing budget proposals and to draw on the expertise of the Irish Human Rights and Equality Commission to support the proofing process.<sup>1</sup> According to the Programme, the aim of such proofing is to advance equality, reduce poverty and strengthen economic and social rights. It commits to ensuring that the institutional arrangements are in place to support equality and gender proofing in the independent fiscal and budget office and within key departments. These commitments have not as yet been realised. However the Department has ongoing obligations in relation to promoting equality of opportunity and protecting human rights, notwithstanding the lack of progress to date in relation to the institutional arrangements promised in the programme for Government.

FLAC made a submission to the Department of Employment Affairs and Social Protection's consultation on its Strategy Statement 2016 – 2019,<sup>2</sup> which remains apposite to the work of the Department in relation to Budget 2019. The submission referred to Section 42 of the Irish Human Rights and Equality Commission Act 2014, which requires public bodies including the Department to have regard, in carrying out its functions, to the need to eliminate discrimination, promote equality of opportunity and treatment for staff and service users, and protect the human rights of staff and service users. The purpose of the duty is to integrate considerations of equality and human rights in the day to day business of the department, including the preparation for and implementation of Budget 2019.

A Government Department must consciously consider the need to comply with the obligations set out in the duty as an integral part of the decision-making process. It is not a matter of box ticking. The public sector duty must be complied with at the time a particular policy such as the budget is under consideration, as well as at the time that decisions in relation to the budget are taken. Compliance with the public sector duty should result in better

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<sup>1</sup> Government of Ireland (2016) Programme for a Partnership Government, Dublin: Dept. of An Taoiseach, p.15.

<sup>2</sup> FLAC: Submission to the Department of Social Protection: to inform the Department of Social Protection's consultation on its Statement of Strategy 2016 – 2019. Available at <https://www.flac.ie/publications/submission-recommendations-to-dsp-strategy-statem/>

informed decision-making, policy development, and better policy outcomes. Overall compliance can lead to services that are more appropriate for users and more cost effective. The duty places equality and human rights considerations, where they arise, at the centre of policy formulation, side by side with all other pressing circumstances, however important those might be.

A department must have sufficient evidence on which to base consideration of the impact of a policy or decision. It will need to consider whether it has sufficient information about the effects of the policy or decision or the way a function policy or decision is being carried out.<sup>3</sup>

The implementation of the public sector duty is particularly relevant to the functions of the Department of Employment Affairs and Social Protection and there is significant scope for human rights standards and equality of opportunity to be integrated into its work. The Department, in its Statement of Strategy 2016-2019, recognises that it is required to have regard to its public sector duty in all its activities as provided for by Section 42 of the Irish Human Rights and Equality Commission Act, 2014. Budget 2019 is a key instance of strategic planning by the Department and as such it must be evident how the public sector duty has been incorporated into its development.

#### **Recommendation**

**The preparation for Budget 2019 is a key instance of strategic planning and pursuant to Section 42 of the Irish Human Rights and Equality Commission Act 2014, the Department should seek to implement effectively the public sector duty to have regard to the need to eliminate discrimination, promote equality of opportunity and protect human rights during the preparation of and implementation of Budget 2019.**

The contents of this submission has been prepared having regard to the equality and human rights obligations on the Department and they will be referred to throughout.

## **II. Right to good administration**

The Constitution lays a heavy emphasis on the right of every person to fair procedures in decision making by public bodies. Similarly, the EU Charter of Fundamental Rights and the ECHR provide for rights to good administration, and a right to an effective remedy within a

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<sup>3</sup> *The essential Guide to the Public Sector Equality Duty* is a guide developed by the UK Equality and Human Rights Commission to support the effective implementation of the UK equality duty on an ongoing basis. It recommends a number of steps that may usefully be drawn and adapted to implement the public sector duty in Ireland. Available at: <https://www.equalityhumanrights.com/en/publication-download/essential-guide-public-sector-equality-duty> [accessed 12 July 2017]

reasonable time by an independent and impartial tribunal established by law. The Constitution also protects the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, to ensure all relevant facts are taken into account and the obligation of the administration to give reasons for its decisions.

### **Resources allocated to the Social Welfare Appeals Office**

According to the most recent Social Welfare Appeals Annual Report (2017) the average time taken to process all appeals was 23.6 weeks – a significant increase from 20.5 weeks in 2016.<sup>4</sup> The overall average waiting time for an appeal dealt with by way of a summary decision in 2017 was 19.8 weeks (17.6 weeks in 2016), while the average time to process an oral hearing was 26.4 weeks (24.1 weeks in 2016). These figures are a reversal of the progress that had been made the year before (2016) and are of great concern to FLAC. We note that there was actually a reduction of 2,803 in the number of appeals received by the Social Welfare Appeals Office in 2017 from the year previous.

As outlined in our previous Pre-Budget Submission to the Minister for Employment Affairs and Social Protection, we are extremely concerned at the long waiting periods for decisions on an oral hearing in relation to a social welfare entitlement. The average time taken to process appeals which required an oral hearing was 26.4 weeks, (24.1 weeks in 2016).

FLAC acknowledges the minor reduction in the average processing times for appeals on Supplementary Welfare Allowance down from 23 weeks to 21 weeks in 2017. However we are still concerned at this long waiting time given the nature of Supplementary Welfare Allowance as a safety net for those with no other income. An average processing time of 21 weeks is unreasonable in this context.

The average time of processing appeals in relation to illness, disability and caring are also a matter of concern with 17.8 weeks for domiciliary care allowance, 17 weeks for family income supplement and 12.6 for child benefit.

FLAC welcomes a further statement from the Chief Appeals Officer that reducing processing times continues to be a priority. We also note that the Chief Appeals Officer and the Minister for Employment Affairs and Social Protection have both pointed to a changeover in appeals as causing delays but it is clear that further progress must be made in addressing delays in processing appeals.

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<sup>4</sup> Social Welfare Appeals Office (2018) *Annual Report 2017*, Dublin: SWAO.

**Recommendation**

**FLAC urges the Department to provide adequate human and financial resources to the Appeals Office to ensure further reductions in processing times for social welfare appeals and timely access to essential payments.**

**Creation of a social welfare appeals database**

During 2017, the Social Welfare Appeals Office received 19,658 appeals, 18,980 of which were decided on. The Social Welfare Office currently does not maintain a public database of previous decisions, although, they publish a limited amount in their annual report each year. FLAC welcomes the increase in case studies in this year's annual report to 70. We reiterate our request to the Social Welfare Appeals Office to commit to publishing all decisions. We do not consider a sample 70 case studies out of 18,980 to be a sufficient number in providing guidance to those submitting appeals.

The absence of a database presents all individuals taking social welfare appeals with practical difficulties, particularly in relation to those related to the Habitual Residency Condition. Without a database, individuals are compelled to prepare their cases within a vacuum of information, potentially unclear on the application and interpretation of legislation. In addition, the absence of a database leave appeals staff to make decisions in isolation which is inimical to achieving consistency in decision making and ensuring public accountability.

Human rights bodies have regularly emphasised the need for consistency in social welfare appeals decision-making and the adverse impact of failing to provide a database for appellants. In 2012, the former Independent Expert on Extreme Poverty and Human Rights called for decisions of the Appeals Office to be published in a form which allows for broad dissemination and understanding among existing and potential beneficiaries.<sup>5</sup> Similarly, the UN Committee on Economic, Social and Cultural Rights has urged that decisions on appeals be made in a consistent and transparent manner.<sup>6</sup>

The concept of equality of arms has been recognised by the European Court of Human Rights as a component of the right to fair procedures enshrined in Article 6 which applies in civil as well as criminal cases. It encompasses a number of elements which ensure that both sides have a fair and equal opportunity to present their case in proceedings. In terms of ensuring equality of arms in civil cases, the European Court of Human Rights has found that the concept implies that each party must be afforded a reasonable opportunity to present his case -

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<sup>5</sup> Office of the High Commissioner for Human Rights (2011) Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona to the Human Rights Council, Geneva: OHCHR, p.12

<sup>6</sup> UN Committee on Economic, Social and Cultural Rights (2015) Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland, Geneva: OHCHR, para.20



including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.<sup>7</sup> However, the absence of a database of appeals decisions on which to base a case places the appellant at a clear disadvantage.

**Recommendation**

**The Social Welfare Appeals office should be resourced to establish an anonymous, searchable database of appeals decisions and make it available to the public.**

**Independent Social Welfare Appeals Office**

In October 2012, FLAC published a landmark report on the social welfare appeals system, “Not Fair Enough”. It made the case for thorough reform of the social welfare appeals system based on international human rights standards of transparency, fairness and the right to an effective remedy. One of the key proposals advanced was to place the Social Welfare Appeals Office on a statutorily independent footing. While the Appeals Office is classified as “independent”, the necessary safeguards are not in place to ensure its actual and perceived independence. For example, Appeals Officers are appointed by the Minister, and employed by the Department of Employment Affairs and Social Protection, and appeals decisions are influenced by policy directions from the Department.

Both actual independence as well as the perception of independence to individuals appealing a social welfare refusal is essential for a robust system which commands public confidence. An appeal should be decided on the applicable law and the individual circumstances of the case, not by policy directions from the Department of Employment Affairs and Social Protection.

**Recommendation**

**The Social Welfare Appeals Office should be placed on a statutorily independent footing.**

**Better, fairer first tier decision-making**

FLAC is concerned at the percentage of appeals that are successful at 60.1% (up from 59.2% in 2016) of appeals having a favourable outcome for the appellant, either being allowed in full or part, or resolved by way of a revised decision by a Deciding Officer in favour of the appellant. While FLAC appreciates that more people are accessing the supports they need via

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<sup>7</sup> *Dombo Beheer v. The Netherlands* (1994) 18 E.H.R.R. 213 at paragraph 33.

the appeals process, the increases in favourable outcomes suggests there significant problems in first tier decision-making on initial applications.

Article 6 of the European Convention on Human Rights requires decision makers determining social welfare entitlements to state adequately the reasons upon which the decision is based.<sup>8</sup> In 2016 The High Court<sup>9</sup> found a decision of an Appeals Officer to be unsafe on the basis that it failed to outline the facts of the case, it did not deal with disputes of facts, it failed to provide reasons for preferring the facts of one party over the other, it did not provide any explanation for the interpretation of facts and finally, it provided no basis for the weight accorded to certain facts.

FLAC submits that these standards set out in this judgment apply with equal force to decisions of deciding officers and could be used as a benchmark for standards for first tier decision making.

In July 2015, the UN Committee on Economic, Social and Cultural Rights<sup>10</sup> expressed concern at the large number of appeals filed with the Appeals Office *“owing to the lack of clear understanding and consistent application of the eligibility criteria”*, as well as the *“considerable number”* of successful appeals. To address the latter issue, the UN Committee recommended that appropriate training be provided to decision-makers at first instance. Enhanced training for decision-makers at first instance would lead to fairer and more robust initial decisions.

This budget should be taken as an opportunity to review supports and training available to decision-makers at first instance and ensure that they are adequate. First instance decision-making should be improved to ensure the best use of limited resources, reduce waiting times for appeals and make certain that people are able to access their social welfare entitlements without undue hardship.

#### **Recommendation**

**Robust standards for first tier decision-making should be identified, established and maintained. The DSP should invest greater resources in training and monitoring of decision-makers at first instance.**

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<sup>8</sup> Hirvisaari V Finland, European Court of Human Rights, 27 September 2001.

<sup>9</sup> National Museum of Ireland V Minister for Social Protection. 2016 IEHC 135 and 2016 ELR 297.

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

### **Termination / Suspension procedures and rights to be heard: Fair procedures**

FLAC is concerned that claimants are not afforded sufficient fair procedures when it comes to suspending/terminating claims. Failure to observe correct pre-termination procedures have resulted in the judicial quashing of a number of welfare decisions in the past.<sup>11</sup>

FLAC is concerned that there is a failure to observe fair procedures in particular in relation to the suspension of rent supplement payments. The procedures adopted have meant that a person can have their rent allowance cut off with little or no warning. While they can make representations to get it restored, the suspension will put their tenancy in immediate peril. So even where the rent allowance payment is ultimately restored, they may already have lost their tenancy or be in bad standing with their landlord, as the source of the rent is irrelevant under the Residential Tenancies Act 2004 (as amended). In 2017 FLAC represented two clients where rent allowance was suspended with little or no warning, causing both clients to fall into rent arrears, before the payment was restored on proper investigation. In one of these cases the payment was stopped on the basis on an uninvestigated anonymous allegation that was completely unfounded.

In the context of the present housing crisis the practice of suspending rent allowance payments should be stopped to ensure no-one loses their tenancy on the basis of a mere suspicion on the part of the Department that they are not entitled to same.

#### **Recommendation**

**Payments should only be terminated/ suspended after a thorough investigation of the claim and where the claimant has the full benefit of fair procedures before a final determination is made.**

### **Recovery of Overpayments**

Overpayments may occur if an extra payment of an allowance, pension or other welfare payment is made to a claimant by the Department of Employment Affairs and Social

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<sup>11</sup> *Mc Connell V Eastern Health Board*, 1<sup>st</sup> of June 1983, the High Court set aside a decision of the Board reducing the claimant's DPMA because it had not afforded the Claimant's legal representative an adequate opportunity of making representation on behalf of his client. In the State (*Hoolahan V Minister for Social Welfare*, the High Court held that in determining the claimant's eligibility for benefit the deciding officer has to act judicially. He has to make know the basis upon which he sought to disqualify her. Furthermore he has to give her an opportunity to deal with these contentions and to make such further argument on her own behalf as she wished. In *Boland v Eastern Health Board* the High Court granted an interlocutory injunction restraining the Eastern Health Board from withdrawing the claimant's SWA on the ground that, as the claimant had no other source of income, the balance of convenience lay in continuing the allowance

Protection to which they are not entitled. Many of the overpayments, which amount to between €100 million and €120 million each year<sup>12</sup> occur due to errors on the part of the claimant or on the part of the Department of Employment Affairs and Social Protection. In some cases, overpayments are written off due to the death of a welfare recipient, delay in acting on the part of the Department or due to its own error where the recipient could not “reasonably be expected” to know that an error had occurred. When the Department becomes aware of an overpayment, they will notify the claimant of the reason for the overpayment, the amount involved and the way in which they propose to recover the payment.

The Social Welfare Act 2012 allows the Department to deduct 15% of a personal weekly rate of payment to recover the overpayment. Prior to this, written consent had to be provided when a deduction would bring the payment below the weekly rate of Supplementary Welfare Allowance. In addition, deductions of up to 15% from earnings can be made under Section 15 of the Social Welfare and Pensions (Miscellaneous Provisions) Act 2013.

FLAC is aware of cases where significant sums were historically overpaid by the Department of Employment Affairs and Social Protection and which the claimant was not aware were still outstanding until they applied for a state pension. In a number of cases there had been no communication from the Department to the recipient for many years. There is little documentation available in respect of the original overpayment. Almost 35,000 pensioners and other welfare recipients are making weekly repayments to the Department for overpayments that date back as much as 30 years ago.

The Ombudsman examined the matter in his 2017 Annual Report and expressed concerns that the Department may be overzealous in their pursuit of recovery of overpayments in some cases following an increase in the number of complaints against the Department of Employment Affairs and Social Protection.<sup>13</sup> Of the 95 complaints regarding overpayments that were made to him, 60% of them were concluded in favour of the applicant. The Ombudsman expressed concern in particular about overpayments made because of the Department staff errors and “legacy non-performing debt” - older payments where there had been no communication from the Department to the recipient in several years. The Ombudsman also expressed concern at the lack of evidence of the overpayment, including appropriate documentation and records and the absence of poverty proofing to ensure that

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<sup>12</sup> Overpayments of €111 million were made in 2017 according to Minister for Employment Affairs and Social Protection Regina Doherty, Select Committee on Employment Affairs and Social Protection debate - Tuesday, 27 Mar 2018.

<sup>13</sup> Ombudsman Annual Report 2017, Improving Public Services.

mandatory deductions from incomes do not cause severe hardship to the person or their family as well as concerns about the adherence to principles of natural justice. We note the ongoing meetings with the Department of Employment Affairs and Social Protection with the Office of the Ombudsman and that the Department is preparing a debt recovery policy guideline. However, FLAC has serious concerns regarding the legal basis on which the Department claims the ability to reclaim historical overpayments given that the 1996 Code of Practice in use by the Department up until 2005 places an onus on them to be pro-active in engaging with persons regarding the overpayment, and would govern the collection of overpayments dating from that time. Further, a question arises as to whether legislation that does not provide for any limitation period and allows an overpayment to be recovered at any point in the future, so long as the person becomes entitled to some further social welfare payment but where debt enforcement proceedings would otherwise be statute-barred, is constitutionally sound or in compliance with the State's obligations under the European Convention on Human Rights.

**Recommendation**

**Ensure the Department informs claimants in cases of overpayments that they can apply to have it varied or reduced, or cancelled and introduce clear, fair procedures to deal with overpayments.**

**Consideration should be given to a limitation period such that where if the Department have not attempted to recover an overpayment they may not do so because of the resulting unfairness to claimants arising from significant delays.**

**Overpayments and standard of living**

The right to an adequate standard of living is guaranteed in a number of international human rights instruments including Article 25 of the Universal Declaration of Human Rights; Article 34 of the EU Charter of Fundamental Freedoms which "respects the right to social and housing assistance so as to ensure a decent existence for all those who lack insufficient resources" and Article 13 of the EU Social Charter which affords the right to be granted "adequate assistance".

Section 13 of the Social Welfare and Pensions Act 2012 affords the Department of Employment Affairs and Social Protection the power to recover overpayments, whether they

arise through the fault of the Department itself or of the claimant, by deducting up to 15% from a social welfare payment without need for the claimant's consent. This may reduce a person's payment to below the State's own designated basic minimum income, Supplementary Welfare Allowance, the rate of which is €191,(€147.80- aged 25, €102,70- aged 18-24) Previously, the Department could not recover an amount which would result in a person receiving less than the basic Supplementary Welfare Allowance rate.

The former UN Independent Expert on Extreme Poverty and Human Rights has stressed that a state's obligation to provide "minimum essential levels of non-contributory social protection" are a legal obligation rather than a policy option.<sup>14</sup> Similarly, the European Committee of Social Rights found in 2013, and before in 2009, that Ireland's minimum levels of sickness, unemployment, survivors, employment injury and invalidity benefits are inadequate to meet a person's needs<sup>15</sup>.

Research conducted by the Vincentian Partnership for Social Justice on the cost of a "Minimum Essential Standard of Living" reveals that rates of social welfare payments are not adequate and do not meet the basic needs of a variety of households.<sup>16</sup> It is relevant to note that while the Insolvency Service of Ireland bases its budgeting model on the "Minimum Essential Standard of Living" model developed by the Vincentian Partnership for Social Justice, the Department of Employment Affairs and Social Protection does not.<sup>17</sup>

According to the CSO Survey on Income and Living Conditions 2016, the at-risk of poverty rate for those who are unemployed is 41%, with a deprivation rate of 42% and a consistent poverty rate of 25% (with corresponding rates of 5.6%, 12.6% and 1.9% for those in employment).<sup>18</sup> Given the high rates of poverty for those who are unemployed, it is essential that the Department do not reduce incomes to a figure that would have a negative impact on their fundamental rights.

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<sup>14</sup> Sepúlveda and Nyst, *The Human Rights Approach to Social Protection*, available at <http://www.ohchr.org/Documents/Issues/EPoverty/HumanRightsApproachToSocialProtection.pdf> [accessed 27 June 2016].

<sup>15</sup> European Committee of Social Rights, 2013 Conclusions on Ireland – Article 12-1, Document no. 2013/def/IRL/12/1/EN.

<sup>16</sup> Vincentian Partnership for Social Justice (2016) *Minimum Essential Standard of Living 2016*, Dublin: VPSJ, p.11.

<sup>17</sup> See for example the Insolvency Service of Ireland (2013) *Guidelines on a reasonable standard of living and reasonable living expenses*, Dublin: ISI.

<sup>18</sup> CSO Survey on Income and Living Conditions 2016

### Recommendation

**The Department should ensure when recovering social welfare overpayments that a person's income is not reduced below a figure which would have a negative impact on their fundamental rights to an adequate standard of living and social security, in this instance the basic rate of Supplementary Welfare Allowance.**

### Legal aid for social welfare claimants

The Legal Aid Board is precluded from providing representation before quasi-judicial bodies such as Social Welfare Appeals Office. Appeals Officers in social welfare appeals, will often have to deal with complex legal issues such as the application of the "right to reside" test under EU law and the Habitual Residence Condition.<sup>19</sup>

The European Court of Human Rights has ruled that the blanket exclusion of any area of law from a civil legal aid scheme breaches Article 6(1) of the Convention.<sup>20</sup> It is likely that the exclusion of the Social Welfare Appeals Office from the scope of the civil legal aid scheme in a blanket manner, without allowing for any examination of the particular facts of the case, may breach the right to a fair hearing guaranteed by Article 6 of the ECHR and may deny access to an effective remedy pursuant to Article 13. In addition where the application of EU law is in issue (as in the case with a rights to reside test), it is also likely that Article 47 of the Charter of Fundamental Rights may also be breached as the right to a remedy under this Article also encompasses the right to legal aid where so required.

In 2011, the former UN Special Rapporteur on extreme poverty and human rights, noted her concerns that several areas of law that are particularly relevant for people living in poverty are excluded from the scope of the Legal Aid Board,<sup>21</sup> stating that exclusions of certain categories of claims from the scope of free legal aid [sic]... discriminates against the poor. In July 2015 the UN Committee on Economic, Social and Cultural Rights expressed concern regarding the exclusion of certain areas of law from the legal aid scheme "*which prevents*

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<sup>19</sup> The "right to reside" test is a question of law which seeks to establish if the applicant has a lawful right to reside in Ireland. Establishing a right to reside is a prerequisite to establishing the habitual residence condition, which is an additional qualifying condition for all means tested social welfare payments and child benefit by which an applicant has to show a connection to the state, by reference to a number of interrelated and to some extent, subjective factors determined in accordance with the jurisprudence of the Court of Justice of the EU.

<sup>20</sup> *Steel & Morris v The United Kingdom*, [2005]41 EHRR 22, at para. 61.

<sup>21</sup> Office of the High Commissioner for Human Rights (2011) Report of the UN Independent Expert on Extreme Poverty, Magdalena Sepulveda Carmona to the Human Rights Council, Geneva: ONHCR, p4.



*especially disadvantaged marginalised individuals and groups from claiming their rights and obtaining appropriate remedies, particularly in the areas of ...social welfare benefits”.*<sup>22</sup>

The lack of availability of legal aid for persons facing all tribunals is not consistent with a vindication of the right to a fair hearing as guaranteed by the Irish courts and international human rights law. The European Court of Human Rights has held that in terms of the scope of the right to a fair trial under the European Convention on Human Rights, there was a positive duty on the state to provide legal aid in matters where the rights and obligations of the individual were in question and the matter was of such complexity that the applicant could not reasonably be expected to effectively represent him or herself.<sup>23</sup> Given that an appearance before a tribunal, including a social welfare appeal, can involve complex issues of law, both Irish and European Union law, and that it could result in a significant impact in a person’s rights and circumstances, everyone appearing before such a tribunal should have the right to legal representation through legal aid, subject to the usual qualification criteria.

### **Recommendation**

**The Minister for Justice and Equality should designate the Social Welfare Appeals Office as a “prescribed” tribunal for the purposes of Section 27(2)(b) of the Civil Legal Aid Act 1995**

### **Social Protection rates**

The Constitution may be invoked to protect socio-economic rights and recognises the dignity, worth and right to equality of all persons.<sup>24</sup> Furthermore, as a State Party to the International Covenant on Economic, Social and Cultural Rights, Ireland has an immediate minimum core obligation to guarantee, at the very least, basic essential levels of all economic, social and cultural rights, including the right to social security.<sup>25</sup>

In March 2015, the UN Human Rights Council adopted a landmark resolution on the question of the realisation in all countries of economic, social and cultural rights, with a specific focus on the issue of social protection floors.<sup>26</sup> Social protection floors are basic minimum income standards which aim to alleviate poverty and social exclusion.<sup>27</sup> The resolution encourages states to put in place social protection floors as part of comprehensive social protection

<sup>22</sup> UN Committee on Economic, Social and Cultural Rights (2015) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*, Geneva: OHCHR.

<sup>23</sup> *Airey v. Ireland*, 6289/73 [1979] 2 EHRR 305 (9 October 1979), [1981] ECHR1 (6 February 1981): “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”.

<sup>24</sup> See for instance *O’Donnell v South Dublin County Council*, [2015] IESC 28.

<sup>25</sup> Office of the High Commissioner for Human Rights (2011) Report of the UN Independent Expert on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona to the Human Rights Council, Geneva: OHCHR, p.8

<sup>26</sup> Human Rights Council resolution 28/12 – Question of the realization in all countries of economic, social and cultural rights.

<sup>27</sup> General Assembly resolution 67/164 – Human rights and extreme poverty.



systems in order to contribute to the enjoyment and realisation of human rights.<sup>28</sup> Additionally, in July 2015, the UN Committee on Economic, Social and Cultural Rights specifically called on Ireland to *“identify the minimum core content of the Covenant rights or a social protection floor and ensure the protection of this core content at all times”*<sup>29</sup>.

Limited resources cannot be used as an argument to counter the State’s human rights commitments, including to maintain its minimum core obligations, or in other words to provide a basic level of subsistence to enable people to live in dignity.

Research undertaken by the Vincentian Partnership for Social Justice on minimum income standards report presents the cost of a Minimum Essential Standard of Living (MESL) in 2018.<sup>30</sup> The analysis measures the extent to which social welfare payments enable individuals and households to afford an acceptable minimum standard of living, which allows for participation in the social and economic norms of Irish society. For example, the single adult household type continues to demonstrate deep income inadequacy, with a full jobseekers payment meeting 81% of MESL expenditure need, when living alone in an urban area. This represents a nominal income shortfall of over €47 per week.<sup>31</sup>

In 2018 social welfare continues to provide an inadequate income for each of the family household compositions with children. The ESRI Report Poverty Dynamics of Social Risk Groups in the EU examined specific barriers faced by lone parents in both accessing work and their experience of higher levels of deprivation and child poverty. The data examined covered the period 2004-2014 focusing on the trends and dynamics in poverty for different risk groups in different welfare regimes. Out of the 11 EU states examined, the persistent poverty gap in Ireland was the largest and increased during the timeframe of the study. The research demonstrated that one-parent families in all countries have high risks of both material deprivation and income poverty. The research showed that 43% of lone parents in Ireland experienced material deprivation in at least one of the two consecutive years compared to 13% for other adults aged 30-65.<sup>32</sup>

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<sup>28</sup> Ireland co-sponsored this resolution, indicating its support for the text as adopted.

<sup>29</sup> UN Committee on Economic, Social and Cultural Rights (2015) Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland, Geneva: OHCHR, para.11.

<sup>30</sup> Vincentian Partnership for Social Justice MINIMUM ESSENTIAL STANDARD OF LIVING 2018 UPDATE REPORT: A Minimum Essential Standard of Living (MESL) is a standard which no one should be expected to live below. It is the minimum needed to live and partake in Irish society today, meeting the physical, psychological and social needs of individuals and households. It is derived from a negotiated social consensus on what people believe is essential for an acceptable minimum standard of living. It defines a minimum standard for everyone, not just those in poverty, identifying the cost of a dignified standard of living which allows participation in the norms of Irish life.

<sup>31</sup> Vincentian Partnership for Social Justice MESL 2018 Update Report, p.11.

<sup>32</sup> Watson, D., Maître, B., Grotti, R., and Whelan, C.T. (2018) Poverty Dynamics of Social Risk Groups in the EU: An analysis of the EU Statistics on Income and Living Conditions, 2005 to 2015, Social Inclusion Report No. 7. Dublin: Department of Employment Affairs and Social Protection and the Economic and Social Research Institute.

Households with an adolescent experience the greatest income inadequacy when reliant on social welfare. Secondary school age children have higher MESL costs than children of other age-groups. Social welfare also continues to provide an inadequate income for the working age households without children.

### **Recommendation**

**Review the adequacy of existing rates of social welfare payments in order to guarantee a basic level of income and an adequate standard of living for everyone**

### **Social Welfare payments for young people under the age of 26**

The current age segregation in means tested jobseekers social welfare payments was introduced in Budget 2009. FLAC regrets the introduction of this policy and has called on the Government to reverse it.

The current full adult rate of jobseekers payment is €198, a reduction from €204.30 in 2009. While there was an increase of €5 to payments in Budget 2018, the maximum applicable rate of payment applicable to young people age 18-24 is still only €107.70 per week, and €152.80 for those age 25. The lower payments fall below the basic minimum income standard for living.

FLAC views this payment structure as discriminatory and believes there is no evidence base to support the Government's claim that it will protect young people from welfare dependency by incentivising them to avail of education and training opportunities, or indeed that they need to be incentivised at all.<sup>33</sup> FLAC urges the Department of Employment Affairs and Social Protection to publish the research on which this policy is based and demonstrate whether those under 26 require greater incentivisation to avail of education or training than those over 26. FLAC also requests the Department demonstrate the effectiveness of this policy.

There also appears to be an assumption by the State that adults below the age of 26 are able to live with and be supported by parents or family members. No evidence has been adduced to support this. In fact the full rate of JSA would appear to be less than the cost of an MESL for an unemployed young adult living in the family home in 2017.<sup>34</sup> This assumption has led to a generalised measure, not specific to the circumstances or realities of each young person in receipt of social welfare.<sup>35</sup>

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<sup>33</sup> Minister for Social Protection, Regina Doherty, Parliamentary Questions: Written Answers, [26512/18], 19 June 2018

<sup>34</sup> The Vincentian Partnership for Social Justice Minimal Essential Standards of Living 2017 Update report

<sup>35</sup> FLAC and CLM welcome some limited measures announced in Budget 2017 which are designed to alleviate some of the difficulties experienced by young people under the age of 26 who are not living with family members, including lower Rent Supplement contributions. The personal rent contribution for young people aged 18 – 24 who are receiving Jobseeker's Allowance of €100 per week was reduced from €30 to €10 and

The Vincentian Partnership for Social Justice Minimal Essential Standards of Living 2018 notes the cost of an MESL for an unemployed young adult living in the parental family home (and qualifying for a full medical card) is €149 per week. The reduced rate of JA for adults under 26 (€107.70) continues to fall short of providing an MESL, and due to the very low rate of payment, an individual would require significant support from their family in order to afford an MESL.<sup>36</sup>

Concerns also remain that reduced social welfare payments increase the vulnerability of people under the age of 26 to homelessness, particularly those who are already disadvantaged and without financial supports from other family such as LGBTI persons, migrants, victims of domestic violence, Travellers and Roma. Focus Ireland notes that vulnerable young people are among the first victims of the housing crisis, with private landlords, social housing bodies and local authorities reluctant to rent to them. At the end of May 2017 the official homeless statistics record that there were over 780 young people (adults aged under 26) living in emergency homeless accommodation. This represents a 20% increase from just one year before.

It is widely recognised that large numbers of young people live without a permanent home but do not enter homeless services and are not counted as officially homeless. These young people survive by sleeping on a friend's sofa, squatting or staying in other insecure or unsafe places.

Focus Ireland also maintains that young adults who grew up in care are particularly vulnerable to homelessness because they often lack a network of family support and may not have the skills to readily adjust to adult life. In this way, especially for those who have been in State care, if they can't go home to their family, this is insufficient to provide accommodation, resulting in destitution for many. In December 2017, there were 1,914 homeless people between 18-22 engaging with Tusla aftercare services<sup>37</sup> and although care leavers receive the normal adult rate of jobseekers payment, there is still a clear difficulty in welfare services meeting their needs.

### **Recommendation**

**Amend Schedule 2 of the Social Welfare Act 2016 to provide for equal treatment for under 26s in relation to Job Seekers Allowance and Supplementary Welfare Allowance.**

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from €30 to €20 for those aged 25 receiving €144 per week. The 2016 Bill will also increase the Back to Education Allowance for young jobseekers aged under 26 from €160 to €193. However, while welcome, these measures are not sufficient.

<sup>36</sup> The Vincentian Partnership for Social Justice Minimal Essential Standards of Living 2018 Update Report.

<sup>37</sup> Minister for Children and Youth Affairs Katherine Zappone, Parliamentary Question, Written Answer [53127/17] 12 December 2017.

## Supplementary welfare allowance and exceptional needs payments

Supplementary Welfare Allowance (SWA) is supposed to constitute a safety net for persons who do not qualify for other welfare payments.

*“It is essential within any national system of Social Welfare to have a support service of last resort, which can enable immediate and relatively flexible assistance to be provided for those in need, who do not qualify for payment under other state schemes. Such a service should also help those whose needs are not adequately met under major schemes and those confronted with emergency situations. The problems of those who will need to avail of these allowances will in most cases be of a nature calling for more than a mere cash response. Social services, social work support and genuine community care are also needed. The reforms envisaged by this bill are designed to meet pressing need in a flexible and speedy manner. The diversity of recipients and the variety of circumstances which cause them to seek assistance require that there must be a considerable element of flexibility in the service to meet particular needs”<sup>38</sup>*

FLAC is concerned that the supplementary welfare allowance scheme is not operating as a sufficient safety net and that claimants are falling through the cracks and are having to depend on charities for essentials such as food and nappies.

ESRI research has demonstrated one-third of lone-parent families and one quarter of families headed by a person with a disability were persistently deprived<sup>39</sup> between 2004-2015, with the rates in Ireland being 10% higher than in other EU states.<sup>40</sup> There are 130,000 children living in consistent poverty according to the same research.

About 3,000 people, including elderly people and children, queued for Christmas food parcels at the Capuchin Centre in Dublin.<sup>41</sup> FLAC is aware from its work on the Justrom<sup>42</sup> programme that people are receiving necessities such as nappies and baby formula from the Capuchin centre on a regular basis. The centre had 8,000 children attend for meals in 2015.<sup>43</sup>

Every person who is habitually resident in the state, whose means are insufficient to meet his/her needs and the needs of any adult or child dependant of the claimant is entitled to

<sup>38</sup> Extract from Dáil Debates 24th June 1975 – Frank Cluskey cols. 1330 -1331.

<sup>39</sup> The ESRI research uses two indicators of social inclusion - material deprivation and income poverty. The research examined deprivation using the EU definition of material deprivation which involves an inability to afford three or more of the following: annual holiday, meeting unexpected expenses, avoiding arrears on household bills, a protein meal every second day, adequate heating of the dwelling, durable goods like a washing machine, colour television, telephone or car.

<sup>40</sup> Watson, D., Maître, B., Grotti, R., and Whelan, C.T. (2018) Poverty Dynamics of Social Risk Groups in the EU: An analysis of the EU Statistics on Income and Living Conditions, 2005 to 2015, Social Inclusion Report No. 7. Dublin: Department of Employment Affairs and Social Protection and the Economic and Social Research Institute

<sup>41</sup> Reported in the Irish Times 23<sup>rd</sup> December 2016.

<sup>42</sup> JUSTROM is a programme funded by the European Commission and administered by the Council of Europe that seeks to promote access to justice among Roma and Traveller women.

<sup>43</sup> Capuchin Day Centre, “Services.” Accessible on [http://www.capuchindaycentre.ie/Capuchin\\_Day\\_Centre\\_2013/Capuchin\\_Day\\_Centre\\_-\\_Services.html](http://www.capuchindaycentre.ie/Capuchin_Day_Centre_2013/Capuchin_Day_Centre_-_Services.html)

SWA.<sup>44</sup> In addition people may also apply for certain discretionary payments. An Exceptional Needs Payment is a single payment to help meet essential, once-off, exceptional expenditure, which a person could not reasonably be expected to meet out of their weekly income. An Urgent Needs Payment may be paid to people in emergency situations. Neither of these payments is subject to the habitual residence test, and therefore may be the last resort of a person or family otherwise been excluded from any other social welfare support where the HRC applies. Recalling the earlier observation in this submission regarding appeal times, it is important that the final safety net provided by the social welfare system is sufficiently resourced to preserve individuals and families from ultimate destitution.

Payments may be made for bedding when moving into a home for the first time, or to visit relatives in hospital or prison. In some circumstances an application for an ENP may be made to assist with funeral expenses. The rate of payment to a person depends on the type of assistance that is needed. There is no automatic entitlement to the payment and Department representatives have discretion in the rates of payment they can make. There is no provision within the social welfare legislation that provides for a test of “unforeseen.”

It is a matter of surprise and concern particularly given the housing crisis, that there has been a significant drop in the amount paid out by the State in exceptional need payments to those in financial difficulties. In 2012, €52.7m was paid out in Exceptional Needs and Urgent Needs payments, this reduced to €35.7m in 2013 and has remained around €31-32m since then. The Government provided €31.5 million for exceptional and urgent needs payments in 2017<sup>45</sup> and there were 3,200 exceptional needs payments issued in the first 17 days of January this year.<sup>46</sup> It is surprising and a cause of concern that these figures are so low given the housing crisis that exists.

Further, while statistics are maintained relating to payments under the ENP scheme, they are not maintained on the number of applications or the outcome of those applications so we have no clear knowledge of how many people have sought emergency needs payments and been refused. FLAC urges the Government to improve its data collection in this area.

There have been recent challenges to the Department regarding a refusal to make an exceptional needs payment for winter clothing to a man who had received the same payment every year for 30 years, and another woman who had received the payment over 15 years. The Department refused the request for ENPs by these two individuals based on their need being not exceptional and “not unforeseen.” In the judicial review applications for both of

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<sup>44</sup> Section 198, the means test for this scheme is set out in part 4 of schedule 3 to the 2005 Act.

<sup>45</sup> Minister for Social Protection, Regina Doherty TD, Parliamentary Questions: Written Answers, [32910/17] 11 July 2017

<sup>46</sup> Minister for Social Protection, Regina Doherty TD, Parliamentary Questions: Written Answers, [2385/18] 17 January 2018

these cases, it was claimed by the applicant that the refusals are unlawful, arbitrary, unreasonable and disproportionate. The Department contend they are entitled to alter the scheme. A previous challenge on similar grounds was resolved to the satisfaction of the applicant.

While the Department maintain data relating to payments under the scheme, they do not retain information on the number of applications in total or the outcome of the applications - including the number of refusals. There were over 103,000 emergency needs payments and urgent needs payments issued in 2017 from a budget of €38 million.<sup>47</sup> However this allocation for ENPs in 2018 was reduced to €36 million.<sup>48</sup> SVP currently spend a substantial amount in meeting the exceptional needs of persons in Ireland spending €33 million annually in providing direct assistance, in particular in rural areas where the Department has closed local offices that previously facilitated ENP payments.<sup>49</sup> SVP have stated that they believe that the reduction in the budget allocation may result in officers refusing payments that they would previously have approved, or approving payments for lower amounts.

While is not considered an exceptional need for the purpose of ENPs, 80,000 people relied on food parcels from charitable organisations in 2017 to make up the shortfall in food required.<sup>50</sup> The ENP is a safety net for people with no other means of providing their basic needs and originated in a time where there was not a substantial number of homeless people living long term in hotels due to the absence of suitable affordable accommodation. Given the changing context of poverty in Ireland and the Department's move towards only providing payments to those where the need is "unforeseen" there must now be a review of how to provide for those whose needs are no longer considered exceptional, but continuous - as in the circumstances of those requiring annual winter clothing.

### **Recommendation**

**There needs to be a comprehensive review of the scope and administration of the SWA scheme, including how vulnerable claimants can access so called exceptional needs payments, to ensure that it operates as a safety net and that claimants do not have to rely on charity for basic essentials. The budgetary allocation in respect of ENPs needs be resourced and restored to meaningful levels as a priority.**

<sup>47</sup> Minister for Social Protection, Regina Doherty, Parliamentary Questions: Written Answers, [8812/18], 20 February 2018

<sup>48</sup> Minister for Social Protection, Regina Doherty, Parliamentary Questions: Written Answers, [21748/18], 17 May 2018

<sup>49</sup> SVP Pre-Budget Submission to the Department of Employment Affairs and Social Protection 2018

<sup>50</sup> The Irish Times, 80,000 people relied on food parcels in Ireland last year, Mon, Jul 2, 2018



## Mortgage Interest Supplement

Section 11 of the Social Welfare and Pensions Act 2013 amended Section 198 of the Social Welfare (Consolidation) Act 2005 to provide for the phasing out of the Mortgage Interest Supplement scheme to new entrants from January 2014 and the cessation of the scheme by the end of December 2017. Claimants getting mortgage interest supplement payments that were due to end in December 2017 have continued to receive equivalent payments under the Supplementary Welfare Scheme from January 2018 – however this payment is unavailable to new applicants.

The Mortgage Interest Supplement scheme provides short-term income support to borrowers who are unable to meet their mortgage interest repayments. The Supplement assists with the interest portion of the mortgage repayment but does not help with payment of the capital portion of the loan. The closure of the scheme to new claimants and its planned abolition means that people experiencing income difficulties cannot access social welfare assistance to meet mortgage interest repayments.

During the economic crisis, a number of expert and inter-departmental groups were established, tasked with examining the issue of mortgage arrears. While sharing the view that Mortgage Interest Supplement should be a time-bound support, each emphasised the importance of the scheme to borrowers experiencing short-term financial difficulties.<sup>7</sup> Abolition of the Supplement was not recommended.<sup>51</sup>

FLAC and CLM have previously expressed the view that the Mortgage Interest Supplement scheme is a positive one which can help prevent temporary financial problems due to illness or unemployment from leading into insolvency, with the attendant social and economic consequences that may follow for the households involved and for society generally. The Oireachtas Committee on Housing and Homelessness has adopted a similar position, recommending that a targeted use of Mortgage Interest Supplement be restored to assist people with a short-term mortgage arrears problem. FLAC repeats its concerns that the gradual winding down of the Mortgage Interest Supplement scheme is a gap in housing supports for those in short-term mortgage arrears and calls into question Ireland's compliance with international human rights law and specifically its obligation to ensure the right to adequate housing.<sup>52</sup> FLAC encourages the Government to review this as a matter of urgency given that there is potential the European Central Bank interest rates will increase from 2019.

### Recommendation

**FLAC recommends that a targeted use of Mortgage Interest Supplement be restored to assist people with a short-term mortgage arrears problem.**

<sup>51</sup> These included the Inter-Departmental Working Group on Mortgage Arrears, the Working Group on the Review of the Mortgage Interest Supplement and the Expert Group on Mortgage Arrears and Personal Debt. 8

<sup>52</sup> Oireachtas Committee on Housing and Homelessness (2016) Report of the Committee on Housing and Homelessness, Dublin:

## Habitual Residence Condition

Despite repeated calls from regional and international human rights bodies and experts, a review of the Habitual Residence Condition and its discriminatory impact on vulnerable groups accessing social welfare payments has yet to be initiated. The Habitual Residence Condition is an additional qualifying condition for all means-tested social welfare payments and Child Benefit by which an applicant has to show a connection to the State by reference to a number of interrelated and, to some extent, subjective factors. In its application, the Habitual Residence Condition disproportionately affects vulnerable groups, such as Travellers and Roma, which experience considerable challenges in terms of establishing a connection to Ireland, by reason of either their nomadic way of life or, in the case of Roma, the inherent barriers they experience in integrating into a new country and proving their connection to the State.<sup>53</sup> In the absence of access to regular social welfare payments, Travellers and Roma are at risk of extreme poverty and destitution. According to the preliminary findings of the Roma Needs Assessment Study, 66.3% of respondents said that they cannot afford to keep the house warm all the time.<sup>54</sup> In the published report *Roma In Ireland: a needs assessment* it was shown more than 50% of Roma live in consistent poverty and almost half of Roma households live in overcrowded housing, often without gas, electricity, running water or sufficient food or basic household items like a fridge.<sup>55</sup>

Human rights bodies recognise the difficulties that can result from the habitual residency condition and the United Nations Committee on the Rights of the Child has recommended that the State makes child benefit a universal payment that is not contingent of the fulfilment of habitual residence condition.<sup>56</sup> The state must also ensure that Travellers and Roma have sufficient access to community employment schemes.

### Recommendation

**Undertake a review of the Habitual Residence Condition so as to establish whether it has a discriminatory impact on access to social welfare, particularly among Travellers and Roma**

## Direct provision

FLAC notes the increase to payments made to the allowance for asylum seekers in direct provision to €21.60. FLAC reiterates our previous recommendation that the weekly allowance for asylum seekers living in direct provision be increased to €38.74 for adults and €29.80 for

<sup>53</sup> In July 2015, the UN Committee on Economic, Social and Cultural Rights recommended that Ireland review the Habitual Residence Condition so as to eliminate its discriminatory impact on access to social security benefits. UN Committee on Economic, Social and Cultural Rights (2015) Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland, Geneva: OHCHR, para.21.

<sup>54</sup> Commissioner for Human Rights of the Council of Europe (2017) Report by Nils Muiznieks following his visit to Ireland from 22 to 25 November 2016, Strasbourg: CoE, p.9.

<sup>55</sup> Pavee Point Traveller and Roma Centre & Department of Justice and Equality (2018) Roma in Ireland – A National Needs Assessment

<sup>56</sup> United Nations Committee on the Rights of the Child, 'Concluding observations on the combined third and fourth periodic reports of Ireland' (2016) CRC/C/IRL/CO/3-4.



children in line with the recommendations of the McMahon report<sup>57</sup>. FLAC has previously made a number of recommendations in relation to the direct provision system including that that the system for direct provision be put on a statutory footing.

We also note that since the Supreme Court declaration in *NHV V Minister for Justice*<sup>58</sup> interim measures have been established that allow asylum seekers to apply for work permits and engage in self-employment. It is FLAC's view that once the threshold point at which the constitutional right to work is reached, then all persons and their dependents who gain that right should have access to social welfare on the same footing as others with entitlement to social welfare supports. It is likely that given the particular circumstances of people in direct provision and the length of time that some people have been in direct provision, that they will require reskilling and retraining in order to exercise the right to seek employment. This is also a matter that comes within the remit of the Department. Indeed, the right to work of many asylum seekers would probably prove illusory if not given educational and training opportunities and guidance to re-integrate to the workplace.

#### **Recommendation**

**All persons in direct provision who gain the right to work should have access to social welfare for themselves and their dependents on the same footing as others with entitlement to social welfare supports, including training and reskilling.**

#### **Implications of *DN V Chief Appeals Officer* [2017] IEHC 6**

Article 23 (2) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, which applies to Ireland, states that Member States shall ensure that such a procedure is concluded as soon as possible. Article 41.1 of The Charter of Fundamental Rights EU Charter states that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

In *DN v Chief Appeals Officer*, the High Court ordered the payment of compensation to a mother who experienced excessive delay in processing her application for subsidiary protection. FLAC represented the woman in the case. The delay in determining her application for subsidiary protection led to her being refused Child Benefit to which she would otherwise have been entitled. While the Court did not find that the refusal to pay child benefit to families in direct provision was a breach of rights *per se*, it did find that the delay on the part of the State in finally making a decision on their application for international protection

<sup>57</sup> Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers (2015) *Final Report*, Dublin: Working Group on the Protection Process

<sup>58</sup> *N.H.V -v- Minister for Justice & Equality and ors* [2017] IESC 35 Supreme Court judgement in *NHV V Minister for Justice* which found the absolute legislative prohibition on asylum seekers from entering, seeking or being in employment to be unconstitutional. While acknowledging that non-EU citizens had no automatic right to work in Ireland, the Supreme Court was of the view that asylum seekers lawfully in the State could not be compared to other migrants who might be seeking permission to work in Ireland.

was so unreasonable that the rights of the mother were breached under EU law and the Constitution.

It is likely that there are others in direct provision who have experience equivalent levels of delay in processing their applications. At the end of 2017, approximately 5,200 people were awaiting a decision from the International Protection Office. This was up more than 1,000 from the 12 months previous despite the introduction of a single application procedure in 2016 proposed to reduce processing times to six months.<sup>59</sup>

### **Recommendation**

**The Department should seek to identify those in direct provision who have experienced inordinate delay in having their application for international protection determined with consequential delays in obtaining social welfare, in particular child benefit, and compensate them accordingly**

### **One Parent Family Payment**

Prior to 2009 lone parents were eligible for OPFP until their youngest child turned 18 or 23 if they were in full time education, with these being reduced to 7 years under the changes. The recipients were moved onto Jobseekers Allowance to engage in “activation programmes” to get them into employment despite a lack of affordable childcare and the main employment options being low paid or part time work. A Jobseekers Transitional Payment was introduced in 2015 which is available until the youngest child is 13 and during which a lone parent does not have to actively seek employment but does have to engage with the Department of Employment Affairs and Social Protection in order to access training opportunities, while the difficulties concerning childcare which has one of the highest costs out of the OECD, still remains.

Children of 14 years and over require care and supervision, and lone parent job seeking claimants continue to be disadvantaged in trying to access the labour market and address the needs of his or her children when they are not attending school. When the One Parent Family Payment was introduced in 1997 its purpose was to try to remedy this obvious barrier to the labour market, by providing an income disregard to help compensate for the cost of childcare arrangements that a one parent family would incur if working. Now that this support has been removed, the childcare needs of lone parent families are a hidden disadvantage as they are now regarded as being the same as a jobseeker with a spouse working in the home. The objective of activation could be achieved in a fairer way by attaching job seeking conditions to a fully restored One Parent Family Payment. The current policy is counterintuitive as it

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<sup>59</sup> UNHCR calls for action to cut Irish asylum waiting times, 25 April 2018 Available at: <http://www.unhcr.org/en-ie/news/press/2018/4/5ae0228c4/unhcr-calls-for-action-to-cut-irish-asylum-waiting-times.html>

removes the supports that are necessary if those who are parenting alone are to access the labour market, and furthermore, it creates inequality in the treatment of households with children. The State has legal obligations in relation to the best interests of children by ensuring equal access to education and in providing for every child's physical, mental spiritual, moral and social development. The introduction of labour activation measures targeting lone parents, without adequate consultation of the affected groups, and without provision of supports to care for children is a policy that is regressive in effect, and incompatible with that state's obligation to treat all children equally.

Recent research from the Economic and Social Research Institute (ESRI) has found that lone parents who were forced to take up work as a result of changes to the One Parent Family Payment lost almost 2% of their income and the Department policies were unsuccessful due to a lack of affordable childcare and an over-concentration on low-paid and part time employment.<sup>60</sup> This is worrying given the persistent high rates of poverty experienced by lone parents in Ireland. This report reaffirms previous research that demonstrates policies enacted under austerity reduced the income of lone parents and pushed them further into poverty. The European Income and Living Conditions survey showed that the rate of in-work poverty among lone parent increased from 9% in 2012 to just over 20% in 2016. The ESRI research confirmed that one in five lone parents are financially better off not working due to the cost of childcare.

#### **Recommendation**

**We recommend One Parent Family Payment be fully restored. We further recommend that a social impact assessment of the changes to the One Parent Family Payment be carried out in order to determine the extent to which changes to the scheme have had a detrimental impact on one parent households.**

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<sup>60</sup> Lone Parent Incomes and Work Incentives, Mark Regan, Claire Keane, John R. Walsh, Lone Parent Incomes and Work Incentives, July 2018, Budget Perspectives, Paper 1, ESRI.