Questionnaire for consultation process on Technical Review of the Social Welfare Code to examine its Compatibility with the Equal Status Acts, 2000-2004

1. Is there any legislation or regulation or administrative rule concerning the social welfare code which may, to the knowledge of you or your organisation, disadvantage persons due to *gender*?

Yes

The Department of Social & Family Affairs last year altered its policy to allow all pension qualifying adults to receive payments directly. In altering their policy however they failed to extend this policy to all women dependents. This is clearly discriminatory against women on grounds of their gender.

The marriage bar which was not lifted until 1973 also has a bearing on this and it has caused great difficulty for many women in receiving a pension as they do not have enough contributions gathered in order to make them eligible for a full contributory pension in their own right. They are therefore financially dependent on their husbands. Direct payment should be offered to all dependents especially women, to help them achieve economic independence from their partners.

The marriage bar effectively forced these women to remain in the home, thus the state should therefore recognise the contribution they have made to society and family life, by enabling them to be credited with contributions for the time spent in the home. The "male breadwinner model" on which the Irish social welfare system is based is outdated as it reinforces women as dependents and does not recognise women's unpaid care work.

The logic of social insurance is that part of the wealth created during a person's economically active years is used to provide pensions. Women affected by the marriage bar cannot relate to this as they were unable to work outside the home because of the bar which was due to government policy and working as a homemaker does not constitute being economically active under the Irish social welfare system. This situation was

slightly improved by introducing the homemaker's scheme in 1994. This allows women to receive social insurance credits for up to 20 years whilst they are outside the workforce and raising children who are under 12 or in need of full time care due to a disability. It is however discriminatory to older women and in particular those who were affected by the marriage bar because they are unable to gather contributions for their time spent as homemakers. Thus, it is unfair that women who stayed in the home before 1994 are unable to access this scheme and many are therefore not eligible for full contributory pensions. This is significant as 45% of women 65 years and older fall below the 60% poverty line.

2. Is there any legislation or regulation or administrative rule concerning the social welfare code which may, to the knowledge of you or your organisation, disadvantage persons due to *marital status*?

Yes

In contrast to the situation of a married couple, there is no legal obligation to provide maintenance for an unmarried partner, neither in the case of separation nor within the relationship. Furthermore, in the case of the death of one unmarried partner, whether it is opposite or same-sex relationship, there are no protection mechanisms with regard to provision for the surviving partner. This creates discrimination against same sex and cohabiting couples, as they are excluded from the Widow's or Widower's (Contributory) Pension and the Widowed Parents Bereavement Grant. Both are payable to married couples with dependent children when a spouse dies.

The size of pension contributions does not normally depend on marital status. However, the question of what benefits are paid out does. Since 1984, all public servants, married or not, must contribute equally to a specific "spouses and children" pension fund, from which payments are made when a person dies after retirement. No payments can be made to an unmarried partner, or to any children of that partner. Even though social welfare pension rules allow for the payment of a supplement to any adult dependent, after death a survivor's pension will be paid only to a legal spouse.

Unmarried fathers have no automatic constitutional right to be involved in the care and upbringing of their children. Instead, any realisation of their family interests, such as guardianship, requires the consent of the mother. There are no customary rights on care, custody or access. This indirectly affects the possibility of receiving certain family benefits that are connected to care-giving and guardianship for a child, such as the guardian's payment

3. Is there any legislation or regulation or administrative rule concerning the social welfare code which may, to the knowledge of you or your organisation, disadvantage persons due to *family status* (e.g. pregnancy)?

Yes

Unmarried fathers have no automatic constitutional right to the care and upbringing of their children. Instead, any realisation of their family interests, such as guardianship, requires the consent of the mother. There are no customary rights on care, custody or access. This indirectly affects the possibility of receiving certain family benefits that are connected to care-giving and guardianship for a child, such as the guardian's payment

4. Is there any legislation or regulation or administrative rule concerning the social welfare code which may, to the knowledge of you or your organisation, disadvantage persons due to *sexual orientation*?

Yes

Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004, is a clear example of differential treatment based on sexual orientation which affects the family life of same-sex couples in particular. Section 19 of the Social Welfare (Miscellaneous Provisions) Act 2004 restricts the definition of 'spouse' or 'couple' to married couples and to opposite sex cohabiting couples for state welfare schemes. This has the effect of restoring discrimination against persons in same-sex relationships.

In the case of severe illness of a gay partner it is very difficult to be granted a carer's allowance. The only way possible, so far, is by applying under Section 2(2) of the Social Welfare (Consolidation) Act 2005. This section allows the Minister to specify persons to be adult dependents. The Equality Authority initiated proceedings on this issue before the Equality Tribunal. They contended that the Minister had a discretion which could be exercised to specify the claimant and his partner as a couple and that the failure to exercise this discretion constituted discrimination contrary to the provisions of the Equal Status Acts. The Government then agreed on a without prejudice basis, to grant qualified adult allowance to the partner of a gay man who was seriously ill. However, this leaves the overall issue undetermined.

6**. Is there any legislation or regulation or administrative rule concerning the social welfare code which may, to the knowledge of you or your organisation, disadvantage persons due to *disability* (including type of disability)?**

Yes

Procedural obstacles occur in terms of mechanisms developed for dealing with complaints by patients of mental health services. No appropriate mechanisms are in force for the submission, investigation and resolution of their complaints.

Although persons with mental health problems may be entitled to Disability Allowance, in practice they often find it difficult to prove that they are unfit for work as their symptoms may not manifest themselves physically. The questions on the application form itself are not conducive to revealing a mental illness and the questions can seem quite intimidating to an applicant suffering from a mental health condition as the medical assessment part of the application focuses much more on physical disability.

7. Is there any legislation or regulation or administrative rule concerning the social welfare code which may to the knowledge of you or your organization disadvantage persons *due to age*?

Yes

Another group of people who are disadvantaged by an administrative rule concerning a social welfare benefit are people in receipt of Irish Contributory Old Age (State) Pensions who are resident outside the State. There are approximately 40,270 people in this position, some 31,000 of whom live in the UK, excluding Northern Ireland.

These pensioners, not all of them Irish citizens, are precluded by a Ministerial decision from having access to the Free Travel scheme available to pensioners in Ireland when they return to this country to visit family or friends or attend weddings, funerals or other family or social occasions. They are discriminated against vis a vis their fellow pensioners solely on the basis of their place of residence and this discrimination causes considerable hardship to a vulnerable and generally impoverished group.

The Free Travel scheme is in theory a non-statutory, discretionary scheme but it has now been in existence for over 40 years and is generally accepted as an integral and valuable adjunct to the Old Age Pension, which has also been extended to other persons of pensionable age who, for whatever reason, are not in receipt of a pension. A scheme which is of such long standing and covers such a large number of people cannot avoid the requirement to avoid unjustified discrimination just on the grounds that it is non-statutory and we suggest that the exclusion of non-resident pensioners is discriminatory.

A case concerning this issue has been taken to the European Committee of Social Rights under the Revised European Social Charter.

The Department of Social & Family Affairs last year altered its policy to allow all pension qualifying adults to receive payments directly. In altering their policy however they failed to extend this policy to all women dependents. This is clearly discriminatory against women on grounds of their age.

The marriage bar which was not lifted until 1973 is an extension of this and it has caused great difficulty for many women in receiving a pension as they do not have enough contributions gathered in order to make them eligible for a full contributory pension in their own right. They are therefore financially dependent on their husbands. Direct payment should be offered to all dependents especially women, to help them achieve economic dependence from their partners.

The marriage bar effectively forced these women to remain in the home, thus the state should therefore recognise the contribution they have made to society and family life, by enabling them to gather contributions for the time spent in the home. The "male breadwinner model" on which the Irish social welfare system is based is outdated as it reinforces women as dependents and does not recognise women's unpaid care work.

The logic of social insurance is that part of the wealth created during a person's economically active years is used to provide pensions, women affected by the marriage bar cannot relate to this as there were unable to work because of the marriage bar due to the government and working as a homemaker does not constitute being economically active under the Irish social welfare system. This situation was slightly improved by introducing the homemaker's scheme in 1994. This allows women to receive social insurance credits for up to 20 years whilst they are outside the workforce and raising children who are under 12 or in need of full time care due to a disability. It is however discriminatory to older women and in particular those who were affected by the marriage bar because they are unable to gather contributions for their time spent as homemakers. Thus, it is unfair that women who stayed in the home before 1994 are unable to access this scheme and many are therefore not eligible for full contributory pensions. This is significant as 45% of women 65 years and older fall below the 60% poverty line.

8. **Is there any legislation or regulation or administrative rule concerning the social welfare code which may to the knowledge of you or your organisation disadvantage persons due *to race, colour, nationality or ethnic or national origin* (e.g. country of origin)?**

Yes

Although the Habitual Residence Condition is formally applicable to people of all nationalities, including Irish social welfare applicants, in practice the HRC can be viewed as discriminatory against non-Irish applicants therefore it may in fact constitute indirect discrimination.

Previously in decisions regarding a person's habitual residence, the DSFA required that a person prove that they had lived in Ireland or the Common Travel Area for a minimum period of 2 consecutive years as specified in section 246 of the Social Welfare Consolidation Act 2005. However Ireland, as a signatory to the European Code of Social Security, is prevented from specifying a fixed period of time to establish habitual residence. In relation to the two year habitual residency requirement, in its 32nd Report (*covering the period 2004*-5) to the Council of Europe on Ireland's compliance with the European Code of Social Security, the Government stated at page 9:

> "*Ireland is aware that the relevant jurisprudence of the European Court of Justice precludes reliance on any specific duration of residence (e.g. two years) for the purposes of establishing habitual residence and has ensured that no such specific period is the determining factor in any HRC decision*".

Previously the two year rule was seen as the most influential if not the determining factor in decisions concerning an applicant's right to a social welfare payment where he or she had to satisfy the HRC. Although the European Code of Social Security is limited to the employees or ordinary residents of a Contracting Party, in practice the change has also been extended to all applicants. Although there are five criteria used to determine if a person is habitually resident, Deciding Officers seem now to be focussing on the "centre of interest" criterion. The individual circumstances of each case are considered and the habitual residence issue is decided in terms of the connections the applicant has with Ireland. The presence of close family here, integration into the community and activities in which the person is involved are just some of the details taken into account when deciding whether the applicant's main centre of interest is in Ireland. The person's

connections, both financial and familial, with their home country or another country in which they lived will also be taken into consideration. This therefore gives a distinct advantage to Irish people who are more likely to be able to satisfy the condition due to having family, friends and social connections in this country whereas people from outside of Ireland are effectively penalised or disadvantaged if they have family members, friends or connections with their home countries. Thus it is quite difficult even for nationals of other EU countries who have moved to Ireland for work purposes to prove that their centre of interest has moved to this country. As this is a condition which it is harder for a non-Irish national to meet than an Irish national, it is discriminatory on those grounds. As far as EU nationals are concerned, it also seems to be in breach of the right to free movement of labour. Under the European Social Charter (Revised) (1996) Part V, Article E, the rights in the Charter "shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status". This particular criterion of the Habitual Residence Condition would also appear to infringe Article E of the Social Charter.

The lack of consistency in the absence of standard guidelines and adequate training on the application of the HRC has led to confusion and incorrect decisions. The legislation was amended by Section 30 of the Social Welfare and Pensions Act 2007and now states "notwithstanding the presumption in subsection (1)…", however in some cases the two year rule is still being applied. There is a substantial delay in the appeals process, in some cases approaching one year therefore if an incorrect decision is made at first instance, a person can wait for prolonged periods of time for a payment to which they are entitled.

In the Annual Reports of the Chief Appeals Officer of the Social Welfare Appeals Office (SWAO), in 2005 and 2006, reference was made to concerns relating to the consistency in decisions relating to the HRC:

> "During 2006 concerns were again expressed to the Decisions Advisory Office about the adequacy of the safeguards adopted by the Department to ensure

> consistency in the decision making process relative to the HRC. Appeals Officers have expressed concern that the roll out of the decision making function to deciding officers located in the Department's Local Offices is likely to increase the risk of inconsistent decision making" (page 14 of the 2006 Annual Report).

People who are required to live in Direct Provision, namely asylum seekers and those people seeking humanitarian leave to remain, are a definite group who are disadvantaged by the application of the Habitual Residence Condition as they are not entitled to any social welfare payments including Child Benefit which was formerly a universal payment. There seems to be a blanket policy of refusing the application of any person living in Direct Provision who has applied for a social welfare payment since the introduction of the HRC on the 1st of May 2004.

In addition one of the criteria used for determining whether an Applicant meets the HRC is "the nature and pattern of the person's employment". Asylum seekers, persons sekking protection or leave to remain or other non-nationals whose status in the country is undetermined are not permitted to work and so cannot meet this criterion, which is accordingly discriminatory against them on the basis of their nationality or country of origin.

The Chief Appeals Officer of the SWAO has been critical of the delays in the asylum process and the refusal of the DSFA to grant payments on the basis that a person is awaiting a decision on their status, sometimes for years at a time which results in great hardship to the applicant. In one recent decision (in accordance with section 318 of the Social Welfare Consolidation Act 2005), he states,

> "*It seems to me, therefore, that the failure of the State to provide for the expeditious hearing of asylum appeals, thereby giving rise to the artificial status of entitled to remain pending appeal, should not be used as a reason for penalising appellants who can exercise no control over the timescale within which their artificial status will be finally determined*."

9. **Is there any legislation or administrative rule concerning the social welfare code which may to the knowledge of you or your organisation disadvantage persons due to *membership of the Traveller community*?**

Yes

In relation to the Traveller community, this should also be taken to include members of the Roma community. The Traveller and Roma community faces discrimination in accessing social welfare payments. Travellers who apply for Supplementary Welfare Assistance in Dublin are dealt with through a 'special' segregated service in Castle Street. Prior to 1985 Travellers were entitled, like other Irish social welfare applicants, to use their local office. There is currently a case pending on this issue under the Equal Status Act 2000.

Through our research, FLAC has discovered that it is policy to stop a Child Benefit payment (and presumably other social welfare payments) if a person fails to notify the relevant section of any change in address. The rationale for this policy appears to be that the person affected will then make contact with the department which has no other way of contacting the person concerned. There is concern that this rule may have negative effects on those members of the Traveller and Roma community who have no fixed or permanent address who may be discriminated against in this regard as a result of their traditional nomadic way of living.

10. **Is there any other group of people who you feel may be disadvantaged by any legislation or regulation or administrative rule concerning the social welfare code?**

Children – Children who are denied Child Benefit due to the requirement that their parents or guardians must satisfy the 'Habitual Residence Condition' (HRC) to qualify for the payment.

This particularly affects those children whose parents/guardians' legal status is not yet determined, i.e. asylum seekers and those seeking humanitarian leave to remain in the Direct Provision system, non EEA workers and migrant workers, (including those within the EEA) who have for whatever reason fallen out of the system and do not have PRSI records. It is particularly harsh on those people who can be awaiting decisions on their legal status for up to 5 years, whose children do not get child benefit for all that time. There is no exact figure of how many children are affected by this but FLAC estimates that it is around 3,000.

Imposing the HRC on Child Benefit also goes against the UN Convention on the Rights of the Child (CRC), to which Ireland is a party. Article 2 of the CRC deems that State parties must protect and ensure the rights of all children "within their jurisdiction without discrimination of any kind" including any prejudice based on their parents' status. In addition Article 3 states that in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The best interests of the child are clearly not taken into consideration where children who are already in vulnerable financial situations do not receive Child Benefit. Finally the right of every child to "benefit from social security" is protected under Article 26 of the Convention.

In his annual report in 2004, the Chief Appeals Officer expressed his concern about the compatibility of the HRC with the UN Convention on the Rights of the Child:

> "There are particular concerns in relation to the application of the HRC to the Child Benefit Scheme – including a view that Child Benefit should have been excluded from the remit of the HRC altogether".

In addition to contravening the CRC the denial of Child Benefit to certain children also goes against the government's own child poverty strategies. Child Benefit has always been used by the State as a crucial tool in removing children from poverty. In the Social Partnership document "Towards 2016" the Government states that "very significant

additional resources are being made available in 2006 to help tackle child and family poverty". Furthermore the current National Children's Strategy 2000-2010 states

> *"Child benefit is an important means of reducing child poverty and supporting the welfare of children, given its universal coverage and its neutral relationship to both the employment incentive and decisions regarding family formation. Significant increases have been allocated directly to support and maintain children in Ireland. Child Benefit will continue to be increased over the lifetime of the Strategy".*

The Strategy is acknowledging the success of Child Benefit as a positive initiative in combating child poverty. Thus, by imposing the HRC on Child Benefit, the actions of the State are not only incompatible with international human rights law but also its own long term and strategic policies with regard to eliminating child poverty and improving the standard and quality of life for many children in Ireland.

People who are required to live in Direct Provision, namely asylum seekers and those people seeking humanitarian leave to remain, are a definite group who are disadvantaged by the application of the Habitual Residence Condition as they are not entitled to any social welfare payments including Child Benefit which was formerly a universal payment. There seems to be a blanket policy of refusing the application of any person living in Direct Provision who has applied for a social welfare payment since the introduction of the HRC on the 1st of May 2004.

Furthermore, people living in Direct Provision are disadvantaged by the SWA payment they receive which is €19.10 per week for an adult and €9.60 per week for a child. In 1999 when the scheme of Direct Provision was introduced the rate of Supplementary Welfare Allowance was IR£76 which converts to €96.50

According to FLAC's report "Direct Discrimination" published in 2003, when the scheme was introduced, the "implied assessment of the benefit of Direct Provision" was

€76.16 per week which after subtracting this figure for accommodation and board, would have left a surplus of €20.34 which is obviously more than the €19.10 that those living in Direct Provision then received and continue to receive.

The current rate of SWA is €185.80 and is due to increase to €197.80 per week later this year and although the cost of Direct Provision must have increased in line with inflation, the allowance given to people who live under this scheme has failed to increase for the eighth consecutive year. The allowance in 1999 equated to less than 20% of the total SWA payment but in 2008 it will equate to less than 10% of the total value of SWA despite SWA increasing by more than 50%. On page 21 of the report, it states "The refusal of SWA is made on the basis that taking into account the value of Direct Provision accommodation the applicant's means are at least equal to the statutory rate less €19.10". The FLAC report highlights the case of people accessing homeless services who are also provided with State funded accommodation and meals but in some instances they are also granted rent allowance where the rent in a hostel is above a certain level. In 2003 the "CWOs applied the guideline that a person should not be left with less than a certain minimum amount per week after provision of board and lodging" which was then approximately €65. At this time FLAC argued that this difference in provision for people entitled to access homeless services and those who lived in Direct Provision amounted to a form of discrimination and submitted that it may have been a breach of the Equal Status Act 2000.