

Submission on the Position of Full-Time Carers

Free Legal Advice Centres
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FLAC's Mission Statement

The Free Legal Advice Centres (FLAC) is a non-governmental organisation which campaigns for full and equal access to justice for all, promotes innovative methods to meet the needs of those living in poverty and operates a range of services designed to meet those needs.

➤ Introduction

The recent increase in respite care grants, together with the introduction of the Carer's Leave Act 2001 and the increase in income disregard in the means test for Carer's Allowance are welcome improvements to the entitlements of carers. However, whilst providing some measure of support, it is arguable that the current measures do not adequately assist carers. It is our intention in this submission to concentrate on the Social Welfare entitlements of carers, highlighting what FLAC believes are necessary changes to the current system in order to ensure adequate recognition of the valuable contribution of carers. It is also intended to scrutinise the Carer's Leave Act 2001 which FLAC feels fails to provide sufficient support and flexibility to carers.

➤ Carer's Benefit

A key criticism of the Carer's Benefit is that a carer who is entitled to another social welfare payment, e.g. a widow's pension, may not also receive Carer's Benefit. They must opt for either the pension or the benefit. Those choosing to maintain their widow's pension lose out on the Respite Care Grant, which is payable only to those in receipt of Carer's Allowance, Carer's Benefit or Domiciliary Care Allowance.

It is also the case that where the care of a person is shared, only one carer can claim Carer's Benefit. Although there is a requirement that the care recipient be in need of "Full-time Care and Attention", according to the Department of Social and Family Affairs it is neither intended nor desirable that a carer would be expected to provide care on a twenty four hour basis. As such, it is unjust to prevent additional carers of the relevant person to be denied receipt of Carer's Benefit. FLAC recommends that this rule be abolished and that the second carer also be entitled to claim Carer's Benefit.

S.6(7) of the Carer's Leave Act 2001 declares that entitlement to Carer's Leave does not depend upon qualifying for the payment of Carer's Benefit i.e. a right to

Carer's Leave exists regardless. The PRSI contribution conditions for Carer's Benefit set out in the Social Welfare Act 2000, while not extremely onerous, may still lead to a situation where some employees may not qualify for Carer's Benefit. While such persons may still be entitled to Carer's Allowance, FLAC proposes an automatic right to Carer's Benefit once the conditions for Carer's Leave have been met. At a minimum the qualifying conditions should be relaxed so as to facilitate a wider range of employees in taking such leave.

In addition FLAC recommends the creation of a long-term benefit option for those who leave work to provide care on a long-term basis (i.e. longer than the current 65 week period for Carer's Leave). This benefit would be payable from the expiry of the Carer's Benefit. Employers would not be affected as the carer would not be entitled to Carer's Leave after the expiry of the 65 week period.

➤ Carer's Allowance

Before the Department of Health launched its Health Strategy in 2001 it called for submission from various groups. The need for financial support for family carers figured very strongly in submissions from the general public as there are significant costs associated with caring that need to be met. The consensus among community-based organisation was similar, with calls for non-means testing of the Carer's Allowance and statutory rights for all carers. The proposals below mirror to some extent those put forward to the Department of Health.

While the means test for Carer's Allowance has been relaxed, it is recommended that the means test be abolished altogether and replaced with an assessment of the needs of the care recipient and the carer. It is also proposed that a continual care payment should be established for carers of highly dependent care recipients. This payment should be a non-means tested payment.

If the carer is caring for more than one person, he/she may get an extra payment of up to half the maximum of the Carer's Allowance. FLAC recommends that a carer be entitled to full Carer's Allowance for each person under his/her care. The annual respite payment is doubled if the carer is caring for more than one person. FLAC believes that the Carer's Allowance should also be doubled in such instances.

The general rule is that the carer must be living with the person being cared for. While this rule can be relaxed in certain cases, FLAC believes that it is too restrictive. It is possible for a carer, who does not live with the person being cared for, to provide full care and attention to that person without the existence of a direct communication system between the two houses.

The person being cared for must have so severe a disability as to require continuous supervision and frequent assistance throughout the day in connection with their normal personal needs and to require the care for at least 12 months.

FLAC recommends that the 12 month period be reduced as it serves to exclude many carers that would otherwise qualify for Carer's Allowance.

FLAC also feels that the rule that the carer must not be employed or self-employed outside the home in excess of 10 hours per week should be relaxed. Currently, should a carer wish to work outside the home for up to ten hours per week this must first be cleared with the department. FLAC recommends that this restriction be abolished, and that the carer be allowed to work up to 10 hours per week outside the home without the clearance of the department. The carer should be allowed to work for 10-20 hours per week outside the home with the department's consent.

As with Carer's Benefit, if there are two carers for the same person, only one may receive the Carer's Allowance. As per above, FLAC recommends that the benefit be available to both carers.

➤ Carer's Leave

While the introduction of the Carer's Leave Act 2001 is a welcome introduction for employees who have to leave the workplace to provide care it is found to be wanting in a number of areas.

Part II

Service Requirement

S.6(1) of the Act states that the employee must be employed for a period of 12 months continuous employment by the employer in question in order to avail of Carer's Leave. This restriction will exclude a number of potential carers from the legislation. FLAC feels that one year is too long and lacks the flexibility to deal with an emergency situation. It may be the case for a number of persons needing full-time care that there is only one individual in a position in terms of both income and family responsibilities to be their carer. We recommend that each situation be decided on a case by case basis as this blanket service rule is too restrictive.

Right to Work During Leave

The Minister has passed regulations in pursuance of the Social Welfare Act 2000 to allow carers in receipt of benefit to work up to 10 hours per week subject to certain maximum earnings. Given that the Carer's Benefit is currently paid at the rate of €139.70 (which is only €14.50 above the current rate of Unemployment Benefit), it is likely that this would involve a significant loss of income for the majority of carers. The maximum of 10 hours work per week is likely to be too little to offset this loss of income which is liable to occur in some cases over a continuous 15 month period.

Limitation on Number of Carers

S.6(3) provides that only one employee can take Carer's Leave in respect of the same care recipient at any one time. As noted already it may be necessary and

appropriate in some cases that two carers are available for a particular relevant person in order to rotate and take pressure off each other as well as to provide 24 hour care where needed. We believe that more than one carer should be allowed to take leave with regard to the same person where it is shown that the illness is of such severity that it is warranted. The current provisions lack the flexibility to allow for such situations.

Methods of Taking Leave

S.8 provides that the leave may be taken in one continuous period of 65 weeks or in a number of aggregated periods. An employer may refuse, on reasonable grounds, to permit an employee to take a period of carer's leave which is less than 13 weeks duration. FLAC points out that it may not be economically viable for the carer to take longer than 13 weeks at any one time given the likely loss of income involved.

Also S.8 states that an employee who has taken a portion of carer's leave of less than 65 weeks will not be entitled to commence a further period in respect of the same care recipient until 6 weeks has elapsed since the termination of the previous period of leave. We feel that greater flexibility is needed here. It may be that during this 6 week period urgent circumstances dictate that the person to be cared for needs full time care and attention. This provision should be loosened in order to take into account exceptional circumstances that might exist in any particular case.

Consecutive Periods of Leave

Subsection (4) of S.8 goes on to provide that once an employee has finished a full term of carer's leave another similar period cannot commence until 6 months has elapsed. Again we feel that this rule is too rigid as it fails to allow for any exceptional cases that might occur. It should be possible to apply for an exemption to these general rules to allow for such situations.

Part III

Annual Leave and Public Holiday Entitlements

S.13(1) specifies that the period on carers leave shall be regarded as continuous employment and will not be treated as part of any other leave entitlement. However, the section also specifies that an employee does not accrue any annual leave or public holiday entitlement during the 65 weeks carer's leave. This is in direct conflict with other pieces of employment legislation dealing with leave, such as the Maternity Protection Act, the Adoptive Leave Act and the Parental Leave Act, all of which allow service during periods of leave to count for annual leave and public holiday purposes. It is arguable that an employee, having completed a period of carer's leave which may in many cases be quite traumatic, should be entitled to a period of annual leave before returning to work. If women can accrue a holiday entitlement during the course of maternity leave, we consider it unjust that a carer cannot accrue some entitlement during carer's leave. A right to a portion of annual leave should be available following carer's leave.

Right to Return to Work

S. 14 allows the carer to return to work in the same job and with the same employer that applied before the leave was taken, subject to any changes of ownership that might have occurred in the interim. S.15 goes on to provide that if it is not reasonably practicable for the employer to allow the employee to return to the job they were in before the leave was taken, the employee shall be offered "suitable alternative employment" under a new contract of employment. This is dependent on continuity of service being preserved, on the work being of a kind that is suitable in relation to the employee concerned and that the terms and conditions of employment are not "substantially less favourable" than those of the previous contract the employee enjoyed.

FLAC has made the point before in relation to other legislation concerning protective leave that these provisions are open to abuse. The reference to whether it is reasonably practicable for an employer to allow the employee to return to the same job is wide open to subjective interpretation. It is also important to note that the terms and conditions of any new contract of employment must not be *substantially* less favourable than the old one. However, this implies that they can be less favourable provided they are not substantially so. This is, in effect, a statutory option for an employer to disimprove an employee's terms and conditions of employment following their period of leave. In the case of a lengthy period of leave from work such as envisaged by this Act an employer is more likely to utilise this section. As such, we recommend amending this section by removing the word 'substantially' so that the terms and conditions of the alternative employment should simply not be less favourable.

➤ The Constitution

The current provisions of Bunreacht na hEireann do not establish any rights for carers. Article 41 (dealing with the family and women in the home) has not been of any particular assistance even to women working exclusively in the home. The CRG has recommended that the provisions be made gender neutral and has suggested that it be re-worded as follows:

"The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home."

FLAC supports this proposition as it would lead to a constitutional recognition of the important contribution made to society by those caring for others.

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