

# **Social Welfare (Miscellaneous Provisions) Bill 2008**

## **Submission**

**Free Legal Advice Centres & Northside Community Law Centre**

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## **Executive Summary**

This submission proposes amendments to the Social Welfare (Miscellaneous Provisions) Bill that we believe better address the needs of individual families to be protected from poverty, while balancing the needs of the Exchequer to maintain fiscal prudence at a time of recession.

### **Mortgage Interest Supplement (Page 5)**

S14 of the Bill proposes to restrict the time and duration of payment and excludes specific mortgages from income support by inserting a new definition of Mortgage Interest. We argue that the effect of the proposed changes are unreasonably punitive and will result in increased costs in the medium to long term.

### **Mortgage Interest Supplement and the delegation of power (Page 13)**

The proposed delegation of power to the Health Service Executive is unnecessary as it duplicates functions already delegated to regulation. This issue is discussed in the context of existing poor administrative practice and the effect of procedural flaw in the appeals process that is preventing clients accessing a fair hearing.

### **Working Group on the Review of the Supplementary Welfare Allowance Scheme; Mortgage Interest Supplement (Page 17)**

An alternative policy approach is proposed which takes into account the recommendations of the above group, current financial restraints, and the needs of those who are most vulnerable.

### **Rent Supplement (Page 18)**

Minor amendments to Section 14(2) (c) of the Bill are proposed. The amendments strengthen the desired need for clear provision in primary legislation while at the same time protecting the existing positive discretion afforded to staff in the Health Service Executive.

### **Jobseekers Benefit (Page 18)**

We argue against the retrospective implementation of the proposed changes to Jobseekers Benefit.

### **Child Benefit/Early Childcare Supplement (Page 19)**

While condemning the cuts to child income support, we welcome the stated intent of the Government to reform child income support if such reform ensures the principle of universality and the protection of the rights of all children in the State.

### **A human rights perspective (Page 20)**

We argue that proposals in the Bill as they stand are not compatible with the State's obligations under the European Convention on Human Rights. The proposals damage both the rights of the individual and also the balanced rights of society as a whole.

## Proposed amendments

<b>Social Welfare (Miscellaneous Provisions) Bill 2008</b>	
<b><u>Section 14</u></b> <b><u>Delete in full</u></b>	<p><b><u>Insert</u></b></p> <p><b>14.—</b>(1) Section 187 of the Principal Act is amended by inserting the following definitions:</p> <p>“‘Mortgage interest’ means interest on a loan that has the meaning given to it by section 2 (1) of the Consumer Credit Act 1995 (as amended by section 2 of, and Schedule 3 2, the Central Bank and Financial Services Authority of Ireland Act 2004.</p> <p>‘mortgage lender’ has the meaning given to it by section 2(1) (as amended by section 2 of, and Schedule 3 to, the Central Bank and Financial Services Authority of Ireland Act 2004) of the 5 Consumer Credit Act 1995.”</p> <p>(2) Section 198 (as amended by section 25 of the Social Welfare and Pensions Act 2007) of the Principal Act is amended—</p> <p>(a) in subsection (2), by substituting “and, subject to subsection (3E) and (3F), the amount of such a payment” for “and the amount of such a payment”,</p> <p>(b) in subsection (3), by inserting “, (3E) and (3F)” after “(3D)”,</p> <p>(c) by inserting the following subsection after subsection (3D):</p> <p>“(3E) Without prejudice to the generality of subsections (1), (2) and (3), and subject to subsections (3A), (3B), (3D), (3F) and (4), where regulations under this section provide for the payment of a supplement towards the amount of rent payable by a person in respect of his or her residence, the regulations shall prescribe the appropriate amount of rent in respect of which such supplement is payable having regard to the family circumstances of the person to whom such supplement is payable and the location of the residence of that person.,</p> <p>(3F) Notwithstanding the provisions in subsection (3E), and without prejudice to the generality of subsections (1),(2),(3) and (4), the Executive or deciding officer may award a supplement, in any case, where the Executive or deciding officer considers it reasonable, having regard to all the circumstances of the case.”</p> <p>(d) in subsection (5), by deleting “in respect of his or her residence”,</p>

	<p>and</p> <p>(e) by inserting the following subsections after subsection (5):</p> <p>“(5A) Without prejudice to subsections (2) and (5) and subject to subsection 5(B), regulations under subsection (1) may prescribe the conditions and circumstances under which, and the periods for which, the supplement referred to in subsection (5), is payable.</p> <p>(5B) Notwithstanding the provisions in subsection (5A), and without prejudice to subsection (2) and (5), the Executive or deciding officer may award a supplement, in any case, where the Executive or deciding officer considers it reasonable, having regard to all the circumstances of the case.”</p> <p>(3) Section 199(1) of the Principal Act is amended by deleting the definitions of “mortgage interest” and “mortgage lender”.</p>
<b><u>Section 18 (2)(a)</u></b>	<b><u>Delete (3A)</u></b>
<b><u>Section 18 (2)(b)</u></b>	<b><u>Delete (4A)</u></b>
<b><u>Insert new section to replace Section 312 of the Principal Act</u></b>	<p><b><u>Delete Section 312 (as amended by section 18 of the Act of 2008) of the Principal Act and insert:</u></b></p> <p>“Where a person is dissatisfied with the determination of an appeal by the person under <u>section 323</u> in relation to a claim under section 196, 197 or 198, the question shall, on notice of appeal being given to the Chief Appeals Officer within the prescribed time, be referred to an appeals officer.”</p>

## **1.0 Introduction**

This submission argues that the proposed changes in the Social Welfare (Miscellaneous Provisions) Bill 2008 are punitive in their immediate effect and regressive in their absence of a coherent policy framework. We submit that the response of the Minister to the needs of those acutely affected by the recession is legislating to restrict and inhibit access to basic income supports.

The payments affected represent critical income supports that if changed carelessly in law will not only punish those in greatest need but will also defeat the Government objective of reining in public expenditure. These costs will be seen in the very real prospect of increased homelessness and long term dependency on the State.

In addressing the specific proposals in the Bill we have focused on the following:

- The need to maintain the principles of the primary legislation. That is, to protect individuals and families from destitution.
- In proposing amendments consistent with the legislation, we have focused on change that is practical, fair and without judgement.
- The need to consider the increased cost to the Exchequer if the principles of the legislation are undermined.

Our submission concentrates primarily on the proposed amendments to in respect of Mortgage Interest Supplement, Jobseekers Benefit and Rent Supplement.

Before addressing these proposals it is important to acknowledge the clarity that has now been proposed in respect of the One Parent Family Payment and the Widowed Parent Grant, Sections 11 and 13 respectively.

## **2.0 Mortgage Interest Supplement**

S14 proposes to further restrict access to Mortgage Interest Supplement by amending legislation to do the following:

- Restrict the time and duration of payment
- Exclude specific mortgages from support by inserting a new definition of Mortgage Interest

- Delegation of increased administrative power to the Health Service Executive.

In examining the proposals in the Bill we have suggested alternative amendments. Our proposals achieve the desired objective to establish the conditions of the scheme in primary legislation but do so in a manner that will not endanger access to basic income supports.

## 2.1 Existing legislative and policy framework

The objective of the Supplementary Welfare Allowance Scheme, as set out in Chapter 9 of the Social Welfare Consolidation Act 2005 (as amended), is based on the principle of a person having sufficient means to meet their needs (S189). In the absence of sufficient income a supplement may be paid, subject to any legislative restrictions. Meeting the needs of a person includes the provision to pay supplements in respect of rent or mortgage costs (S198)<sup>1</sup>.

Currently, the detailed conditions governing each supplement are delegated to regulation<sup>2</sup>. The regulatory provisions have an inherent capacity to allow flexibility. Essentially, Community Welfare Officers have the discretion to allow payment in an individual case if the evidence of individual need is persuasive.

The introduction of more specific provisions in primary legislation is desirable but this needs to be achieved in a manner that preserves the existing positive discretion that allows the Scheme to be flexible in response to income deprivation and hardship.

In 2006 the Department of Social and Family Affairs published a report from an internal working group set up to review the Supplementary Welfare Allowance Scheme<sup>3</sup>. In examining the objectives of the Scheme, it concluded:

*The Group also endorsed the position that this SWA support service should operate without blame, i.e. regardless of how the applicant came to be in need of income support. The only issue for ongoing eligibility, subject to statutory eligibility restrictions, is*

<sup>1</sup> 198 (1) Subject to this Chapter, in the case of a person whose means are insufficient to meet his or her needs, regulations may provide for a weekly or monthly payment to supplement that person's income.

<sup>2</sup> Social Welfare (Consolidated Supplementary Welfare Allowance) Regulations 2007, S.I. 412 2007.

<sup>3</sup> Report of the Working Group on the Review of the Supplementary Welfare Allowance Scheme – Phase II, November 2006, Department of Social and Family Affairs, Government Publications.

*his/her individual ability to become, or more towards, self sufficiency. (Page 194)*

The above statement reinforces the first principle of the Scheme set out in the primary legislation and so clearly articulated in S189 of the Social Welfare Consolidation Act 2005 (as amended):

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

We argue that the current proposals in S14 of the Bill demonstrate a decision to erode this principle set out in law, by imposing restrictions of such magnitude as to render S189 and S198 to the status of quaint sentiment rather than a protection against homelessness and deprivation of basic needs.

## **2.2 Proposed definition of Mortgage Interest**

The Bill (S14 (1)) proposes to insert a new definition for Mortgage Interest<sup>4</sup>.

*... mortgage interest' means the proportion of any amount payable by a person to a mortgage lender which is for the time being attributable to interest payable under an agreement entered into by that person with the mortgage lender for the purpose of defraying money employed in the purchase, repair or essential improvement of the sole or main residence of that person or to pay off another loan used for that purpose but does not include interest payable in relation to such agreement by virtue of a delay or default in making a repayment under that agreement ...*

The definition proposed seeks to judge past action rather than present need. A loan taken out at a time when it could be paid becomes an irresponsible action in hindsight and therefore not deserving of assistance. This is clearly contrary to any principle of 'no blame' income support as all those who have consolidated their loans or 'topped up' their mortgages will be refused assistance with that portion of the loan<sup>5</sup>.

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<sup>4</sup> Currently the definition of Mortgage Interest is confined to Section 199 of the Social Welfare Consolidation Act 2005 which addresses situations in which an individual might be disqualified from receiving a payment. A definition of Mortgage Interest also exists in the regulatory provisions contained in S.I. 412 2007.

<sup>5</sup> This is supported by the increased number of calls received by the Money Advice and Budgeting Service (MABS) technical support panel concerning clients who are facing potential repossession and a lengthy appeals process following a refusal of Mortgage

It is important to note that this definition is not significantly different from the one already present in regulation. Under the existing regulatory definition, a person would probably be refused payment if the loan was for a purpose other than the purchase and or repair of their residence. However, Article 38 of the regulations does allow the Health Service Executive (HSE) to award a supplement in any case where the circumstances so warrant<sup>6</sup>.

In other words, irrespective of what the loan was used for, the fact a loan is secured against the home of the claimant can be examined and a supplement potentially awarded in some circumstances. In effect, as the primary legislation address the question of need, so the regulatory restriction cannot be seen to contradict that principle.

- **We are recommending that a new definition be inserted in the primary legislation. However, we submit that the definition should include all loans, irrespective of their purpose, provided those sums are secured against the family home. We propose that for this purpose the definition of loan contained in the Consumer Credit Act 1995 (as amended) be used<sup>7</sup>. See proposed wording to amendment on page 3.**

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Interest Supplement. Statistics available from MABS show that nearly 27% of over 12,000 new clients in 2008 have mortgages and are experiencing problems in making repayments

<sup>6</sup> S.I. 412 2007, Article 38 (1) *Payment in exceptional circumstances:*

*Notwithstanding the foregoing articles, the Executive may award a supplement in any case where it appears to the Executive that the circumstances of the case so warrant.*

<sup>7</sup> “‘housing loan’ means—

(a) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land—

(i) for the purpose of enabling the person to have a house constructed on the land as the principal residence of that person or that person's dependants, or  
(ii) for the purpose of enabling the person to improve a house that is already used as the principal residence of that person or that person's dependants, or  
(iii) for the purpose of enabling the person to buy a house that is already constructed on the land for use as the principal residence of that person or that person's dependants, or

(b) an agreement for refinancing credit provided to a person for a purpose specified in paragraph (a)(i), (ii) or (iii), or

(c) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is constructed where the house is to be used, or to continue to be used, as the principal residence of the person or the person's dependants, or

(d) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is, or is to be, constructed where the person to whom the credit is provided is a consumer



### **2.3 Statutory protection of the existing discretion of decision makers to meet need**

All our proposed amendments are concerned with the necessity to preserve the inherent flexibility of the Supplementary Welfare Allowance Scheme and its ability to address the individual needs of claimants. However, this discretion must not be at the expense of legislation that fails to determine specifically the conditions applicable to particular schemes

- **We are recommending that the powers contained in Article 38 of the regulations be inserted into Section 198 of the Principal Act. That is, the power to award a supplement in any case where the circumstances so warrant. This will protect the principle of response to need while at the same time allowing the Minister to determine the governing conditions by way of regulation. See proposed amendment on page 3.**

### **2.4 Restriction on the amount and duration of Mortgage Interest Supplement**

The Bill 2008 (S14 (2) (e)) proposes to introduce more prescriptive instructions in relation to the regulatory provisions governing the conditions under which a person may receive a supplement as well as explicitly delegating increased administrative power to the Health Service Executive to refuse or allow a claim<sup>8</sup>.

There are two distinct questions that need to be addressed in respect of this:

1. Are the proposals to limit the amount and duration of payment appropriate in a legislative and policy context?
2. Is the proposed delegation of administrative power to the Health Service Executive appropriate?

The first question is addressed below. The second question warrants separate treatment and is addressed in section 3.

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<sup>8</sup> (5A) Without prejudice to subsections (2) and (5), regulations under subsection (1) may prescribe the conditions and circumstances under which, and the periods for which, the supplement referred to in subsection (5), is payable.  
(5B) The amount of a supplement payable in accordance with subsection (5) shall be limited to the amount and duration determined by the Executive to be appropriate, having regard to the family circumstances of the person concerned and subject to the conditions and circumstances and the period for which the supplement is payable, as may be prescribed.

### 2.4.1 Current legislative provisions

Under current regulatory provisions, the only restriction to the duration and amount of a supplement is contained in Article 10 (2) (a) of S.I. 412 2007<sup>9</sup>. This restriction allows the HSE to refuse a supplement in a case where they believe the interest to be *unreasonable*.

However, this reason for refusal is counterbalanced by Article 10 (3) (a) and (b) which allow the HSE to award a supplement even if the amount of interest is considered unreasonable<sup>10</sup>.

In this type of case, the regulatory provisions restrict the duration of payment to 12 months. A straightforward example would be if someone became ill, could not work, and had a large mortgage, but there was likely to be recovery and a return to work within a fixed period.

Determining entitlement to a supplement from the perspective of what is reasonable allows each case to be decided on its merits by examining in relative terms what a client could pay prior to their change in circumstances, and taking into consideration their capacity to return to the workforce in the short to medium term.

### 2.4.2 Limitation of supplement

It is arguable that existing regulatory provisions do not attempt to place limits on the amount of Mortgage Interest Supplement for the simple reason that to do so in an equitable manner is impossible. As the State cannot dictate or predict the amount a person can borrow in the first instance, so the State cannot reasonably prescribe limits that intelligently relate to borrowings and subsequent needs should a person's circumstances change.

How are the proposed limits to be decided? In the case of Rent Supplement, limits are determined, in theory at least, by reference to the

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<sup>9</sup> (2) Subject to sub-article (3), it shall be a condition of any claimant's entitlement to a supplement under sub-article (1), that the Executive is satisfied that  
a) the amount of the mortgage interest payable by the claimant does not exceed such amount as the Executive considers reasonable to meet his or her residential and other needs.

<sup>10</sup> (3) (a) Notwithstanding sub-article (2) and subject to paragraph (b), the Executive may award a supplement where the amount of mortgage interest payable by the claimant exceeds such amount as the Executive considers reasonable to meet his or her residential and other needs.  
(3) (b) No supplement referred to in paragraph (a) shall be paid in respect of any period more than 12 months from the date on which the claim therefor is made.

prevailing market conditions. There is therefore the capacity to impose a reasonable methodology when restricting entitlement. This is not the case for mortgages.

Recent trends in decision making suggest that claims are being refused that might otherwise be awarded in different economic circumstances. The client's individual needs and rights under the legislation are thus disregarded in favour of finding a 'catch-all' administrative mechanism to decide claims.

- **To avoid this tendency we refer to our recommendation in 2.3 above. That is, the instruction to address distinct individual needs in the context of the regulatory interpretation.**

### **2.4.3 Current administrative practice**

Unfortunately, in many cases, Community Welfare Officers tend to refer to the rent limits when deciding what is a reasonable level of interest, despite the absence of regulatory instruction to do so.

In addition, recent decisions have shown a marked tendency to exclude claimants who have loans with lenders who charge interest at a higher rate. The following is an extract from a recent decision which captures the trend of refusals currently taking place:

*The interest rate from ... mortgages is ...which is well in excess of the normal mortgage rates. To qualify for a supplement under Section 12(2) of the Social Welfare Legislation, "The amount of supplement payable shall not exceed such amount as the Executive consider reasonable to meet the residential needs of the claimant". In your case reasonable accommodation can be obtained by you for less than €600 per month.*

The majority of refusals that are currently under appeal are the result of decisions such as the one above. The decision maker has failed to even consider what 'reasonable' means in the context of the claimant's capacity to pay the mortgage prior to becoming unemployed. Reference is made to private rental costs; not the client's mortgage. The decision maker has also determined that the interest rate charged is unreasonable without any justification for such a conclusion.

#### **2.4.4 Duration of payment**

The same objections can largely be applied to the issue of duration. Who decides? How long? What is the rationale? In the event of homelessness, how are the housing needs of the claimant to be met? At what cost?

#### **2.4.5 The effect of the proposed change**

In essence, the Bill is instructing decision makers to restrict access to such a degree as to render any regulatory protections void. If reference is made to rent limits for this purpose it is fair to conclude that the majority of claimants will be refused a supplement<sup>11</sup>.

The proposed introduction of limits is unreasonable, as they can have no arguable rationale as to how they are to be determined on a fair basis. To introduce this measure can only be described as a blunt and indiscriminate mechanism that contradicts the very principles of the primary legislation by deliberately excluding many applicants from receiving assistance.

- **We are recommending a more balanced approach which addresses the need to define the conditions and limitations of the Supplement while at the same time protecting the principle of meeting need from arbitrary interference. See page 3.**

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<sup>11</sup> Current figures excluding insurance costs show that mortgage repayments on borrowings of €300,000 are over €1,600 per month. Current rent limits do not exceed €1,200 per month in any area of the country.

### 3.0 Mortgage Interest Supplement and the delegation of power

Section 14 (2) (e) 5B is unnecessary as it duplicates the power already given to the Minister in form of regulatory provision in 5A. In addition it creates a dubious decision making power to the HSE that could leave the state exposed to considerable legal challenge under Section 3 of the European Convention on Human Rights Act 2003. That is, that every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

Specifically, it is proposed that in implementing the changes to the duration and limit on the payment of Mortgage Interest Supplement the Executive has full power to decide what that will mean in practice.

*The amount of supplement payable in accordance with subsection (5) shall be limited to the amount and duration determined by the Executive to be appropriate ...*

The HSE in this case is being invited, not to interpret regulation, but to make policy. This policy will be determined without the protection that is afforded to legislative change that demands debate, scrutiny and accountability. The only restriction on the Health Service Executive's administrative power in this case is that they should be cognisant of the regulatory when setting the limits and duration of payment.

It is perhaps the case that the Government, when drafting this Bill, decided that it would be inappropriate to set limits in law as this would invite considerable debate. Instead, a more circuitous route has been chosen, one which cannot be seen or challenged.

### 3.1 Administrative function of the Health Service Executive

The HSE is currently responsible for the administration of the Supplementary Welfare Allowance Scheme and this function is set out in S194 of the Social Welfare Consolidation Act 2005 (as amended)<sup>12</sup>. We submit that the proposal to delegate increased power to the HSE goes beyond giving effect to the principles of the parent act. In the first instance, the principle of limits is unsound and it is proposed to further

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<sup>12</sup> 194 (1) *Subject to the general direction and control of the Minister, the Executive, in respect of its functional areas, shall be responsible for the administration of functions performable under this Chapter and the functions relating to supplementary welfare allowance ...*

compound this problem by providing the HSE with unfettered authority to make policy to define who should receive assistance.

Historically this controversial approach was taken in the case of Rent Supplement. Due to frequent arbitrary and unaccountable decisions by officials in the Health Service Executive, it was decided to place rent limits in to regulation for reasons of transparency and fairness, whilst leaving discretion to Community Welfare Officers to pay over those limits in certain circumstances.

As we have argued in Section 2.4.2, limits cannot reasonably be applied to Mortgage Interest Supplement. However, should this irrational policy be pursued, it is critical that it is done in a manner that is transparent, accountable and, above all, challengeable.

### **3.2 The appeals process**

The considerable increase in the number of applications for Mortgage Interest Supplement and other income supports has resulted in a corresponding increase in the number of appeals.

It is understandable, although not necessarily sound, that decision makers under the pressure of increased claims might feel the need to refuse claims that might be allowed in different economic circumstances. In this climate, it therefore imperative to protect the rights of the claimant to a fair hearing, and to ensure a corresponding protection to decision makers from the accusation of bias.

We submit that it is necessary, therefore, to examine a structural flaw in the existing Social Welfare Allowance appeals process and amend it. We refer specifically to S312 of the Social Welfare Consolidation Act 2005<sup>13</sup>.

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<sup>13</sup> 312 Where a person is dissatisfied with the determination of an appeal by the person under section 323 in relation to a claim for Supplementary Welfare Allowance, the question shall, on notice of appeal being given to the Executive within the prescribed time, be forwarded by it to the Chief Appeals Officer for referral to an appeals officer. This section was amended by S18 of the Social Welfare and Pensions Act 2008 (No.2 Act).

### **3.2.1 The current appeals process**

If a person is refused a basic Supplementary Welfare Allowance payment or a supplement such as Mortgage Interest Supplement, they have a right of appeal to the Health Service Executive. If the appeal is unsuccessful, they have a further right of appeal to the Social Welfare Appeals Office.

If a claimant wishes to exercise this further right of appeal they are required to submit a notice of appeal to the Health Service Executive Appeals Office outlining the grounds of their appeal. The Health Service Executive Appeals Officer is then required to forward the case to the Social Welfare Appeals Office.

The difficulty with this approach is that it places the appellant at a disadvantage. The Health Service Executive, having already decided against the claimant, is afforded the opportunity to try the case again, based on new submissions made by the client, before the appeal is lodged with the Social Welfare Appeals Office.

A recent case highlights the extreme consequences of such an approach. A client, on giving notice of appeal to the Social Welfare Appeals Office, was advised that this notice must be made to the Health Service Executive who had already heard the case. The client and his representative complied with this instruction and duly submitted a detailed submission outlining the grounds of the client's appeal. However, the Health Service Executive Appeals Office chose to essentially 'sit on' the case, delaying the forwarding of the appeal for a period of over 20 weeks. During that time, the HSE had the opportunity to consolidate their arguments by examining the client's submission. Proceeding to oral hearing in these circumstances would place the client at a disadvantage as they would be without the protection of the basic principles of natural justice that ensure a fair hearing.

Other examples have seen the Health Service Executive Appeals Office referring cases back to Superintendent Community Welfare Officers after refusing the appeal rather than forwarding them to the Social Welfare Appeals Office. Case records show that this has been done to look for additional reasons for refusal despite the matter having been already decided.

### 3.2.2 Compatibility with the European Convention on Human Rights

We assert that the current appeals structure applicable to Supplementary Welfare Allowance appeals is incompatible with Article 6<sup>14</sup> of the European Convention on Human Rights as enforced by the European Convention on Human Rights Act 2003, in particular S3 (1) which states:

*Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.*

- **We propose that S312 of the Principal Act be amended to ensure that the decisions of officials of the HSE are appealed in a manner consistent with the appeals process applicable to decisions of deciding officers. That is, notice and grounds of appeal are submitted to the Social Welfare Appeals Office. See page 3.**

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*Article 6 (1): Right to a fair trial*

*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*



#### **4.0 Working Group on the Review of the Supplementary Welfare Allowance Scheme; Mortgage Interest Supplement**

The time to consider the issue of reasonable lending and reasonable borrowing has gone. We are in a situation where reality of need demands an intelligent response that avoids greater cost in the long term.

In this context, we reason that a more equitable and fiscally sensible approach would be to consider one of the recommendations of the Working Group on the Review of the Supplementary Welfare Allowance Scheme<sup>3</sup> (see Section 2.1 earlier).

*Payment to long-term recipients of mortgage interest supplement should be reviewed with a view to putting procedures in place to address their long-term housing need. This may take the form of a financial interest in the customer's property. (Page 18)*

The alternative in passing this Bill in its current form is to create substantial debt, increase repossessions and essentially render a significant number of households more financially dependent on the social welfare system through homelessness and the provision of Rent Supplement.

The recommendation of the Working Group was made in 2006 just before our current crisis began. Is it not reasonable to suggest the recommendation might be given even stronger consideration given what has taken place since?

- **We are recommending that it would be prudent to consider strengthening the entitlement to Mortgage Interest Supplement in the short term, thereby providing people with the necessary safety net to successfully move out of unemployment. We also contend that it would be wise to consider payment of a supplement in the medium and long term that is conditional on the State having a financial interest in the property.**

**In addressing the above considerations we are recommending that an expert group be convened to examine these suggestions with representatives from relevant stakeholder organisations.**

## 5.0 Rent Supplement

The proposal in respect of Rent Supplement (S14 (2) (c)) needs clarification. Essentially, it is reinforcing the existing conditions applicable to Rent Supplement applicants which are set out in regulation. It is arguable therefore, that the change is benign and possibly welcome as it clarifies conditions of entitlement in primary legislation. However, although rent limits currently apply in regulation, there is also provision to allow Community Welfare Officers the discretion to exceed those limits.

In reading the proposed amendment, it can reasonably be interpreted that the currently allowable discretion operated by Community Welfare Officers is being restricted. This interpretation would defeat the positive flexibility that is an inherent part of the Supplementary Welfare Allowance Scheme.

- **We are recommending minor amendments to this section that will preserve the positive discretion to award payment in cases of exceptional need. See page 3.**

## 6.0 Jobseekers Benefit

The proposed changes to Jobseekers Benefit increase the number of contributions required for the payment, reduce the length of time a person can receive it and retrospectively shorten the claim time for existing claimants

It must, be noted that changes such as the ones proposed serve to emphasise a policy of 'fiddling with' the legislation to save money in the short term at the expense of a more long term policy approach that might seek to strengthen the social insurance principle in law.

### 6.1 Retrospective change to Jobseekers Benefit

One distinct change to Jobseekers Benefit that must be resisted vigorously is the retrospective use of legislation which removes a benefit from those who have already qualified under the provisions of existing law.

It is an accepted principle that statutory construction should employ a presumption against retrospectivity. This principle has generally been upheld in the development of social welfare law over the years, to the extent there are usually provisions to explicitly protect the rights of existing claimants.

It is arguable that Jobseeker's Benefit as a social insurance benefit confers on the claimant distinct rights to receive the payment having made all the required social insurance contributions. To extinguish that right retrospectively is to amend a scheme in which the recipient is already participating. In effect, the claimant could be seen to have a property right to that payment under the terms under which they originally qualified.

- **We are recommending that the retrospective effect of the changes to Jobseekers Benefit contained in S18 of the Bill be deleted. See page 3**

## **7.0 Child Benefit/Early Childcare Supplement**

S20 and S21 of the Bill propose amendments to the Principal Act to cut Child Benefit and Early Childcare Supplement respectively. Child Benefit will be paid at half the full rate for those aged 18. From December 2009 no Child Benefit will be paid for 18 year olds. Early Childcare Supplement will be stopped at 5years 6 months rather than 6 years.

The cuts in Child Benefit and the Early Childcare Supplement have been extensively commented on in media. The changes, as proposed, illustrate more a panic to find the loose change for the bus fare, rather than a more measured approach to reforming child income support.

- **We note the Government's publicly expressed commitment to reform child income support and in particular the intention to put forward proposals in coming year. We cautiously welcome such proposals if they address the needs of all children in the State and retain the universality principle of Child Benefit.**

**We recommend that relevant stakeholders are involved in a consultation process to examine any proposed reform of Child Income support.**

## **8.0 A human rights perspective**

The changes to both Jobseekers Benefit and Mortgage Interest Supplement demand scrutiny as to their compatibility with the European Convention on Human Rights as enforced by the European Convention on Human Rights Act 2003, in particular, Article 1 of the first protocol, Article 8 and Section 3 of the Act.

The obligations in the Convention carefully balance the rights of the individual with the rights of society as a whole. It is legally required that the State considers its positive obligations to interfere in order to meet its obligations under the Convention.

### **8.1 Article 1 of the first protocol: protection of property**

*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

When applied to the proposed amendments in respect of Mortgage Interest Supplement it is clear that the Government will argue that the public interest is being served in the form of fiscal restraint. This analysis is not tenable. In choosing to introduce measures to restrict a support to the extent proposed, is to at once threaten the property of claimant and then collaterally cause a greater cost to the Exchequer in the form of alternative housing supports.

In the case of retrospective cuts to Jobseekers Benefit it is arguable that the State has chosen to ignore the right to benefit as a property right without sufficient justification as to the necessity of this measure from the public interest.

## **8.2 Article 8: right to respect for private and family life**

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

It is arguable the proposals in respect of Mortgage Interest Supplement fail in their compatibility with Article 8. The State has chosen to wilfully interfere with access to an income support that relates to the protection of the family home and conversely chosen not to interfere to help alleviate the current difficulties faced by claimants.

Perversely, the balanced rights of society in respect of the economic well-being of the country are being damaged though fiscal panic and an absence of foresight as to the increased costs to the Exchequer in the medium to long term in the form of dependence on Rent Supplement and homelessness.

We thus propose amendments to alleviate the worst excesses of the proposed legislation in a manner that is compatible with the Convention provisions.

## **8.3 Section 3. European Convention on Human Rights Act 2003**

*3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.*

The current proposals in the Bill expose the State to accusations of being in breach of the above protection. We refer specifically to the existing SWA appeals structure and the proposed amendment to delegate increased power to the Health Service Executive.