



NOT FAIR ENOUGH

Making the case for reform of the
social welfare appeals system

EXECUTIVE SUMMARY

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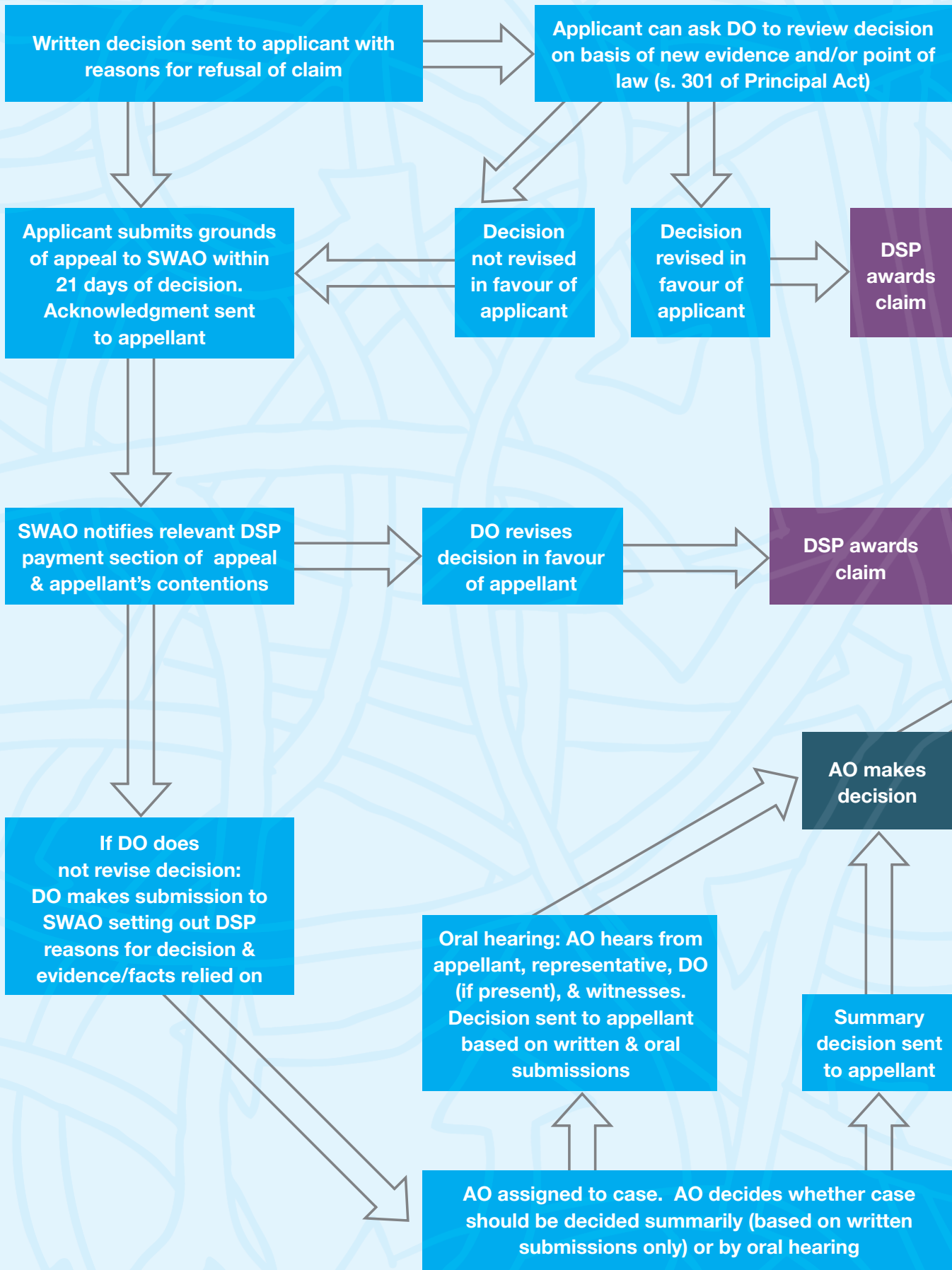
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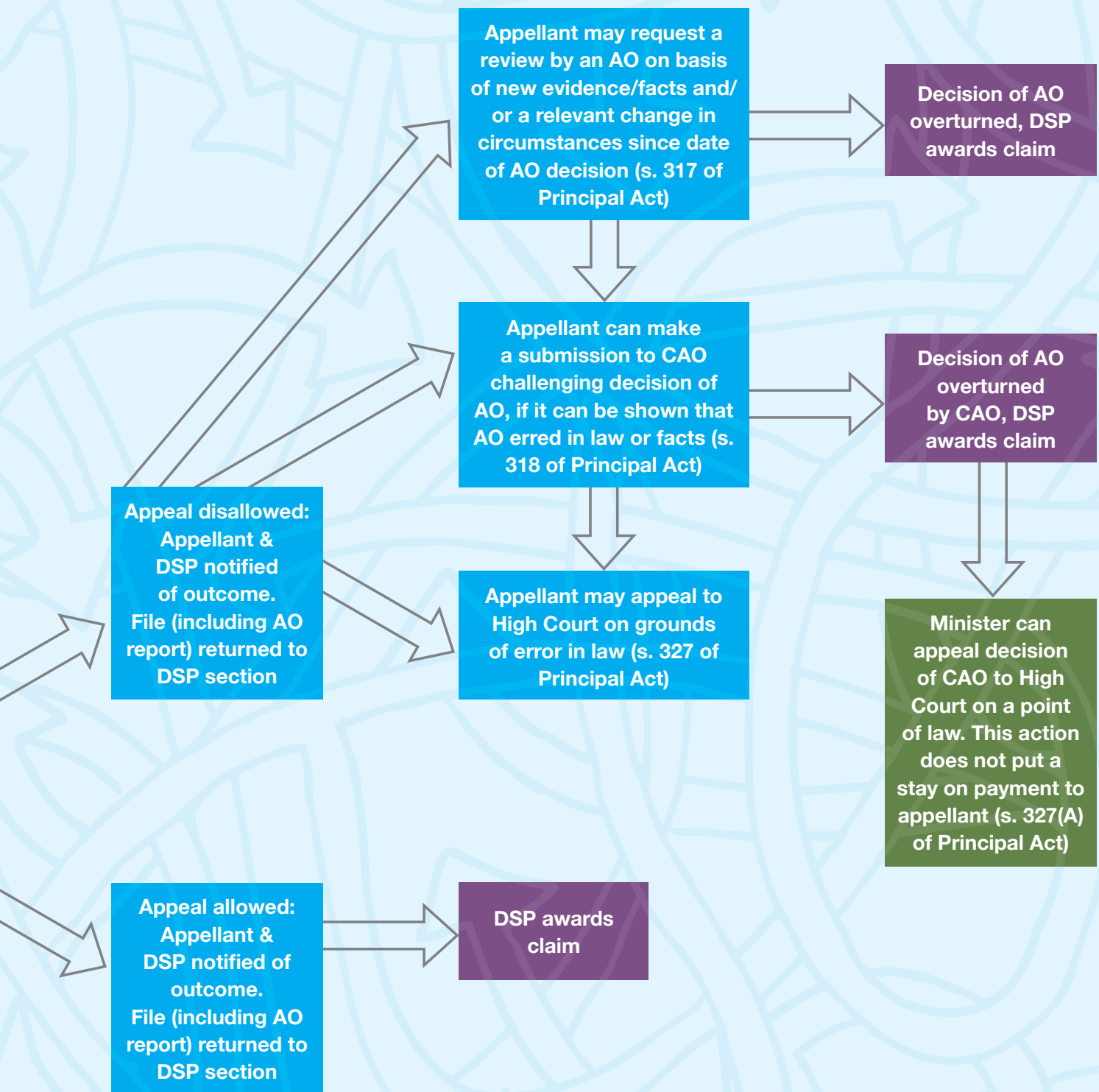
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Social Welfare Appeals System





AO	Appeals Officer
CAO	Chief Appeals Officer
DO	Deciding Officer
DSP	Department of Social Protection
SWAO	Social Welfare Appeals Office

Introduction

FLAC, an independent human rights organisation that seeks equal access to justice for all, recognises that those who need support should be able to access their rights and entitlements to it in a fair and timely way.

Social welfare law is a key area of FLAC's work because many people who need to avail of the welfare system find it to be a labyrinth of complex law, rules and regulations with an appeals mechanism that is neither open nor transparent.

Based on FLAC's own casework, its contact with colleagues and on a legal analysis, this report examines whether the appeals system provides an accessible, fair and independent means of reviewing social welfare decisions.

It concludes that the appeals system is failing those whom it is intended to serve and that the basic rights of access to social welfare, to fair procedures and to an effective remedy are not available as needed.

Background and rationale

The Social Welfare Appeals Office was established more than 20 years ago following calls by the Commission on Social Welfare for a more independent and fair system to be put in place. However, the Appeals Office continues to be a section of the Department of Social Protection despite having its own separate premises and staff. All of the Appeals Officers (including the Chief Appeals Officer) are nominated by the Minister for Social Protection and remain employees of the Department of Social Protection. The Appeals Office is a quasi-judicial body which exercises an important function and in the current economic circumstances it finds itself playing an ever more prominent and critical role due to the increasing number of people applying for state support. To put this into context, the workload of the Appeals Office in 2007 was 19,568 but by 2011 the number of live appeals was more than 51,500.

FLAC has conducted this research to assess whether the appeals system offers an accessible, fair and independent means of reviewing social welfare decisions. It also serves as a practical guide for users of the system while at the same time critiquing the current operation and structure and proposing substantial improvements.

Following this in-depth analysis, FLAC has determined that the system requires fundamental reforms to ensure better quality and faster decision-making. As it currently operates, the system does not comply with fair procedures, as it does not ensure equality of arms for appellants. It does not provide an effective remedy, as in many instances people are waiting for extended periods on a decision around their appeal for a basic social welfare payment.

Report objectives

The main objectives of FLAC's report are to:

- ★ Set out the law and regulations which govern the operation of the social welfare appeals system in a clear and accessible manner to enhance people's understanding of the system.
- ★ Analyse the Appeals Office and its systems from a human rights perspective to determine whether it complies with both domestic and international human rights law.
- ★ Examine the experience of advocates who are familiar with the process and are involved in making social welfare appeals on behalf of others.
- ★ Raise issues of concern about the perceived independence of the Appeals Office as well as other factors which indicate that the process does not afford access to justice.
- ★ Make recommendations to improve the appeals system while also ensuring that appellants are able to access their rights and entitlements in a fair and timely manner.

Report outline

Chapter 1 of *Not Fair Enough* examines the law underpinning the social welfare appeals system. It describes the establishment of the Appeals Office as well as its current structure and operation. The social welfare appeals process is set out step-by-step to illustrate the complexities of the system and to show how to navigate the different stages. The first chapter also considers the increase in the workload of the Appeals Office and examines how it has reacted to the surge in social welfare appeals since the beginning of the economic downturn.

The second chapter outlines the fundamental human right to social security and looks at the various instruments and mechanisms which can be used to assert it. It considers whether the current social welfare appeals system conforms to domestic and international standards of fair procedures contained in the Irish Constitution, the European Convention on Human Rights (ECHR) as well as UN instruments. There is a particular focus on the European Court of Human Rights' interpretation of Article 6 of the Convention which guarantees the individual's right to fair procedures. The chapter also assesses whether the appeals process affords social welfare appellants an effective remedy, given the current delays and emphasis on summary decision making.

The third chapter provides an insight into the experience of advocates who have engaged with the Appeals Office in the course of their work. The information in this chapter was garnered from a survey sent to a variety of NGOs, state-sponsored bodies as well as lawyers and individuals with expertise in the area. In total, 32 people gave feedback on the operation of the appeals system and their perceptions of its independence and fairness. The chapter also contains responses from the Chief Appeals Officer on behalf of the Appeals Office, as FLAC was not granted permission to survey or interview Appeals Officers directly. The Decisions Advisory Office also contributed to the report by answering queries from FLAC in relation to its interaction with the Appeals Office and its perception of potential improvements to the system.

Conclusions

The social welfare appeals process, as it currently operates, does not comply with all of the State's domestic and human rights obligations as it does not afford a fair, efficient and effective procedure or remedy. As long as the Appeals Office remains part of the Department of Social Protection, it will not achieve perceived and actual independence or transparency, both of which are essential for public confidence in the system.

The current pressure on the appeals system has resulted in a number of appellants being unable to access and assert their fundamental rights due to delays, over-reliance on summary decision-making, and the potential hardship for some appellants awaiting a decision on their appeal. The social welfare system needs to be overhauled both at first instance when a person makes an application as well as at appeal stage. Putting more resources into making correct initial decisions would prove more efficient and cost-effective for the State by reducing the number of appeals against wrong refusals, while also resulting in a fairer outcome for appellants as they would be able to assert their rights at the outset rather than face unnecessary delays.

In this light, FLAC makes the following overarching recommendations towards reforming the social welfare appeals process so that it complies with domestic and human rights standards. Specific recommendations are also made on both procedural and structural changes which could enhance the system as it currently operates. Some recommendations are directed to the Department of Social Protection and concern first instance decision-making, where improved procedures would lessen the number of appeals going to the Appeals Office, and speeding up the furnishing of files and Deciding Officers' submissions to the Appeals Office and to appellants, which would significantly reduce the delays at the appeals stage. Other recommendations are directed to the Appeals Office itself.

FLAC is acutely aware of the current economic circumstances in which the State finds itself, but this does not lessen the State's human rights commitments, which were made freely and independently. The State has to ensure that the people's right to social security is protected, promoted and respected through the operation of the social welfare system as a whole.

Overarching recommendations

- A. The Social Welfare Appeals Office should be placed on a statutorily independent footing to ensure perceived and actual independence from the Department of Social Protection. The Government should examine different models for independent quasi-judicial tribunals and should consider various options to increase the perception of independence including making the Appeals Office directly accountable to the Oireachtas or ensuring separation of powers by making it part of the Courts Service.
- B. All actions and decisions taken by staff members of the Department of Social Protection, including those of the Appeals Office, should comply with national and international human rights standards. In particular, employees should be made aware of their obligations and positive duty to act in a manner compatible with the European Convention on Human Rights Act 2003.
- C. The social welfare appeals process should be transparent, fair and efficient to make certain that people can assert their rights and entitlements in a fair and timely fashion.
- D. The rights of people applying for social protection should not be dismissed or reduced because of the economic recession. The government should seek to respect, protect and promote the rights of the most vulnerable and ensure that the rule of law is observed. It must maximise its limited resources to ensure that people can live in dignity.
- E. The Appeals Office should carry out an audit of its procedures to ensure the maximum use of available resources.

Recommendations relating to Procedural Change

DECISION-MAKING AT FIRST INSTANCE

1. 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.
2. Social welfare application forms should be simplified and made more readily accessible and easier to use. The forms should be set out so as to make it as clear as possible to applicants what information is required to process their claims, and to obtain all necessary information at the outset.
3. Department of Social Protection staff should advise potential applicants on their possible entitlements based on their individual circumstances. Where necessary, the staff should direct applicants to organisations such as the Citizens Information Centres or relevant NGOs for assistance with making an application. Where there are English language difficulties, the applicant should be provided with the information in his or her own language or provided with an interpreter where necessary. In the case of literacy difficulties, applicants should be given appropriate assistance with understanding the information and completing the forms.
4. Department of Social Protection decision-makers should ensure that claimants are able to make an application for social welfare payments, or are assisted to do so where necessary; that their applications considered in full; and that in the case of a negative decision, a written refusal is issued with reasons for the refusal.

5. A quality control audit of Deciding Officers' decisions should be carried out to identify any trends or patterns of poor quality decision-making or inconsistencies arising from different interpretations of policy or law. Any discrepancies should be addressed by the Department through guidelines and training.
6. Adequate training should be provided for Department staff in relation to any changes in social welfare legislation or policy, European social security law and case-law as well as human rights obligations and standards.

ACCESS TO INFORMATION

7. Appellants should be informed of their right to access their social welfare file when they are informed of their right of appeal against a refusal of their social welfare applications.
8. A clear instruction should be given that an appellant's file and the Deciding Officer's submission or comments on the grounds of appeal should be sent promptly to the Appeals Office and in any event within four weeks of receipt of notice of the appeal.
9. A copy of the appellant's file and the Deciding Officer's submission, which is sent to the Appeals Office when an appeal is lodged, should be automatically sent to the appellant and the appellant should be given the opportunity to reply before the appeal is heard or decided summarily.
10. The Appeals Officer's report should be automatically sent to the appellant with the decision letter from the Social Welfare Appeals Office along with information on the appellant's right to a review by the Appeals Officer or the Chief Appeals Officer on a point of fact or law. Information on the statutory appeals process on a point of law should also be included.

CONSISTENCY IN DECISION-MAKING

11. Appellants and their representatives should be given access to any previous decisions which may be relevant to their case. An anonymised searchable database should be established and made available to the public by the Social Welfare Appeals Office as recommended by the UN Special Rapporteur on Extreme Poverty and Human Rights following her visit to Ireland in January 2011.

FAIR PROCEDURES

12. The social welfare appeals process should comply with fair procedures as set out in the Irish Constitution and Article 6 of the European Convention on Human Rights and incorporate the elements therein.

ORAL HEARINGS

13. The appellant should be informed that he or she can request an oral hearing. A specific option should be prominently displayed on the social welfare appeal form to indicate this possibility and the significance of an oral hearing should be explained.
14. Oral hearings should be granted when requested unless there is good reason for not doing so, and should always be granted when there is a conflict of evidence or matters which could benefit from discussion and clarification. The appellant should be afforded an opportunity to explain his or her case, rectify any mistakes or misinterpretations on the part of the initial decision-maker and answer any questions raised by the Appeals Officer.
15. The length of time to process an oral hearing should be reduced so it does not become a disincentive to appellants' requesting an oral hearing.

REASONABLE PROCESSING TIMES

16. All appeals, whether decided following an oral hearing or based on written evidence only, should be finalised within a reasonable period of time. Steps must be taken to reduce the current delays in the appeals process while at the same time ensuring that all appeals are properly considered and decided.
17. A set time-frame should be established for each step of the social welfare appeals process. As suggested above, the Department of Social Protection should forward a social welfare file to the Appeals Office within a short time frame so that the appeal can be processed without lengthy delays.
18. There should be a system for prioritising urgent cases, for example, appeals from people who cannot access another payment while awaiting a decision of the Appeals Office on a primary payment, possibly due to the application of the Habitual Residence Condition, should be prioritised as they cannot access Supplementary Welfare Allowance, the so-called safety net payment, in the interim. Alternatively, in cases of hardship a system should be established for urgent interim payments while awaiting an appeal decision.
19. If an appeal is not processed within the set period, an interim payment should be paid to the appellant to prevent him or her incurring debts or facing destitution while awaiting a decision on a social welfare appeal.

RIGHT TO ASSISTANCE AND LEGAL REPRESENTATION AT APPEAL STAGE

20. Appellants should be informed of their right to obtain legal information from the Legal Aid Board prior to making an appeal.
21. Appellants should be encouraged to seek assistance at the earliest possible opportunity so they can get appropriate advice and make complete written submissions in support of their appeal.
22. Civil legal aid should be made available for social welfare appeals where representation is necessary either for oral hearings or making written submissions or both.
23. Providing more resources to advocates – whether through the Legal Aid Board, the Citizens Information Service or not-for-profit organisations working on social welfare appeals – may improve the quality of submissions to the Appeals Office, therefore making it easier to decide a case on the written evidence only. However, this will be dependent on the quality of representation and where there is any conflicting evidence a person should still be granted an oral hearing.
24. The Appeals Office should maintain statistics on the number of people represented at social welfare appeals including those represented by lawyers. This would help to identify whether there is an increased need for representation at appeal stage.
25. The Appeals Office should meet hold similar meetings to those held regularly with the Decisions Advisory Office, with appellants' representatives or advocates, to identify any issues arising on the part of the appellants and their representatives and to maintain a balanced approach to both sides.

ACCESS TO AN EFFECTIVE REMEDY

26. The current social welfare appeals process should be examined to determine whether it provides an adequate and effective remedy. The recommendations outlined above in relation to reasonable processing times, equality of arms, access to information and legal representation should all be implemented to ensure that the appeals process affords a genuine remedy for people trying to access social welfare payments.

CHIEF APPEAL OFFICER'S MECHANISM

27. There should be greater transparency in the way in which the Chief Appeals Officer's review mechanism works. More information should be provided about how she conducts these reviews and statistics kept on the number of reviews requested.

Recommendations relating to Structural Changes

APPEALS OFFICERS

28. The Minister for Social Protection should not appoint Appeals Officers from other parts of the Department of Social Protection. Instead a public appointment procedure should be put in place to ensure that people are appointed on specific criteria.
29. Terms of reference for Appeals Officers should be drawn up to include job requirements, relevant expertise and experience and a fixed term of office with potential for renewal. Selection criteria should be made public which would ensure a fairer appointment process and greater transparency and accountability.
30. Appeals Officers should be employed from a variety of different backgrounds to allow for diversity and a greater range of expertise. The position should not be limited to civil servants. All Appeals Officers should become employees of the Appeals Office.
31. Regular training should be provided to Appeals Officers in relation to the different areas of law upon which they are expected to make a decision. These include but are not limited to social welfare law, immigration law, EU law and human rights law. There should also be training in cultural awareness and sensitivity in relation to ethnic minorities, including Travellers, sexual orientation and transgender issues and persons with disabilities.
32. The current situation whereby Appeals Officers may automatically transfer back into another part of the Department of Social Protection should be ended so as to enhance confidence in the independence of the Appeals Officers.

Notes

Notes

NOT FAIR ENOUGH sets out the operation of the Social Welfare Appeals Office and charts the increase in the workload of the office as well as looking at the challenges facing it in terms of limited resources and delays. The report also summarises some of the main difficulties facing appellants and their advocates when they come into contact with the appeals system. These include the perceived lack of independence of the Appeals Office as a section of the Department of Social Protection, as well as the need for greater transparency, consistency and even-handedness. FLAC examines the process in light of domestic and international human rights law to which the State is committed even in times of austerity. The report outlines various perspectives on the appeals system, from advocates representing clients at appeal stage to the views of the Chief Appeals Officer on behalf of the Appeals Office. FLAC makes the case for reform of this key institution which plays an ever more critical role as more and more people seek state support in a fair and timely manner.



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