

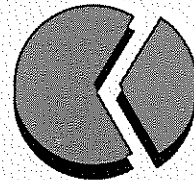
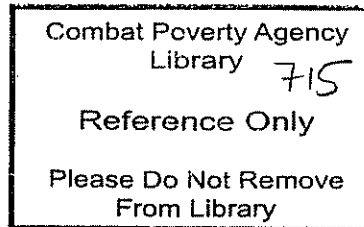


Policy Submission

Reform of the Supplementary Welfare Allowance Appeal System

Submission to the Minister for Social Welfare

February 1994



COMBAT
POVERTY
AGENCY

A SUBMISSION TO THE MINISTER FOR SOCIAL WELFARE

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ON

**REFORM OF THE SUPPLEMENTARY
WELFARE ALLOWANCE APPEAL SYSTEM**

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INTRODUCTION

The Combat Poverty Agency has for some time now been concerned with some fundamental shortcomings in the operation of the Supplementary Welfare Allowance (SWA) appeal system. The Agency is not alone in expressing such concern. Since the introduction of SWA in 1977, criticism of the operation of its appeal system has been regularly voiced by voluntary bodies, welfare rights organisations, claimant groups and indeed by the Minister's own Commission on Social Welfare. There has also been criticism raised over the years by members of the Oireachtas. The essence of these criticisms is that the present system does not respect an appellant's right to a fair and independent hearing and that a fair procedure, based on the provisions of natural/constitutional justice, does not operate. The failings in the SWA appeal system contrast starkly with the practice of the Social Welfare Appeals Office (SWAO) which, it is generally agreed, operates fairly and independently. The creation by the Minister of the independent SWAO in 1990 has won widespread acclaim. But this very positive development serves only to further highlight the inadequacies of the SWA appeals system.

NATURE OF THE PROBLEM

A person who is dissatisfied with the determination of an application for SWA has a statutory right to appeal that determination. This right of appeal is now contained in Section 267 of the Social Welfare (Consolidation) Act, 1993. Section 267 (2) provides for the making of regulations by the Minister "for the making and determination of appeals". To date, no regulations have been made under this subsection. However, the absence of regulations does not mean that there need be any lack of guidance as to how

the SWA appeal process should function. Like all other areas of social welfare, SWA appeals are governed by the prescriptions of natural justice and, more specifically, by Article 40.3 of the Constitution. In 1977 the Supreme Court in its judgement in the case *Kiely versus Minister for Social Welfare (2)* found that "Article 40.3 of the Constitution implies a guarantee to the citizen of basic fairness of procedures". In a 1978 Seanad debate the then Senator Mrs. Mary Robinson quoted from a letter to her by the then Minister for Social Welfare (Mr. C. J. Haughey), in which he (the Minister) acknowledged "that the rules of natural and constitutional justice must apply to appeals under the (SWA) Act". The text of this 1978 Seanad debate is included as an appendix. In this context, the rights conferred by natural/constitutional justice include:

- the right to have one's case heard;
- the right to examine evidence relied upon by the deciding body;
- (in certain instances) the right to cross examine and to be legally represented.

In addition, there is a requirement that the appeals officer should act independently and be seen to so act. Furthermore, there is a presumption that appellants are entitled to an oral hearing if this is necessary to enable them to present their case to best advantage. This last point has been clearly dealt with by the Supreme Court in 1977, again in the case *Kiely versus Minister for Social Welfare (2)*.

The Agency is aware of, and indeed shares, the view that the present SWA appeal system does not operate on the basis of fair procedure. In another Seanad debate, this time in 1986 (25 March 1986), Senator Mary Robinson voiced the opinion that in the case of SWA there was "no appeal system" and that the "principles of natural justice simply do not appear to apply". A more recent commentator, Mr. Gerry Whyte of the Law School, Trinity College, Dublin, has described the SWA appeal system as amounting to "no more than a system of internal review".

PRESENT DRAWBACKS

In practical terms, the main complaints levelled against the existing SWA appeal system are as follows :

1. that the appeals are not heard by independent appeals officers;
2. that the procedures do not encourage people to present the best possible case;
3. that oral hearing are not available;
4. that appeal decisions are unduly influenced by the Superintendent Community Welfare Officer (who is responsible for the first decision);
5. that appellants do not usually know the nature of the case against them;
6. that appellants are usually poorly equipped to present their cases in writing;
7. that there are unreasonable delays in dealing with appeals.

There is a strong perception that the current appeals officers do not act independently of the organisation (Health Board) to which they belong. There is a perception that appeals officers feel bound by policies and guidelines set out by the Health Boards or by the Department of Social Welfare.

From its own enquiries the Agency is satisfied that there is substance in this perception. Such failure on the part of an appeals officer to act independently flies in the face of the ruling of the Supreme Court, in the 1958 case *McLoughlin versus Minister for Social Welfare*. In that case, the Supreme Court found that a social welfare appeals officer was wrong to have bound himself by the contents of a Ministerial minute and that this amounted to "an abdication by him from his duty as an Appeals Officer".

The perceived inadequacies of the existing appeals system are, to some extent, confirmed by the relatively low level of successful appeals. The available SWA appeal statistics show that, in 1990, 16.5% of appeals were allowed. In 1991, 14.18% of appeals

were allowed and in 1992, 9.8% of appeals were allowed. This success rate compares very unfavourably with the outcome of appeals to the SWAO where, in 1992, 19% were allowed and a further 13% were partially allowed, giving a cumulative "success rate" of 32%. A further point of comparison might be the outcome of complaints to the Ombudsman. In 1992, 16% of complainants to the Ombudsman had their complaints fully upheld and a further 34% had their complaint partially upheld or were assisted in some fashion. Even allowing for the quality of the SWA statistics, and accepting that SWA differs from other mainstream social welfare payments (and from the wider range of issues dealt with by the Ombudsman) the SWA appeal success rate does seem problematic.

A further cause of concern is the level of variation in the making of SWA appeals from one Health Board to another. Expressed as a ratio of total applications made, the appeal rate varies enormously between Health Boards. For example, it appears that in 1988 the Western Health Board received only 16 appeals for the full year whereas the Mid Western Health Board received 178 appeals for that same year. In 1990 the Western Health Board received only 9 appeals but by 1992 this figure had increased to 68 appeals. The low ratio of appeals per application made in some Health Boards suggests that there is a lack of awareness in some regions as to the existence of the appeal system.

Another worrying feature is the disparity in appeal outcomes as between the various Boards. On the basis of the limited statistical information available, the success rate would appear to vary between a high of 50% in the case of the North Eastern Health Board in 1992 and a low of 2.6% in the case of the Southern Health Board in 1990. In the case of the Eastern Health Board, it appears that the success rate has dropped from 18.24% in 1990 to 6.87% in 1992.

The Agency accepts that some of the problems of the appeal system have to do with the lack of resources made available for appeals purposes. Indeed this particular problem

may become more acute as it appears that the volume of appeals for 1993 was significantly greater than for earlier years. This increase in SWA appeals may be directly related to the current high levels of unemployment. It is the Agency's view that this increase in demand for SWA makes it all the more necessary that applicants should have their constitutional right to a fair appeal process vindicated.

VIEWS OF OTHER BODIES

Since the introduction of the SWA scheme in July 1977, concern has been expressed as to the adequacy of the appeal system. In November 1977, an umbrella group representing such bodies as Women's Aid, Cherish, Ally, and Sherrard House made a submission to the Department of Social Welfare on the need to establish an SWA appeal system which would be "informal, independent, locally based and relatively speedy". In 1978, the Irish Association of Social Workers made a submission to the Departments of Health and Social Welfare on the operation of the SWA scheme. The IASW highlighted, in particular, failings in the appeal system. The IASW stressed the need to have an independent appeals system operating on the basis of national standards and providing for oral hearings where needed. In succeeding years other welfare rights organisations and professional groups have continued to make the case for an improved SWA appeal system.

The Commission on Social Welfare in its 1986 Report noted that a typical criticism of the SWA appeal system was "the lack of defined procedure. It was felt that any arbitrary decision of the higher officer sufficed to meet the statutory requirements. A particular need for regulation in this area is considered necessary because of the considerable degree of divergence between the approaches adopted by different Health Board officers." The Commission made a series of proposals in relation to the reform of social welfare appeals generally. The Minister has, broadly speaking, acted on these proposals, particularly in the creation of the independent Social Welfare Appeals

Office in 1990. However, the Commission envisaged that SWA appeals would fall to be dealt with by the central SWAO and that, accordingly, the standards which would apply in the case of mainstream social welfare appeals would also apply in the case of SWA appeals. Unfortunately, this has not happened.

Last year the Agency funded a preliminary assessment of the SWA appeals system, undertaken by FLAC. In the course of its research, FLAC was in contact with the relevant officials in all of the Health Boards and also the Department of Social Welfare. In addition, it was in contact with a range of voluntary welfare organisations and with a number of representative client groups.

Amongst the points made by the non- statutory respondents were the following:

- (1) that the circulars and guidelines governing the operation of SWA should be published, both in the interests of transparency and in the interests of reducing the numbers of applications and appeals;
- (2) that people who are refused SWA should be given written details of the refusal;
- (3) that prior to appeal an informal, quick review of the refusal should be undertaken by a senior Health Board official, where requested. This would allow for an immediate response to immediate and urgent needs;
- (4) that the administration of SWA appeals should be taken out of the hands of the Health Boards;
- (5) that whatever structure is given to the SWA appeals system, it should include the following practices :

- a. notification of right of appeal and information on how to make an appeal;
- b. provision of all evidence relied upon by the deciding officer;
- c. provision of an oral hearing where requested;
- d. the right of representation for the appellant, and that appeal decisions should be given in writing with detailed reasons for the decision;
- e. that in order to avoid delay, Superintendent Community Welfare Officers should be required to provide a report to the Appeals Officer within a specified time limit.

The points outlined above are, broadly speaking, in line with the kind of suggestions being made since 1977.

AGENCY POSITION

The Agency takes the view that the present SWA appeal arrangements are seriously deficient and do not respect the right of appellants to a fair hearing in accordance with fair procedure. The Agency feels that SWA clients are entitled to the same level of independent and professional appeals service as is available to mainstream social welfare recipients from the SWAO. The Agency recognises that the provision of such an appeal service will have resource implications. At the same time, the Agency is conscious that there are, perhaps, constitutional rights involved and that there cannot be any justification for providing SWA clients with an appeal system which is seriously inadequate and fundamentally out of line with what is available from the SWAO. Another point of comparison might be with the operation of the Appeals Commissioners in relation to taxes - tax payers have access to an appeal system which does operate in accordance with fair procedure.

In introducing the SWA Bill to the Dáil in 1975, the late Frank Cluskey, then Parliamentary Secretary to the Minister for Social Welfare, spoke of the need to

remove "the last remaining vestiges of the Poor Law". The establishment of a proper SWA appeal system would complete the work begun with the passing of the Social Welfare (Supplementary Welfare Allowances) Act 1975.

OPTIONS

The Agency is urging the establishment of an SWA appeal system which, while respecting the requirements of fair procedure, would be speedy and accessible. In reviewing the discussion since 1977, it is clear that there are a number of models which the Minister might consider:

1. Full integration into the mainstream social welfare appeals system.
2. Reform of the existing health board SWA appeal system possibly in the context of a wider health board appeal function including SWA, DPMA, DCA, medical cards and nursing home subventions.
3. Establishment of an SWA appeals structure independent of both the health boards and the Department of Social Welfare.

Each of these models is capable of being developed in a number of ways. On balance, the Agency favours the adoption of some version of Option (1), i.e. integration of the SWA appeals function into the mainstream social welfare appeals function. There are a number of grounds for this conclusion. Firstly, the existing social welfare appeals system, especially since the creation of the separate SWAO in 1990, has shown itself to be a professional, independent appeals body. The SWAO has the experience and the respect of the public to enable it to take on this new function. Given the likelihood that SWA (and perhaps also DPMA) is likely to be administered by the Department in the not so distant future, it seems sensible that the appeal function should be linked to the

mainstream social welfare appeal function. The Agency recognises the demands such a move would make on the existing SWAO. However, whatever system is introduced there will be a price to be paid. In terms of ensuring accessibility for SWA appellants, it might be possible to involve the 8 regional headquarters of the Department in the SWA appeal function (though the Agency recognises that the fact that the SWAO has its own separate headquarters is an essential part of the public perception of the independence of the Office).

The Agency sees little merit in Option (3), i.e. the establishment of an entirely separate SWA appeals system. The Agency sees difficulties in relation to Option (2), i.e. the creation of an appeal function covering a number of areas, including SWA, within the health boards. This, in fact, was the recommendation of the Report of the Commission on Health Funding which suggested that "an independent appeals officer for the health and personal social services should be appointed in each (health board) functional area". One problem is that the establishment of such a system would be primarily a matter for the Minister of Health. A second problem would have to do with the degree to which one might expect a health board appeals officer to act independently. Unlike deciding officers in the Department of Social Welfare, health board officials taking decisions in the area of entitlements are acting on the basis of authority delegated by the CEO and not on their own authority. This context would appear to be already influencing the existing SWA appeals system. It may be that any health board appeals officer would find it difficult to disregard this particular influence. Another consideration would be that the existing SWA appeals officers operate in a rather isolated fashion i.e. they lack the support of colleagues engaged in the same function. It is difficult to see how these drawbacks might be overcome.

In the event that SWA appeals were to remain with the health board appeals officers, one possibility might be to have their decisions subject to audit by the Chief Appeals Officer of the SWAO, thus ensuring the quality of the appeal decisions. However, such a development would probably require an appropriate amendment to the *Social*

Welfare (Consolidation) Act, 1993 whereas the Minister could assign SWA appeal functions to the SWAO simply by designation. In any event, it is the view of the Agency that the better option is to include SWA appeals into the mainstream of social welfare appeals handled by the SWAO.

CONCLUSION

The Agency believes that the present system of SWA appeals is seriously inadequate; that the constitutional rights of appellants may not be adequately provided for; that the standard in the case of SWA appeals contrasts very unfavourably with that applying in the case of mainstream social welfare appeals; and that the Minister should very seriously consider immediate action to improve matters. It is the Agency's view that the best option in this regard is to incorporate SWA appeals within the scope of the SWAO.