

# *Fair Recovery*



Ombudsman

How complaints helped to improve the  
Department of Employment Affairs and Social  
Protection's handling of overpayments





Ombudsman

2019 Office of the Ombudsman

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July 2019

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# Foreword

*This report charts the engagement between my Office and the Department of Employment Affairs and Social Protection (DEASP) from 2015 onwards in relation to the issue of the recovery of overpayments made to its clients. My Office began to put a particular focus on this issue after I noticed an increase in the complaints coming to my Office and also because an unusually high number of these complaints was being upheld.*

I decided to assign a number of my staff with particular expertise in social welfare complaints to handle all incoming cases. I asked that they should monitor volumes and trends and identify any underlying systemic issues that were arising. From an early stage, I felt that it would be important that my Office should actively engage with the Department and seek to agree on preventative measures to deal with any systemic concerns which were being identified.

As Ombudsman, I recognise the importance of the Department having thorough and comprehensive control, detection and recovery systems in place. This is clearly in the public interest and the Department takes seriously its responsibility for the proper and efficient use of public funds.

I also recognise and accept the Department's obligation to take all necessary and proportionate measures in seeking to recover payments especially where there is objective evidence of fraudulent behaviour on the part of the claimant.

Given the myriad of benefit schemes administered by the Department, many of which are complex, and the number of customers the Department deals with, it is inevitable that some overpayments will arise as a consequence of errors, omissions or misunderstandings on the part of claimants which are not found to be fraudulent. In other cases, overpayments will arise because of errors on the part of the Department. It is important that such cases are dealt with in a flexible and equitable manner and that in appropriate cases, debts are not pursued having regard to the individual circumstances.

Over the years, my Office has developed a good working relationship with the Department and its staff at all levels are open, flexible and cooperative. This report describes how my Office and the Department worked together in a positive and collaborative manner towards improving systems and procedures and doing so in a way that enabled the Department to deal with overpayment cases while ensuring that the process does not create inequity and hardship where there is no objective evidence of fraud on the part of the complainant.



A handwritten signature in black ink, appearing to read 'Peter Tyndall'.

**Peter Tyndall**  
**Ombudsman**  
**July 2019**





# Chapter 1:

## Background

*As Ireland was in the throes of the financial crisis it was inevitable that the State had to make deep cuts in public expenditure. As economic activity reduced, there was an inevitable fall in tax receipts. The State necessarily put an emphasis on increasing the funding available for public services by every means possible, including the recovery of any debts owed to it. There was clearly broad political and public support for such initiatives in light of the economic climate.*

Against this backdrop, the Department brought an increased focus to bear on the recovery of overpayments made to claimants. More resources were committed to the task and a significant effort was made to increase recovery levels. In addition, the Department's statutory powers were strengthened to aid in recoveries.

By 2016 the Department was paying income supports to approximately 1.6 million people and had overall expenditure of €19.2 billion. In his 2016 report on the Accounts of the Public Service the Comptroller and Auditor General included a chapter on Management of Social Welfare Overpayments. He indicated that between 2013 and 2016, the Department recorded overpayments of between €100 million and €120 million annually. Over the same period, the level of overpayment debt outstanding at year end increased from €420 to €482 million.

The C&AG reported that the total debt related to almost 192,000 individuals owing sums from less than €100 (36,211 individuals) to sums of over €50,000 (1,156 individuals).

# Chapter 2:

## *Statutory provisions relating to the recovery of overpayments*

*There are a number of key legislative provisions which underpin the Department's legal authority to deal with overpayments and their regulation.*

Section 341 of the Social Welfare Consolidation Act 2005 provides for the recovery of debts due to the Department by civil proceedings or by deduction from other payments. It regards sums due to the Department "as debts due to the State under statute or simple contract debt and recoverable by the Minister in any court of competent jurisdiction."

The Statute of Limitations Act 1957, Section 11(1) provides that:

"The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued ..."

This provision effectively debars the Department from recovering debts (whether duly owed or not) through the civil courts if six or more years have elapsed since the debt was raised. The purpose of the statute is to encourage plaintiffs to bring claims without undue delay and to protect defendants from stale claims which are harder to defend. While there is no statute of limitations preventing the Department from recovering overpayments from claimants or pursuing debts which are (i) unenforceable by civil proceedings in the courts, and (ii) in conflict with the provisions and spirit of the Statute of Limitations Act 1957, the manner in which the Department has pursued overpayments of a historic nature as illustrated in some complaints received gave rise to some concerns.

Part 9 of SI 142 of 2007 sets out a series of provisions relating to overpayments and their recovery. Article 246 of Part 9 deals with the reduction or cancellation of overpayments due to the Department. It provides for a reduction or cancellation of a debt, at the discretion of the Department, if it has failed to act within a reasonable period on information provided by or on behalf of a person or if an error had been made by the Department and the person concerned could not reasonably have been expected to be aware that a failure or error had occurred.



Sections 17 and 18 of the Social Welfare and Pensions Act 2011 amended Section 342 of the 2005 Act. It provides that deciding officers could, subject to circumstances that shall be prescribed, defer, suspend, reduce or cancel any repayments due to the Department. However, under Section 342A, which was inserted under the 2011 Act, a statutory constraint was imposed in relation to the treatment of cases where there was evidence of "false or misleading statements or wilful concealment of facts" on the part of the claimant. This provision essentially said that, in cases of wilful intent, where an overpayment was due it could not be reduced by the amount of any other payment to which the claimant would otherwise have been entitled. Thus, if the Department establishes in any given case that there is evidence of wilful intent on the part of the claimant there can be no offsetting of the debt which arose as a consequence.

The Department's statutory powers were strengthened in January 2013 when Section 13 of the Social Welfare Act 2012 was commenced. Section 13 amended the Social Welfare Consolidation Act 2005, in relation to the recovery of social welfare overpayments by way of weekly deductions from a person's on-going social welfare entitlements. The amendment allows for a deduction of an amount of up to 15% of the personal weekly rate of social welfare payment payable to that person for the purpose of the recovery of the overpayment. The new section also provides that a person will not be entitled to compensate for any overpayment deduction from their primary social welfare payment by claiming Supplementary Welfare Allowance.

In 2013, the Department produced a circular for its Deciding Officers - "Decision Making and Natural Justice". The circular is available at [www.welfare.ie](http://www.welfare.ie). It relates to decision-making generally and not just to overpayment cases but it clearly sets out the standards of fair procedures and natural justice which would be expected of all decision makers.

Due to the nature of its role the Department deals, mainly, with disadvantaged groups of people and because of the scale and nature of its work it is inevitable that mistakes happen, for a variety of reasons. When overpayments arise the Department clearly has an armoury of powers to pursue claimants. As Ombudsman, my concern is to ensure that individuals are dealt with properly, fairly and consistently. Later in this report, I will outline a number of individual cases under a series of thematic headings which gave rise to concerns that the Department was not always using its powers in an appropriate manner and that, while guidance was in place for Deciding Officers, there was a failure by individual decision makers to adhere to the guidance in a consistent and proper manner. I also came to the view that such was the volume of overpayment cases being pursued by the Department and the nature of the complaints that were coming to my Office, that more comprehensive and specific guidance and training was required for decision makers dealing with overpayment cases.



# Chapter 3:

## Complaints to my Office

*As I indicated earlier, I began to put more focus on the overpayments issue when I noticed the increase in such cases being handled by the Office in 2015 and also the relatively high level of such complaints that were being upheld at the time (50%). Below is a breakdown of closures in recent years.*

Closure Categories	2013	2014	2015	2016	2017	2018	Total
Upheld	1	1	11	18	7	6	44
Assistance Provided	0	1	2	7	7	6	23
Partially Upheld	0	0	0	1	0	0	1
Discontinued/Premature	0	0	1	1	2	1	5
Not Upheld	0	0	9	10	9	10	38
<b>TOTAL</b>	<b>1</b>	<b>2</b>	<b>23</b>	<b>37</b>	<b>25</b>	<b>23</b>	<b>111</b>

Following my examination of these complaints I was principally concerned about the Department's practices with regard to the following:

- Overpayments to customers because of errors made by the Department's own staff
- Legacy non-performing debt – particularly older overpayments where there had been no communication from the Department to the customer for several years
- Undue delay by the Department in acting on information in its possession
- Lack of evidence of overpayment – including appropriate documentation and records
- Poverty proofing – to ensure that mandatory deductions from customers' incomes did not cause undue hardship to them or their families
- Uniformity – to ensure that decisions to raise a debt and pursue recovery are consistent throughout the country
- Overpayment deductions being made from inappropriate sources
- Adherence to the principles of natural justice

I go into more detail in relation to these concerns in Chapter 5.

# Chapter 4:

## Review of local overpayment files

*The process of engagement between my Office and the DEASP involved the establishment of a liaison arrangement between my systemic examination team and staff of the Department's Control Division and Debt Management Unit. This was to ensure an efficient and effective process for the examination of individual complaints.*

Coordinating complaints at a central level also meant that systemic issues and trends identified in the examination of complaints could be considered and appropriately addressed. Regular meetings were held as individual cases were being concluded and systemic issues were discussed and resolved. By early 2016 my concern was that while there was an acceptance on the part of the Department that certain errors had occurred and efforts were being made to prevent them recurring I was not convinced, in light of the volume and types of complaints which I continued to receive at the time, that at a local level, errors were not being repeated. For its part, the Department had recognised that there was a need for a more comprehensive set of guidelines to assist its staff in dealing in a wide range of, sometimes complex, overpayment cases which could include a set of high level principles and processes to deal with the concerns highlighted by individual cases.

However, in light of the complaints I continued to receive at the time I decided that it was necessary to conduct a local review of a random sample of overpayment cases which had been decided upon by the Department but had not come before my Office.

The Department was quite happy to cooperate with my Office in the conduct of the local review as it recognised that this would increase its awareness and understanding of the challenges that needed to be met.

I asked my key caseworkers to conduct an examination of a random selection of overpayment files in two local offices and to report back with findings. This process commenced in March 2016.



## Methodology

It was agreed that the Department, in consultation with its Debt Management Unit, would randomly select 100 cases, based on criteria set down by my Office and my Office would then randomly select 33 cases for the purposes of the examination.

In terms of the selection criteria my Office asked that the random sample of overpayment case files should include:

- 50% old overpayments
- Jobseekers allowance (JA)
- Jobseekers benefit (JB)
- Supplementary Welfare Allowance (SWA)
- Basic Supplementary Welfare Allowance
- Supplements, rent etc.
- Exceptional Needs Payments
- Pensions

## Review findings

Nine of the 33 cases were repaying at the maximum allowable mandatory deduction (15%) of their weekly personal income. The following patterns were identified following a detailed analysis of the selected cases:

### Type of overpayment raised

Jobseeker's Allowance	21
One Parent Family	6
Basic Supplementary Welfare Allowance Scheme	3
Jobseeker's Benefit	2
Rent Supplement	1

### Number of overpayment cases examined by amount of debt raised

Up to €1,000	5
€1,001 to €10,000	22
€10,001 to €20,000	3
€20,001 to €30,000	0
€30,001 to €40,000	2
Over €40,000	1
<b>Total cases examined</b>	<b>33</b>

### Number of overpayments by commencement date

(Several cases had more than one overpayment raised against them)

Overpayment began 1 to 6 years ago	26
Overpayment began 7 to 10 years ago	10
Overpayment began 11 to 20 years ago	13
Overpayment began 21 to 30 years ago	4
Overpayment began over 30 years ago	1
<b>Total number of overpayments</b>	<b>54</b>

### Reasons for overpayment

Claiming and working	17
Spouse working	1
Means not disclosed	3
Overtaken holidays	1
Claiming and full time student	3
Claiming J/A and Carers	1
Claiming OPF after marriage	1
Claiming OPF and CB but had no qualified children	1
Overpaid rent supplement after moving address	1
Impersonation / fraud	4

### How overpayment was discovered

Claimant informed DSP	4
Anonymous report	1
Routine entitlement review	3
Receipt of Revenue COE* list	7
Fresh claim made	2
Information not available	16

\* COE list is a 'Commencement of Employment' list provided by Revenue to the DEASP at regular intervals showing PPS numbers of people who were registered as having commenced employment.

It is noteworthy that in over half of the cases selected for examination, the DEASP could not provide an explanation as to how the overpayment was discovered.

## Documentation relating to overpayments

An examination of each overpayment case file was conducted to confirm that a fair and sound system for raising and pursuing an overpayment debt with claimants was evident. My Office also sought evidence that the DEASP's own legislative obligations and guidelines were properly followed.

In particular, my Office sought the following key documents.

- Copy of formal 'Revised Decision' document, signed and dated by a Deciding Officer/Designated Person
- Copy of formal calculation of overpayment, signed and dated by a Deciding Officer/Designated Person
- Written detail of reason for raising an overpayment with an explanation of what was factored into the decision to raise a debt
- Copy of all documentation sent to the customer relating to the overpayment
- Copy of all documentation sent to the DEASP by the claimant
- Records of phone calls / meetings / interviews and /or other communications with customers
- Evidence that the customer was advised of their right of appeal
- Appeals documentation where a customer exercised their right of appeal
- Copy of acknowledgements and agreements signed by customers regarding their overpayment

In most case files examined there was an absence of key supporting documentation relating to the recovery of overpayments. The examination also raised worrying questions about the propriety of pursuing overpayments in several of the cases selected.

DEASP staff explained that over the years many Social Welfare Offices changed locations and many were amalgamated. In the past few years the Community Welfare Service merged with the DEASP. For these and other reasons many older files were purged, archived, filed in storage locations, misfiled, etc. Added to that it was the DEASP's practice to forward case files to a customer's new local office when they changed address while continuing to claim. In other cases a customer's original file may be transferred to the Central Debt Unit (CDU).

The examination of 33 overpayment case files highlighted concerns about the Department's overpayment decisions, records and processes. The propriety of continuing to pursue recovery and / or the rate of deductions in many of the cases examined was questionable, for a variety of reasons.

### **The following is a sample of concerns and weaknesses revealed:**

Of the 33 cases examined 15 (almost 50%) were identified as having concerns which cast doubt on the Department's justification in recovering the overpayments raised against the claimants.

Many of the files lacked the following necessary details:

- Documentation relating to the Deciding Officer / Designated Person's revised decision, including a clear explanation of the basis for that decision, as well as a record of the claimant's agreement or argument.
- Calculation of the overpayment raised, forming part of the revised decision documentation, signed by the Deciding Officer / Designated Officer.
- A record of all correspondence / meetings / discussions (by phone and in person) / agreements / disputes / arguments for mitigating circumstances, relating to overpayments.

Other weaknesses identified included:

- Many of the case files reviewed did not contain evidence that claimants were informed of their right of appeal when they were notified of the revised decision in their case.
- Claimants who did not accept they owed a debt and who decided not to cooperate with the Department when asked to repay it, lost their right to appeal the revised decision later (sometimes many years later) when they needed to apply for a Social Welfare payment again. They were simply informed that they had an outstanding debt which they must repay, often by deduction from their new entitlement. This can typically happen when former claimants reach State Pension age.
- Claimants do not have a right of appeal against a decision of the Department to deduct 15% of their personal income.
- Absence of poverty proofing.

### **Feedback to the Department on the local review**

Having completed the review, my Office provided the Department with its findings, analysis and conclusions.

My Office highlighted the fact that the Department had extensive legislative powers to pursue citizens for sums of money, through their lifetimes, including their retirement and declining years, and from their estates after their death, on the basis of prima facie evidence. The review had revealed that Deciding Officers and Designated Persons make decisions to raise debts against claimants, often for tens of thousands of euro, on the basis of determinations that the claimant 'wilfully intended to conceal certain information' or that they 'should have known their change of circumstances would have affected their entitlements', even though the claimants disputed the determination.



The powers exercised by the Department in many cases to raise debts and pursue recovery goes beyond the powers conferred upon the State's judiciary in cases of debt recovery. Indeed, in cases of dormant overpayments, where the Department had not actively pursued recovery with the claimant for six years or more, the Department is statute barred from enforcing recovery through the courts. It was acknowledged that the statutory provisions for debt recovery entrusted to the Department under Section 13 of the Social Welfare Act 2012, means it is not prevented from pursuing debt recovery in cases which are statute barred from enforcement through the courts. However, such a power could give rise to concerns as to fairness and possible breach of natural justice.

In giving feedback to the Department at the time, I indicated that the issues that surfaced required further engagement with a view to bringing about systemic improvement on the basis of the shared information and the organisational learning to be derived from the review and individual complaints. The sheer scale of the overpayments and the potential for serious adverse effect on a very large number of vulnerable claimants, if such overpayments were not dealt with fairly and properly, meant that the matter needed on-going urgent attention. I also pointed out that two separate matters which were not covered by the review would also come into focus i.e. the exercise of powers of recovery by "attachment of earnings" and debt recovery from the estates of deceased claimants.

# Chapter 5:

## *Individual complaints and systemic issues*

*As my Office worked through individual complaints and resolved them with the cooperation of the Department a number of broad underlying concerns began to emerge. As cases were upheld and solutions agreed that, in turn, gave an indication as to the necessary systemic improvements which needed to be put in place. This chapter sets out the details of a number of individual cases which highlight the broader issues.*

This Chapter also outlines many of the views I have already communicated to the Department in the course of dealing with individual cases and the systemic issues. I should make the point that the vast majority of cases did not suggest evidence of “wilful intent” on the part of the complainant.

I was principally concerned about the Department’s practices with regard to the following:

- Overpayments to customers because of errors made by the Department’s own staff
- Legacy non-performing debt – particularly older overpayments where there had been no communication from the Department to the customer for several years
- Undue delay by the Department in acting on information in its possession
- Lack of evidence of overpayment – including appropriate documentation and records
- Poverty proofing – to ensure that mandatory deductions from customers’ incomes did not cause undue hardship to them or their families
- Uniformity – to ensure that decisions to raise a debt and pursue recovery are consistent throughout the country
- Overpayment deductions being made from inappropriate sources
- Adherence to the principles of natural justice

## Poverty proofing

Recovery of an overpayment should not cause undue hardship to a claimant or his or her family. The Department should assess the current financial circumstances of a client before applying the 15% legislative deduction or in determining the level of periodic repayments to be agreed in any given case. It should also be open to reviewing cases where the claimant's financial burden has increased for unavoidable reasons.

Poverty proofing is a complex issue. Essentially, it is the requirement on the part of a public body to ensure its actions in recovering debts do not leave the debtor in abject poverty. The term 'poverty proofing' in a way presupposes that there must be a definable poverty line, below which people and their families should not be allowed to fall. The poverty line is not however clearly defined.

The basic level of weekly income under the supplementary welfare allowances scheme, provided for in the Social Welfare Consolidation Act 2005, as amended, sets out the minimum income an individual and/or families are entitled by law to receive. For example, the rate set in March 2018 for a single person aged 26 and over was set at €196 per week. The rate has traditionally been considered to be at or about the poverty line. But it is not as straightforward as that. For example if a single person (over 26 years of age) in receipt of Basic Supplementary Welfare Allowance is living at home with their parents they will receive €196. If the same individual happens to be living in a private rented flat and receiving a rent supplement, they will have to pay the first €30 per week out of their income towards the cost of their rent. This means they will have a post rent disposable weekly income of only €166. Does that now mean that €166 is the revised poverty line?

Poverty proofing is a process whereby the individual circumstances of the person under consideration are fully considered by a trained staff member. I have already provided the Department with an informal guide as to how poverty proofing might be conducted in individual cases.

It is noteworthy that prior to issuing an attachment notice relating to an overpaid person the Minister is legally obliged to determine the circumstances of that person. This is set out in sub-section 343C of the 2005 Act as inserted by the Social Welfare and Pensions Act 2013. It provides that the Minister must consider a range of specific matters in relation to the overpaid person as follows:

- His or her personal and family circumstances;
- Any statutory deductions that may affect his or her earnings or income;
- The amount of overpayment;
- The period of time for which the overpayment is outstanding;
- The amount of net income or earnings of the overpaid person;
- The employment circumstances of the overpaid person;
- The amount of debt due to the overpaid person.

## Poverty proofing: Case 1

A man whose main income was a State benefit and a small overseas pension, said that he could not afford to repay an overpayment of Invalidity Pension at the rate of €15 per week. He did not dispute the overpayment. The Department had previously reduced the rate at which it was recovering the overpayment from €30 a week to €15 a week, on the basis that the Social Welfare Appeals Office (SWAO) asked that he be treated leniently in relation to the recovery rate. The SWAO had, however, upheld the decision to raise the overpayment.

I was conscious that an increasing number of complaints coming to my Office were about financial hardship experienced by having to repay an overpayment at a time when the only source of income complainants had was a State benefit. In this case the man submitted details of his weekly income and expenditure. He had a number of debts which he was trying to pay off each week. It was clear that he suffered financial hardship by having to repay the overpayment debt at the rate of €15 per week. I asked the Department to review this case on the basis of his current financial situation and to poverty proof his circumstances.

Following this review, the Department reduced the repayments to €5 per week. I was satisfied with the outcome and that this revised rate was more appropriate to his circumstances.

## Poverty proofing: Case 2

I received a complaint from a man about an overpayment of €18,000 which dated back to the mid-1990s. He did not dispute the overpayment. His complaint was that he was suffering financial hardship by having to repay at the rate of €25 per week. His only income was a State Pension (Non Contributory) (SPNC).

The man had not declared his wife's income for a number of years and during that time he was in receipt of another State payment. The Department's decision was that the man was in breach of Section 302(a) of the Social Welfare Consolidation Act 2005, and had wilfully intended to hide his true financial circumstances and continue to receive a higher payment to which he had no entitlement. I made it clear to the Department that I was not condoning any fraudulent acts and that my interest in this case was confined to the administrative failure to poverty proof the man's current financial situation. I outlined the man's current weekly income and expenditure and asked the Department to review the situation.

Following this, the Department reduced the recovery rate to €10 per week. In this case, I was satisfied that the man wilfully intended to hide his true means. My interest was confined to the failure of the Department to poverty proof his current financial situation prior to seeking to recover the overpayment at a rate that led to undue hardship.



## Legacy debt

Particular issues arise in complaints about older debts, generally referred to as 'legacy debt'.

Complainants presented several different arguments as to why they should not be required to repay the overpayments raised against them. Depending on the particular circumstances of the case, complainants argued that:

1. they were unaware that they had been overpaid
2. they never deliberately falsified or withheld any information from the Department which would have affected their entitlement
3. the overpayment arose not because of anything they did wrong but because the Department made a mistake
4. they thought their debt was cancelled as they had received no communication from the Department for several years
5. they had no recollection of the circumstances leading to the alleged debt and had no way of reviewing or challenging the Department after so many years had passed
6. they asked the Department for documentary evidence of the overpayment which they did not receive
7. they had no idea there was an outstanding debt recorded against them until they submitted a claim for a State Pension
8. they could not afford to repay the overpayment

In some cases the Department had informed customers that if they refused to repay the overpayment that it would initiate legal proceedings against them, but never did. Some complainants said that they had strongly argued their case with the Department as to why they should not have to repay the overpayment.

They reasonably concluded that as the Department did not initiate legal proceedings and did not contact them further that it had simply accepted their case and written off the overpayment.

It is clearly important that as soon as the Department becomes aware of a debt, it should notify the complainant. In the event that there is no settlement, there should be regular on-going contact with the claimant. If there are procedures in place to regularly audit a proportion of files of persons in current payment, then it is more likely that overpayment cases will be uncovered more quickly and this will prevent large debts being built up. It is also more likely that in the case of more recent debts which are uncovered that full documentation will be available to show how the debt arose and how it was calculated.

If claimants refuse to cooperate with the Department it must regularly and repeatedly inform them that the debt, unless written off for whatever reason, will remain payable and will at some point be collected through the exercise of one or more of the options open to it. By doing so it is likely to encourage claimants, who may no longer be social welfare recipients, to engage with the Department to repay their debts at a time when they are in employment and in a better financial position to make repayments than when they reach State pension age.

## Legacy debt: Case 1

A woman received a letter from the Department in 2013 seeking the recovery of an overpayment of €13,000 which was backdated to 2001. She said she was unaware of the overpayment and had not been advised of it by the Department until she became entitled to a State pension. The Department was deducting €29 per week from her pension. She said she could not afford to repay this amount per week.

The Department told my Office that it had contacted the woman in 2001. The woman had appealed the decision but the appeal was unsuccessful. The Department said it wrote to her again and told her that the debt would be recovered from any future social welfare payments awarded to her. It also said that it did not have legal powers to recover the overpayment from her earnings at that time.

Following my Office's intervention, the Department reduced the recovery rate to €10 per week. It subsequently suspended the recovery. Following discussions with my Office, it agreed to write off the remainder which amounted to €11,000. I was satisfied that this remedy was reasonable in light of the delay in recovering the overpayment.

## Legacy debt: Case 2

A man was advised by the Department in 2016 about an overpayment of €2,000 which dated back to 1990s. The Department told him that it would recover the overpayment at the rate of €28.20 per week. The man said that he had never received any notification about the overpayment prior to 2016 and that the repayment rate would cause him financial hardship. The Department was unable to give him a breakdown of how the overpayment was calculated or explain how it arose.

During my Office's examination of the complaint the Department acknowledged that it could not locate any documentation about the man. It had no records about the overpayment.

The Department cancelled the overpayment and agreed to refund the amount already recovered. It also agreed to amend its records to reflect the decision. I was satisfied that the decision to cancel the recovery was reasonable due to the lack of records to verify the overpayment.

## Legacy debt: Case 3

I received a complaint from a man who was notified of an overpayment of €17,000 dating back to the period 1998 to 2000. He had received no notification from the Department in the intervening years. The notification coincided with his application for Invalidity Pension. The man sought his file under the Freedom of Information Act. However, the Department told him that his file had been purged.

The Department acknowledged to my Office that it could not locate the file and it could not provide evidence to support a decision that an overpayment existed. It agreed to write off the overpayment and to amend its records to reflect the decision. No payment had been recovered from the man and he was not due a refund.

## Record keeping and documentation

In view of the significant powers the Department has to pursue people for sometimes significant sums of money, through their lifetimes, including during their retirement and declining years, and from their estates after their death, it is essential that a robust overpayment documentation system be maintained throughout the period of debt recovery. Comprehensive record keeping is essential to maintain the integrity of the system and to confirm the validity of the pursuit of an overpayment in any given case. In examining individual complaints, I will always seek to ensure that each decision is evidence-based and objectively justified.

I have upheld a number of cases where I have identified failings in this area. The following are some examples.

### Documentation: Case 1

I received a complaint from a woman who had received a notification in 2010 about an overpayment of €800 in relation to a Back to School Clothing and Footwear Allowance (BTSCF). The woman disputed the overpayment and said that it was a back payment as a result of an appeal. She had applied for the BTSCF in 2009. The Department recovered the overpayment in 2014 in respect of the 2009 BTSCF. The woman said she had repaid the money for the sake of expediency and said that she did not want any delay with her application for Domiciliary Care Allowance in respect of her child.

The Department's file contained very few documents and none which could support a claim that an overpayment existed. There were no records confirming that the overpayment had been repaid either. I asked the Department to review its decision in light of the lack of adequate records

The Department cancelled the overpayment and made arrangements to refund the sum the woman had repaid.

### Documentation: Case 2

I received a complaint from a man who received a letter from the Department in 2011 telling him that an overpayment had been raised against him in the amount of €10,000 in respect of Job Seeker's Allowance (JSA). The man said that he had initially applied for Job Seeker's Benefit (JSB) and when that entitlement ended, he applied for and was awarded JSA. He had also supplied the Department with all of the information it asked of him in relation to his own circumstances, along with his wife's payslips and the date she was due to return to work after maternity leave. The man said that the Department lost his documents on several occasions and he had to resubmit copies of the same documents at least three times.

When he received the first JSA payment, he queried it because he thought it was too high. The Department assured him it was correct. He also said that the Department had written to him seeking his comments on the proposed repayment, but he was not told about his statutory right to appeal the overpayment. Despite making many telephone calls and writing many letters, the man did not receive a reply. The man said he had to engage a solicitor to obtain a response. He received a response 14 months later but his issues were not addressed. The letter said that he did not inform the Department of his wife's return to work. It was another two years before the Department wrote to him again advising of his entitlement to JSB. Arrears were withheld and he was told that it would recover the overpayment at the rate of €28 per week.

The Department confirmed to my Office that the man did advise it of his wife's return to work two months before the due date, but the Department had failed to act on the information. I discovered that its file was incomplete – there were no records of the man's numerous telephone calls, and there was no record of his communication, nor was there a record that he was asked at least three times for the same information and there was no record of a meeting the man had with the Department.

I was quite concerned at the paucity of records on the man's file. He had retained copious records of all of his communication with the Department, including telephone calls and letters. There was also a lack of consistent and prompt follow-up and engagement with the complainant.

I asked the Department to review its decision to recover the overpayment on the basis that its records were incomplete and it had the information about the woman's date of return to work. I was of the view that the Department had allowed the matter to escalate over a number of years and had not engaged properly with the complainant. Furthermore, it had not taken responsibility for its failure to keep proper records nor had it taken any responsibility for the overpayment, which it accepted was a result of its errors.

The Department cancelled the overpayment and refunded the amount which it had already recovered, on the basis of the above. The local office confirmed that the file was incomplete and staff were instructed to ensure that files contain records of all events. The local office also confirmed that responses to communication would receive prompt attention and that they would follow-up on outstanding queries within 7-10 days.

## **Maintaining Contact and Debt Reminders**

In many cases of old/legacy overpayments, claimants had not received any communication from the Department for many years (for 20 years in one case examined). I acknowledge that the statutory provisions for debt recovery entrusted to the Department under Section 13 of the Social Welfare Act 2012, means it is not prevented from pursuing debt recovery in cases which are statute-barred from enforcement through the courts. However, the Department should send a reminder at least annually to overpaid claimants to inform them that their debt remains outstanding, setting out the actions that are proposed for recovery and setting out the options open to the Department into the future for recovery of the debt should they fail to engage with the Department in the recovery process promptly.

The Department accepted that failing to send debt reminders to debtors represents unsound and unfair administrative practice. It has introduced a process for sending debt reminders to customers and former customers annually.



## Maintaining contact: Case 1

The Department had raised two overpayments against a claimant, one in the late 80s and the other in the late 90s. The older overpayment had been repaid. The man queried the second overpayment of over €5,000 on the basis that he believed the calculation was incorrect and he said he advised the Department of his change in circumstances when he returned to work. He said he did not receive any communication about the overpayment for a number of years. The Department wrote to him in 2013, when he was entitled to a State pension, seeking recovery of the overpayment.

My examination revealed that there was inadequate communication with the claimant. The Department had failed to advise the man in writing of the factors that gave rise to the overpayment, in accordance with the governing legislation, namely the amount, and the proposed method of recovery. Nor was he offered an opportunity to comment on the proposed method of recovery, prior to recovery. The Department also failed to advise him of the revised decision to raise the overpayment, which effectively meant that he was denied an opportunity to appeal the decision to the Social Welfare Appeals Office. He had received no reminders from 1991 until he became entitled to a State pension at 65 years of age in 2013.

At my request, the Department reviewed its decision and its paper work. It confirmed that it could not locate the documentation required to support the second overpayment. The Department cancelled the overpayment and refunded the amount already recovered.

## Wilful Intent

In view of the punitive consequences of deeming an applicant to have acted with 'wilful intent' (see page 9) it is particularly important that care should be taken to ensure that there is clear objective proof of 'wilful intent' before applying the provisions of Section 302(a) in any given case (that is, where a claimant wilfully concealed a material fact, the overpayment cannot be offset against an entitlement to another State payment).

In the following cases I found that the Department's decision was reasonable and was supported by the facts of the case:

### Wilful intent: Case 1

A woman received notification from the Department about an overpayment of €24,000 in relation to her State Pension (Non Contributory) (SPNC). When she applied for the SPNC she declared that she did not have any weekly means. She was awarded the SPNC on the basis that she did not have an income at the time. Following notification of the overpayment the woman said that she was entitled to a State Pension (Contributory) (SPC) and that she wished to offset the overpayment against her true entitlement.

The Department indicated to me that it had received information from the Office of the Revenue Commissioners which had prompted it to conduct a review of the woman's circumstances. The Department interviewed the woman and she acknowledged that she did not declare her true means at the time of her application for SPNC and had over €115,000 in savings. The Department was satisfied that the woman had wilfully intended to conceal her true means and found her in breach of Section 302(a) of the Social Welfare Consolidation Act 2005, as amended (SWCA). In circumstances where there is evidence to prove a breach of Section 302(a) of the SWCA, the legislation prohibits offsetting an overpayment against another entitlement.

I was satisfied that the Department was correct in deciding that the woman had wilfully intended to conceal her true means. There was no evidence of financial hardship and the woman subsequently engaged with the Department with a view to repaying the overpayment.

### Wilful intent: Case 2

A woman received notification from the Department about an overpayment of €50,000 in relation to SPNC. The Department had conducted a review of the woman's circumstances following information received from the Office of the Revenue Commissioners. The woman applied for SPNC in 2011. At that time her means were assessed on the basis of the information she provided and she was awarded the maximum rate of SPNC.

My examination of the case indicated that the Department's reports and file records supported the decision to raise an overpayment. It had proof that the woman had over €240,000 at the time she applied for SPNC and she had wilfully concealed her true means. The Department decided that she was in breach of Section 302(a) of the SCWA, as amended. Again, as in the previous case above, the woman had an entitlement to the State Pension (Contributory) but the legislation prohibits offsetting an overpayment against an entitlement to another State payment.

I was satisfied that the decision to raise the overpayment was reasonable. There was no evidence of financial hardship. The woman said she would contact the Department and repay the overpayment.

## Estate Cases

In cases where the estate of a deceased claimant is being pursued in relation to possible overpayments, particular issues arise. In such cases it is important that the Department ensures that, as a matter of course, it issues a revised decision to the executor and explain about rights of appeal.

It can be particularly challenging for the Department to review and test evidence of possible overpayments, in some cases long after the events, in instances where the claimant has passed away.

In the following two estate cases I concluded that the Department had acted fairly and properly.

### Estate cases: Case 1

I received a complaint from an executor of an estate about an overpayment of €85,000 which had been raised against the estate following the death of a woman. The original overpayment had been reduced from €102,000 to €85,000 prior to submitting a complaint to my Office. The executor said that the overpayment had been repaid some years before. The executor believed she had an entitlement to a further reduction and said that legal and funeral expenses had not been taken into account by the Department. The executor also said that the solicitor did not advise of a right of appeal and did not involve her in the discussions to negotiate a reduction in the overpayment.

I explained to the executor at the outset that any difficulties she had with the solicitor were a matter for herself and were not a matter for the Department.

The file revealed that the deceased person had not declared her true financial position when she applied for her State Pension (Non Contributory) in 1991. I was also satisfied that the file showed that both the solicitor and two executors had been advised of the option to appeal the decision to raise an overpayment against the estate after the woman died in 2008.

There was evidence to show that the funeral and legal expenses had been taken into consideration by the Department.

I was of the view that the Department had acted correctly in this case. I was also satisfied that the amount accepted by the Department in full and final settlement took into consideration the funeral and legal expenses. The Department was not responsible for any lapses in communication between the solicitor and the executor. Furthermore, there were sufficient funds in the estate to cover the repayment.

## Estate cases: Case 2

An executor said that following the death of a woman in 2015, a Schedule of Assets was sent to the Department, at which time, it calculated an overpayment of €54,000. The executor said that the calculation of the overpayment included an interest charge.

I found that the Department's file had evidence to show that the woman had not declared her true financial position at any time between 1991, when she was awarded her State Pension (Non Contributory) (SPNC), and the time of her death in 2015. The executor was provided with a breakdown of how the overpayment was calculated and he was also advised of his right to appeal the decision to raise the overpayment to the Social Welfare Appeals Office. There were sufficient funds in the estate to meet the overpayment.

I explained to the executor that the Department does not charge interest. I set out how means are assessed, and I explained that the calculation was based on the money the woman received, to which she had no entitlement or a reduced entitlement, based on her means. I explained that overpayments in estate cases are raised against the estate, not the beneficiaries or executors of an estate and that the recovery of the overpayment is recouped from the estate.



## **FAIR RECOVERY**

DEASP's handling of overpayments



# Chapter 6:

## *The Department's response*

I commend the Department for its positive engagement with my Office in dealing with the concerns I have highlighted and in accepting the need to tackle the underlying systemic issues which have emerged.

In the cases which my Office has upheld during the review period the Department has accepted my conclusions, has provided the appropriate redress to individual complainants and has undertaken to make every effort to learn from those cases. This includes updated guidance and training for staff. The Department also assisted my Office in conducting a review of local complaint handling (see Chapter 4) and indicated its general acceptance of my Office's findings.

A new call centre was set up by the Department to deal with calls from debtors who wish to negotiate an agreed rate of payment.

As already indicated, the Department introduced a process for the routine sending of debt reminders to customers and former customers annually.

The Department has made increased efforts in the area of training and development of staff with some of that focus aimed specifically at decision making in relation to overpayment cases.

The Department has received validation from Quality and Qualifications Ireland for seven accredited special purpose awards and courses are due to commence co-delivery during 2019 with the National College of Ireland. These include a Certificate in Community Welfare Service Provision and a Certificate in Decision Making. One of the aims of the certificates is to improve the quality of decision making at first instance. The Department was concerned at the number of decisions that are overturned by the Appeals Officers and the delays suffered by its clients as a result. The Department told my Office that it wants to afford its clients their rights and entitlements within a reasonable time and in a positive customer-focussed context.

At the request of the Department, my Office has provided it with a number of anonymised Ombudsman case studies, including cases involving overpayments, which will be used in practical exercises and assignments during a number of the courses.

During 2018 the Department had been working, through its Central Debt Unit, on the drafting of a procedures manual entitled Management of Customer Overpayments and Recovery of Customer Debt. This is a comprehensive document which seeks to identify the various types of overpayment cases that may arise as well as providing detailed guidance to staff on the practices and procedures to be followed in identifying possible overpayments and how to handle them. Helpfully, it also includes a section on the role of my Office and how to assist in the resolution of complaints which I raise with the Department. Much of the content of the manual is based on the lessons learned from the engagement between the Department and my Office in resolving individual cases.

The final approved manual was circulated to all staff in the Department in June 2019.



Ombudsman

2019 Office of the Ombudsman

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