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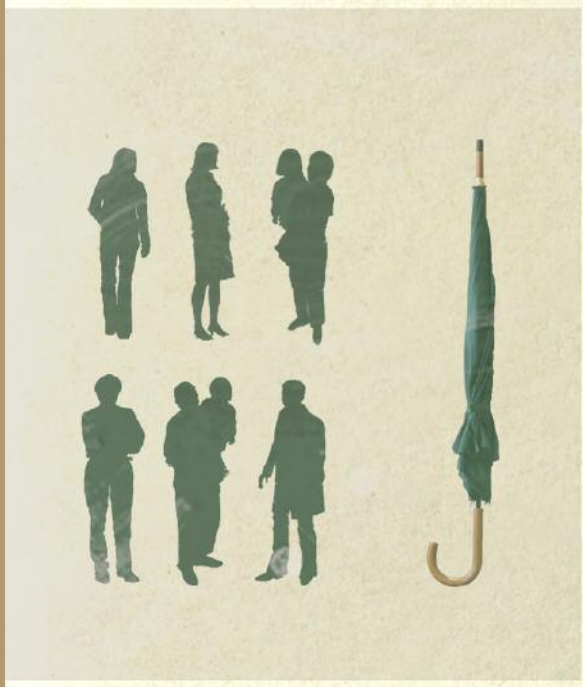


THE SELF-EMPLOYED AND THE OLD AGE CONTRIBUTORY PENSION

Report on an Enquiry into the Impact of Certain Provisions of Social Welfare Legislation on the Self-Employed

Contents

Preface

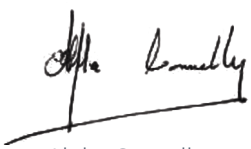
One of the functions of the Human Rights Commission is to conduct enquiries. This it may do of its own volition or at the request of any person who considers the conducting of such an enquiry to be necessary or expedient for the performance of certain other specified functions of the Commission.

At its plenary meeting on 29 July 2004, the Commission delegated to the Chief Executive its function of conducting an enquiry at the request of a person. The delegation is subject to the requirement that before a decision is taken to conduct an enquiry the Chief Executive consult with the Commission's Casework Committee and take the Committee's views into consideration.

This is a report on the first enquiry conducted by the Human Rights Commission.[1] It relates to the important issue of pension provision for older persons and, in particular, the expectations of one group of pensioners who were required by law to make compulsory PRSI contributions late in their working lives.

I wish to acknowledge the substantial work carried out by the Commission's Senior Caseworker, Des Hogan, in relation to the conduct of the enquiry and to the preparation of the report. I would also like to acknowledge the assistance provided on specific matters by the Assistant Caseworker, Gerry Finn, and by the Administrator (Finance and Human Resources), David Carolan.

I would further like to acknowledge the exemplary co-operation of the Department of Social and Family Affairs with the Commission in the conduct of this enquiry. The end goal of all public bodies, not merely the Human Rights Commission, in relation to human rights should be to ensure that, in carrying out their activities, the rights of all persons in the State are respected. An enquiry is not intended to be an adversarial process. In a case such as the present, it is designed to identify whether there are any deficiencies in the law and/or practice relating to human rights and, if so, to suggest ways in which those deficiencies may be remedied. I hope this report fulfils these purposes.



Alpha Connelly
Chief Executive
November 2006

Chapter 1

General Introduction

Pension provision by the State

1.1 As in many other European countries, older persons in Ireland are expected to constitute an increasingly greater proportion of the population in the years ahead. In Ireland's National Strategy Report to the European Union on Adequate and Sustainable Pensions,[2] a recent study is cited to the effect that Ireland's old age dependency ratio will change from a rate of 5:1 in 2000 to 2:1 in 2050.[3] The National Strategy Report also states that "baseline projections ... showed that pension spending [by the State] as a percentage of GNP would rise from 4.6% in 2000 to 9% in 2050".[4]

1.2 Ireland's social security system comprises both social insurance and social assistance.[5] Since the inception of social insurance in 1953, the State has employed a "pay as you go" social insurance scheme. This scheme runs alongside a means-tested social assistance scheme.[6]

1.3 From 1961 there have been ongoing attempts to move workers from social assistance to social insurance coverage for State pension purposes by requiring categories of workers to enter social insurance.

1.4 Thus, in the ten-year period from 1994 to 2004, the number of recipients of social insurance pensions rose from 55% to 70% of State pension payments, it being estimated that the figure will rise further to 86% by 2016.[7] In terms of the individual, the actual difference in a weekly payment between a full contributory and a non-contributory State pension is €9.30 per week, the former being the greater.[8]

1.5 State strategies to deal with the anticipated old age dependency ratio of 2:1 in 2050 are stated to include the National Pensions Reserve Fund and consideration of raising the retirement age for older workers as well as encouraging occupational and personal pension schemes. Ireland will benefit from the fact that other European states are facing the same problem within a shorter timeframe. However, unlike other European states, Ireland's rapidly

changing migrant-related demographics suggest that up to 20% of its population may consist of first-generation migrants by 2020.[9]

The medium-to long-term contribution of this category to the social insurance fund is unknown in the absence of a coherent immigration policy in the State.

1.6 This enquiry focuses on the entry of one category of workers (the self-employed) into social insurance under the Social Welfare Act 1988 and the impact of the legislation on persons aged 56 years or over at that time. Prior to and since the 1988 legislation, other categories of workers have been brought into social insurance. It is understood that there is little scope to extend coverage further.[10]

The nature of an enquiry

1.7 The Commission may, in its discretion, decide to conduct an enquiry into any relevant matter at the request of any person who considers the conducting of such an enquiry to be necessary or expedient for the performance of any of the following functions of the Commission, namely:

- to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights;
- to consult with such national or international bodies or agencies having a knowledge or expertise in the field of human rights as it sees fit;
- either of its own volition or on being requested to do so by the Government, to make such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights in the State;
- to promote understanding and awareness of the importance of human rights in the State and, for those purposes, to undertake, sponsor or commission, or provide financial or other assistance for, research and educational activities.[11]

1.8 The enquiry function of the Commission is therefore not free-standing. It serves as an aid to the performance of the other four specified functions.[12]

1.9 It is also important to appreciate that, in the exercise of its enquiry function, the Commission does not act as an adjudicatory body. It does not decide on the merits of a particular alleged violation of human rights; nor is it for the Commission to afford a remedy to a person or persons who believe that their human rights have been violated. When a matter is brought to its attention, it may, however, enquire into the matter in order to carry out one or more of the other four specified functions. For example, on foot of an enquiry, it may make recommendations to the Government for the strengthening of human rights in the State, or it may conduct an enquiry to aid it in a review of practice in the State relating to the protection of human rights.[13]

Chapter 2

Background to the Enquiry

The request for an enquiry

2.1 The persons who requested the Commission to conduct this enquiry ("the complainants"), J.J.G. and S.G., are a married couple. They are now retired, but from 1964 until their retirement they ran a small business in County Donegal. They contacted the Commission concerning their non-eligibility for the standard-rate Old Age (Contributory) Pension ("OACP"),[14] as determined by the Department of Social, Community and Family Affairs (as it then was) ("the Department").

2.2 The issues raised by them relate to changes brought about in social welfare legislation by the Social Welfare Act 1988 ("the 1988 Act") and the Social Welfare Act 1999 ("the 1999 Act").

2.3 The 1988 Act made social insurance provision for the self-employed compulsory for the first time from 6 April 1988. It required self-employed persons to make pay or asset-related social insurance ("PRSI") payments,[15] in addition to paying income tax. The complainants informed the Commission that, as employers, they paid PRSI contributions towards their workers' pensions but, being self-employed, they could not pay PRSI contributions towards their own pensions prior to 6 April 1988, even if they had wished to.

2.4 They asserted that they were thus obliged by law to contribute towards an OACP for themselves by paying PRSI contributions from 6 April 1988 onwards, but that in the 1990s they discovered that they were both ineligible for an OACP by virtue of their age on 6 April 1988. This arose because one of the contribution conditions for an OACP was (and still is) entry into insurance before attaining 56 years of age. J.J.G., the husband, was 61 years old on 6 April 1988 and S.G., the wife, was 57 on this date.

2.5 Partly in response to an advocacy campaign for a change in the law,[16] the 1999 Act introduced a special half-rate pension for self-employed persons. It provided that persons aged

56 or over on 6 April 1988 but who had not attained the age of 62 would qualify for a half-rate OACP if they had 260 weekly (5 years') contributions before they reached 66 years of age (that being the relevant statutory cut-off age for making PRSI contributions). The complainants fell within the eligible age category under this legislation but failed to meet the contributions requirement.

2.6 Upon the passage of the 1999 Act, the complainants applied for the half-rate pension but the Department replied stating that J.J.G. did not qualify because he did not have the requisite 260 weeks of contributions. J.J.G. reached the age of 66 on 30 August 1992 and claims to have made 231 weekly contributions by retirement age. S.G. reached the age of 66 on 25 December 1996 and claims to have made 56 weekly contributions by that time. According to the Department, however, J.J.G. had made 208 weekly contributions by retirement age and S.G. had made 52 weekly contributions.

2.7 Clearly J.J.G. could not comply with the requirement of 260 weekly contributions before reaching the age of 66. However, the couple's cumulative contributions on 30 August 1992, on their account, exceeded this figure.[17] They therefore approached the Department and requested that their combined contributions be taken into account for the purposes of a pension. They also requested that they be allowed to make up the few months' shortfall in J.J.G.'s contributions. The requests were refused.

Consideration of the enquiry request

2.8 In the course of considering the enquiry request, the Commission wrote to the Department seeking clarification of a number of matters, namely, the rationale for and objective of the change in policy and legislation in 1988 and the criteria that were used in deciding upon the age and contribution requirements. It also sought the Department's views on whether the changes required persons aged 56 years or over on 6 April 1988 to make PRSI contributions while being precluded from receiving an OACP benefit. The Commission further sought the Department's views on the matters raised by the complainants, including their claim that they should be allowed to benefit from an OACP by either making up the few months' shortfall in J.J.G.'s contributions or by having S.G.'s one year of contributions transferred to J.J.G. The Commission further sought the Department's view of the complainants' assertion that any monetary refund would comprise only 50–60% of the contributions they had made since 1988.[18]

Finally, it sought a summary of the communications between the Department and the complainants.

2.9 In its reply, the Department set out in general terms the underlying principle of social insurance: namely that persons who claim a contributory pension on the basis of their contributions must have made an appropriate level of contribution and that it was for this reason that the requirement of entry into insurance before the age of 56 was retained in 1988. Indeed, a similar requirement had been in place since the introduction of social insurance pensions coverage. As such, the Department contended that the requirement of a minimum number of contributions being paid before reaching the age of 66 in order to qualify for a pension was not intended as an age restriction but rather to ensure that the underlying principle of social insurance is satisfied.

2.10 It set out the rationale for the 1988 Act, quoting from a 1978 Green Paper discussing social insurance for the self-employed and citing a 1986 report on the issue by the Commission on Social Welfare which recommended that payment of social insurance would represent a good investment for the self-employed. The Department then outlined the benefits for which self-employed persons were eligible and the qualifying conditions for an OACP. Regarding the requirement of 260 weekly contributions under the 1999 Act, the Department stated that it considered this threshold to be fair and that it reflected a certain consistency of commitment to the Social Insurance Fund.

2.11 On the question of making up the few months' shortfall, the Department replied that there was "no facility" for the payment of retrospective contributions in order to secure entitlement to benefits, and that any such provision would be inconsistent with the insurance dimension of the system. The Department also stated that it is not possible to transfer contributions between spouses.

2.12 On the benefits available to the self-employed as a result of PRSI contributions, the Department advised that these are: Widow's and Widower's (Contributory) Pension, Orphan's (Contributory) Allowance, OACP, Maternity Benefit, Adoptive Benefit and Bereavement Grant. On any refunds due, the Department advised that J.J.G. is entitled to a 53% refund on the contributions he made (being the pension element of these contributions) and possibly some compensation for loss of purchasing power if the Department is deemed responsible for delay in making a refund. In addition to listing the communications between it and the complainants, the Department also advised the Commission that a refund application form was sent to J.J.G. on 29 June 2004.

2.13 The Commission then wrote to the complainants stating that it had received the Department's response to the clarifications sought from it and that, as part of its response, the Department had indicated that it recently forwarded to the complainants a refund application form. The Commission asked whether they had considered claiming the refund. They reiterated their previously stated view that they had made the PRSI contributions on the understanding that they were towards a pension fund and not in order to have them partly returned to them. They stated they were prepared to add the small balance due to cover the half-rate contributory pension and asked the Commission to "highlight the illegal demand by Government and to grant us our human rights".

2.14 The Commission also asked the complainants whether they had utilised any complaint mechanisms internal or external to the Department in respect of their grievance, including any recourse to the Office of the Ombudsman. They stated that they had not. They indicated that they had been involved in an association in the 1990s which had lobbied for a change in the law, and that they had written to the relevant Minister on a number of occasions.

2.15 Before proceeding to take a decision on the request for an enquiry, the Commission checked the information supplied to it by the complainants, including the relevant legislative provisions. It also identified a number of human rights issues raised by the request.

2.16 The Human Rights Commission Act of 2000 provides:

> In this Act (other than section 11), "human rights" means –
>
> (a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and
>
> (b) the rights, liberties or freedoms conferred on, or guaranteed to, persons by any agreement, treaty or convention to which the State is a party.[19]

2.17 On a preliminary review of the matters raised by the request, it seemed that a number of rights guaranteed to persons by international agreements to which the State is a party were relevant to the situation of the complainants.[20]

2.18 It thus appeared that:

- the complainants belonged to a clearly identifiable group who could not possibly

qualify under the 1988 Act for an OACP by virtue of the requirement of entry into insurance before the age of 56 years since they were both over the age of 56 on 6 April 1988 and the retirement age is 66;

- the subsequent change to the law in 1999 to provide for a special half-rate pension for those aged 56 to 61 years on 6 April 1988 suggested that there may have been a recognition in Government of hardship and/or unfairness caused by the 1988 Act;

- although the Department suggested that a 53% refund might be available to the complainants, the complainants strongly felt that an injustice had been done to them and that such a refund did not redress this injustice, which they saw as a violation of their human rights; and

- the matters complained of raised a number of human rights issues under international agreements to which the State is a party.

Chapter 3

The Decision to Conduct the Enquiry and the Conduct of the Enquiry

The decision to conduct the enquiry

3.1 On 20 December 2004, having considered the nature of the enquiry request, the law on the matter, the response of the Department to the Commission's queries, the human rights issues involved and its legislation and guidelines, the Commission decided to accede to the request for an enquiry. It was of the view that the conducting of an enquiry could be considered expedient for the performance of two of its other functions, as specified in the Act, namely:

- to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights; and

- to make such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights in the State.

3.2 The terms of reference of the enquiry were:

- to enquire into the impact of sections 11 to 18 of the Social Welfare Act 1988 and of section 21 of the Social Welfare Act 1999[21] on the complainants and on other self-employed persons who were required to contribute to this legislative scheme of social insurance

when it was not possible for them to enjoy all the benefits covered by the scheme, in particular the OACP;

- to enquire into the rationale for this requirement; and
- to enquire into any justification(s) advanced for excluding persons such as the complainants from the full range of benefits under the scheme.

Procedure

3.3 The Commission's founding legislation provides that, for the purposes of an enquiry, the Commission may require a person to furnish relevant information, documents and things to it and, where appropriate, require such person to attend before it for that purpose.[22] It also provides that an enquiry may be conducted in public or in private as the Commission, in its discretion, considers appropriate,[23] and that, subject to the provisions of the legislation, the procedure for conducting an enquiry shall be such as the Commission considers appropriate in all the circumstances of the case.[24]

3.4 The Commission decided that this enquiry would be held in private but that its outcome would be made public. The main rationale for this was that the Department in question had co-operated with the Commission to date, the net points at issue in the enquiry seemed not to be in dispute, and there was no apparent need for public hearings. As such, it was felt that the enquiry could be conducted more efficiently and effectively in private. However, in line with the Commission's operational value that, in carrying out its functions, it act in a transparent manner,[25] and given the desirability of disseminating widely the Commission's views on human rights matters and its practice of doing so, the outcome of the enquiry would be made public.

3.5 The procedure adopted in the enquiry is given in Appendix 3 of this report.

The conduct of the enquiry

3.6 In March 2005, the Commission put a number of additional questions to the complainants and some 30 detailed questions to the Department. Included in the questions to the Department were requests for statistical data relating to Exchequer figures in the years 1985 to 2005.

3.7 Over the coming period, the Department kept the Commission informed of the work it was undertaking on compiling a response to the Commission and, in July 2005, the Commission received a substantial and comprehensive reply from the Department.

3.8 In August 2005, the Commission interviewed and received documents relevant to the enquiry from P.P., who was one of the main organisers of the Self-Employed Pension Association, an advocacy group which lobbied for changes to the law in the 1990s and early 2000s.

3.9 In September 2005, the Commission interviewed the complainants at its offices.

3.10 In November 2005, the Commission contacted a number of representative groups to identify any representations they had made to Government on pensions for the self-employed during the 1990s. One response was received in December 2005. Follow-up in early 2006 produced no further responses.

3.11 In February 2006, the Commission met with the Office of the Ombudsman to clarify some matters arising from an earlier investigation by that Office into entitlements to the Old Age (Contributory) Pension.

3.12 In May 2006, the Commission sent a draft of its report, minus it conclusions and recommendations, to both the complainants and the Department for any views they may have thereon prior to finalisation of the report. It also sent a copy of relevant sections of the draft report to P.P. and other named bodies, again seeking any views on the extracts forwarded.

3.13 The complainants responded in June 2006, as did some of the other bodies notified. A preliminary response was received from the Department in July 2006, and a final response was received in September 2006. Further clarification was received in November 2006. The Department's response was detailed and its comments have been taken into account in compiling this final report.

3.14 This report is being concurrently submitted to the Secretary General of the Department of Social and Family Affairs and the complainants. Since the report contains a number of recommendations to Government, it is also being copied to the Taoiseach and the Minister for Justice, Equality and Law Reform.[26] The report is available on the Commission's website, www.ihrc.ie, and hard copies may be obtained from the Commission's offices on the 4th floor of Jervis House, Jervis Street, Dublin 1 (tel: 01 8589601).

Chapter 4

Background to the Social Welfare Act 1988

The Social Insurance Fund

4.1 The Department, in its initial response to questions put to it by the Commission, concisely described the system of social security in Ireland as:

> ...combining a social insurance system under which entitlement to contingency-based benefits is secured on the basis of contributions linked with earnings, with a system of social assistance under which entitlement to similar contingency-based payments is secured on the basis of an assessment of the person's means.
>
> The social insurance or PRSI system is based on payment of compulsory contributions to the Social Insurance Fund, in return for which, and subject to meeting the conditions prescribed, contributors become eligible for a range of income replacement benefits.

4.2 In its response to the draft enquiry report, the Department stressed how "the public social insurance protection system in the Republic of Ireland is based on an implicit intergenerational and solidaristic compact between workers, employers and the State, as opposed to an actuarially based insurance programme as would be available privately". In other words, a social contract exists between these two groups of persons and the State. The fundamental principles of the PRSI system refer first to a "contributory" principle whereby people are compulsorily insured against the hazards which affect their capacity to work and earn – such as unemployment and sickness – and become eligible for income replacement benefits when they meet the required prescribed conditions. Secondly, they refer to a "solidarity" principle between different earning groups and different generations whereby contributions can be redistributed to support other contributors who have lost their earnings.

4.3 Indeed in 1988, the Minister for Social Welfare described the basis of social insurance as "the provision of a basic level of protection as a right and without a means test".[27] In 1999, the Minister for Social, Community and Family Affairs described the social insurance system as being "based on an ongoing and long-term social contract between employers, employees, the self-employed and the Government".[28]

4.4 The current Social Insurance Fund was established by the 1952 Social Welfare Act. It comprises a current account and an investment account. The Minister for Social Welfare is responsible for managing and controlling the current account, while the Minister for Finance is responsible for managing and controlling the investment account.[29] The concept involved prescribes that monies standing to the credit of the current account not required to meet current expenditure are transferred to the investment account of the Fund, and vice versa where the monies in the current account of the Fund are insufficient to meet its liabilities. This allows for assets to be accumulated where contribution income exceeds expenditure, and for Exchequer subventions where expenditure exceeds income or assets.[30]

4.5 The Social Welfare (Consolidation) Act 1981 ("the 1981 Act"), which was the Principal Act in force in 1988, consolidating as it did social welfare law, provided that the Social Insurance Fund was to comprise contributions paid by employees and their employers, by voluntary contributors, and Exchequer monies.[31] Discounting the marginal numbers of voluntary contributors, the Social Insurance Fund thus comprises tripartite funding, which is the international norm for such social welfare schemes.

4.6 In 1986, the Commission on Social Welfare, citing international experience and a 1984 analysis by the International Labour Organisation, stated:

> Tripartite funding – by employers, employees and the State – is a feature of social insurance schemes in most countries and has applied in the Irish system since its inception at the beginning of the century.[32]

4.7 This contrasts with social assistance schemes, which are funded directly from taxation.

4.8 In its response to questions put to it, the Department outlined the financing involved in the social insurance system as follows:

> As with many social insurance systems throughout the world, the Irish social insurance

system is based on the "Pay As You Go" approach. This means that in broad terms, contributions received in one period are used to meet expenditure in that period and there is no intention to build up a significant fund of assets. Where, as at present, contribution income exceeds expenditure, some assets are accumulated. Conversely, during periods where expenditure exceeds contribution income, an additional exchequer subvention may be required to finance benefits.[33]

4.9 Exchequer subvention of the Social Insurance Fund appears to have decreased over time from 39.9% in 1965 to 20.7% in 1977 to 28.8 % in 1985 and to less than 2% by 1995.[34] Future Exchequer subvention appears to be predicated upon whether benefits are income- or price-related.[35]

Pensions

4.10 Old age pensions were first introduced in Ireland in 1908 in the form of a non-contributory pension scheme under social assistance.

4.11 In 1953, a unified system of social insurance was introduced under the 1952 Social Welfare Act. This legislation included provision for a widow's contributory pension for certain employments, subject to two qualifying conditions: a minimum number of contributions and an annual yearly contribution rate.[36]

4.12 The Social Welfare (Amendment) Act 1960 introduced an OACP for the first time for certain employments.[37] In the 1970s the qualifying age for the old age pension was successively reduced from 70 years to 66 years and the age before which one had to have entered into insurance in order to benefit was also successively reduced from 60 years to 56 years.[38]

4.13 By the time of the Social Welfare Act 1981, the qualifying conditions for receipt of the OACP were: a) entry into insurance before the age of 56 years; b) at least 156 employment contributions paid; and c) an average of at least 48 contributions paid or credited each year since entry into social insurance.[39]

The self-employed

4.14 A Departmental Green Paper, entitled Social Insurance for the Self-Employed, was published in 1978. It proposed that self-employed persons be brought into the social insurance system. This was also recommended in 1986 by the Commission on Social Welfare,[40] and in 1988 by the National Pensions Board.[41]

4.15 The reasons for bringing the self-employed into the social insurance system were set out by the National Pensions Board as follows:

- it will provide the self-employed with basic pension cover as of right in return for the payment of social insurance contributions

- it will improve the equity in the financing of social welfare by providing for the self-employed to make a direct contribution towards financing their own social insurance cover. Currently, a significant number of the self-employed rely on non-contributory means-tested benefits for which they make no direct contribution. The cost of such benefits is financed by all taxpayers, including employees who are also required currently to make a direct contribution towards the cost of their own benefits ...

- it will bring Ireland into line in this regard with most other EEC countries, where social insurance cover for pensions for the self-employed already exists.[42]

4.16 On 29 July 1987, the Minister for Social Welfare announced that social insurance cover would be extended to self-employed persons from 1988.

4.17 During the Second Stage of the passage of the Social Welfare Bill, 1988, through the Dáil, the Minister cited the first and second reasons given by the National Pensions Board as the rationale for the legislation:

> Up to now the [self-employed] were excluded from compulsory social insurance and left to make their own pension arrangements. Many now rely on means-tested social assistance. Up to 70 per cent of formerly self-employed persons qualified for social assistance pensions to which they had not directly contributed. The result of this policy was inadequate pension cover for a large segment of the population and inequity in the financing of social welfare generally.

4.18 The stated aim of the 1988 Act was thus to address an identified gap in pension coverage for older persons by extending social benefit cover to the self-employed similar to that available to employed workers, and to move the self-employed from social assistance to social benefits on grounds of equity, with savings to the Exchequer.

Demographic breakdown of the self-employed

4.19 The National Pensions Board 1988 report cited a 1985 Labour Force Survey as providing an analysis of the self-employed classified by industry. Excluding some 28,600 "assisting relatives" who were not affected by the 1988 legislation,[43] it was estimated that 228,300 persons came within the broad definition of being self-employed.[44] The 1988 report estimated that:

> The majority of the self-employed comprise some 119,000 full-time farmers accounting for almost 52% of the total. Also included ... are some 40,000 working full-time company directors who are not regarded as being employed under a contract of service. Such persons pay income tax under the PAYE income tax system but are not insured under the present social insurance system.[45]

4.20 Moving that the Social Welfare Bill, 1988, be read for the second time in the Dáil, the Minister estimated that "the self-employed comprise over 20 per cent of the workforce" and described the bringing of this previously excluded section of the workforce into the social insurance system as an historical development in social welfare provision. He stated that the number of self-employed persons who would be affected by the legislation was 240,000, comprising 200,000 persons assessable under Schedule D (i.e. farmers and others in similar situation) and 40,000 persons assessable under Schedule E (i.e. company directors).[46]

Chapter 5

The Impact of the Social Welfare Act 1988 on the Self-Employed

General

5.1 The 1988 Act brought self-employed persons into social insurance for the first time, making it mandatory for them to pay PRSI on their own earnings or assets.[47]

5.2 The Social Welfare Act 1988, in so far as relevant, provided that from 6 April 1988:

> (a) every person who, being over the age of 16 years and under pensionable age ... who has reckonable income or reckonable emoluments shall be a self-employed contributor for the purposes of this Act, regardless of whether he is also an employed contributor,
>
> (b) every person becoming for the first time either an employed contributor or a self-employed contributor shall thereby become insured under this Act and shall thereafter continue throughout his life to be so insured...[48]

5.3 Thus PRSI was payable from that date by self-employed persons with either reckonable income (income from a trade or a profession, property or investments for tax purposes) or reckonable emoluments (income to which PAYE tax applies). Double liability was precluded.

5.4 Subject to minimum contribution and maximum ceiling levels, the new law required self-employed persons to pay PRSI rates of 3%, 4% and 5% for the years 1988 to 1990,

respectively.[49] This was below the 6.6% rate recommended by the National Pensions Board and the 5.5% rate recommended by the Commission on Social Welfare. It compared with a PRSI rate of 5.5% paid by employed persons in the same period.[50] The rates or amounts of contributions could be altered by regulation.[51]

5.5 As in the case of employees, the minimum contribution was £208 and the maximum ceiling was £16,200 for rate calculation purposes, again subject to amendment by regulation.[52] The Department provided the Commission with the rate, benefit and ceiling levels for PRSI contributions for both employed and self-employed persons in the period 1987 to 2005 and these are set out in Appendix 4 to this report.

5.6 Table A details total PRSI contributor numbers in the years immediately before and immediately after the passing of the 1988 Act, and demonstrates the level of increase in contributor numbers and PRSI receipts in the years after 1987/88.

TABLE A

Year	Contributors	PRSI Receipts (£IRL)
1985/86	1,369,365	£873,175,000
1986/87	1,342,850	£904,870,000
1987/88	1,342,200	£973,054,000
1988/89	1,493,967	£1,092,173,000
1989/90	1,466,342	£1,167,958,000
1990/91	1,476,198	£1,351,669,000
1991/92	1,510,993	£1,407,648,000
1992/93	1,473,184	£1,506,376,000

5.7 Table B gives a breakdown for the three years 1988/89 to 1990/91 of the number and percentage of those contributors who were self-employed as well as the number and percentage of self-employed contributors who were aged 56 years or over on 6 April 1988 (i.e. those who could not, on the face of it, by virtue of their age, meet the requirement of entry into

insurance before the age of 56 [53]). From these figures, it can be seen that, in these years, the self-employed comprised between 10% and 12% of PRSI contributors. This contrasts with the projection of 20% given by the Minister on the Second Reading of the 1988 Bill in the Dáil.[54]

TABLE B

Year	Total # PRSI Contributors	# Self-Employed	% of Total Contributors	# Self-Employed 56+ yrs	% of Self-Employed 56+ yrs
1988/89	1,493,960	156,405	10.47%	61,517	39.33%
1989/90	1,466,342	161,161	10.99%	53,019	32.90%
1990/91	1,476,198	172,941	11.72%	58,352	33.74%

5.8 Table C shows the rates payable by employees, the self-employed and employers in 1988/89.

TABLE C

	Employer's Share		Employee's Share			Total
Employees (Class A1)	11.8% PRSI	0.60% Redundancy contribution	5.5% PRSI	1.25% Health contribution	1.0% Employment and training levy	20.15%
Self-Employed (Class S)	N/A	N/A	3.0% PRSI	1.25% Health contribution	1.0% Employment and training levy	5.25%

5.9 It will also be noted that, in addition to the social insurance levy, two additional levies were required. For employees and the self-employed these were a 1.25% health contribution and a 1.0% employment and training levy.[55]

5.10 Self-employed persons entering social insurance in 1988 were entitled to three available benefits provided they met qualifying conditions and the relevant contingency occurred (such as reaching retirement age). These benefits were:

- an OACP;
- a widow's (later also a widower's) contributory pension and
- an orphan's contributory allowance.

5.11 The Government had decided not to include other benefits such as invalidity benefit for self-employed persons, as recommended by the National Pensions Board.[56] As the Department pointed out to the Commission, PRSI payments correspond to composite benefits, with the pension component of a PRSI payment calculated as 53% of the payment for refund calculation purposes.[57]

5.12 To qualify for a full-rate OACP a self-employed person had to meet the conditions prescribed in the 1981 Act, namely:

1 entry into insurance before attaining the age of 56 years;
2. at least 156 weeks (3 years) of contributions since entry into insurance;[58]
3. at least 48 yearly average payments.[59]

5.13 Of the available benefits, it was the OACP that attracted most attention, since this was the rationale given for the change to the law. The main barrier to entitlement to an OACP was, however, the pre-existing requirement of entry into insurance before the age of 56 years contained in the 1981 Act.[60]

5.14 Self-employed persons aged 56 years or over on 6 April 1988 thus started making the mandatory annual PRSI contributions to the Exchequer from the tax year 1988/89. In successive years, however, as persons from this group reached 66 years and retirement age, they discovered that they were ineligible for an OACP.

5.15 Three potential avenues by which the complainants might have sought to obtain an OACP – pooling of contributions by spouses, voluntary "top up" contributions either before or after reaching 66 years of age, and a pro rata pension based on the percentage of the number of years of contributions – were not available to them.[61]

5.16 Whereas aggregation between spouses was permitted in 1988 for the purposes of the Income Tax Acts, it was not permitted for social insurance benefits.[62]

5.17 There was no provision in the 1988 Act for self-employed persons to "top up" their contributions either by making "voluntary contributions" or continuing to contribute for years

worked beyond 66 years of age, as many self-employed persons did. That this was intended was made clear by the Minister at the Second Stage Reading of the Bill in the Dáil:

> Representations have been made to me in relation to self-employed persons who have never been insured before but who, because they have less than ten years to go before pension age, will not under the present rules be able to qualify for an old age pension. My Department examined in detail the possibility of making provisions to enable such persons to continue paying contributions after age 66 until they had ten years of insurance completed. The potential cost of this concession, however, would be prohibitive. It was estimated that in year 11, the first year in which the persons concerned would qualify for a pension, the additional cost of paying them the pension would be £40 million for the full year alone. This would significantly exceed the total amount of contributions collected from them in the previous ten years and would be a continuing cost over the following years. Accordingly, they have not been included.[63]

5.18 Nor was there any provision in the 1988 Act for a pro rata pension calculated on the basis of a percentage of the number of years' contributions, although there was a precedent for the provision of a pro rata OACP where the average yearly rate of 48 payments (one of the three qualifying conditions) was not met.[64]

The complainants

5.19 The 1988 Act for the first time obliged the complainants and others in like situation to make mandatory PRSI contributions for themselves in addition to the PRSI they already paid for their employees. The complainants were aged 61 years and 7 months (J.J.G.) and 57 years and 3 months (S.G.) on 6 April 1988, when the new law came into force.

5.20 Between April 1988 and August 1992, J.J.G., as required by the 1988 Act, made PRSI contributions of approximately 3%–5% of his annual earnings.[65] In August 1992 he reached 66 years. However, he continued to undertake PAYE work until 1996/97. S.G. claims that, on the advice of their accountants, she paid PRSI contributions in the year 1990/91 only.

5.21 The cumulative sums of PRSI payments made by the complainants amounted to approximately 3%–5% of one annual salary for slightly over 5 years. As there was no provision for making "top up" contributions or receiving a pro rata pension under the 1988 Act, the

complainants did not receive an OACP when they applied to the Department on 27 January 1998.

5.22 An idea of the impact of the 1988 Act on the complainants, as perceived by them, can be gleaned from the interview held by the Commission with them on 30 September 2005, relevant extracts of which are given below.

Commission:	to confirm your ages, Mr [J.J.G] you were born on the 30th of August 1926?
J.J.G.:	Yes, that's right, we've come a long way ... We are disturbed about how we were treated. We paid whatever we were told to pay.
Commission:	You also presumably paid for your employees?
S.G.:	Yes, whatever we had to pay, we paid it...
On the OACP	
Commission:	When did you realise that there would be no benefit to you?
J.J.G.:	We didn't really pay attention to it.
Commission:	The impact of the 1988 law was that you started paying into PRSI and ...
S.G.:	We thought we would receive a pension.
Commission:	Have you received any other PRSI benefit?
S.G.:	No.

On refunds

S.G.: We were only offered 53% of what we had paid in. What's the point of that? It's the unfair attitude of the Department which we are concerned with. We wouldn't accept a refund under any circumstances. We got an application for that from the Sligo office two years ago. I'll send you in a copy of that. We think it is unfair that they won't allow us to make up the difference. Yes, that's the first time we were offered a refund. [The Minister] said before that that we were entitled, but this came from Sligo.

... We think that we should be allowed to pay whatever to make up the contributions.

On the transparency of the law

S.G.: That's what is happening in the State and that needs to be brought out in the open. It's not fair what they are doing to us given the amount of work we have put into the area over many years. There have been many ups and downs, especially in a rural place.

Others affected

5.23 It will be recalled that, in introducing the 1988 Act, the Minister, citing the National Pensions Board 1988 report,[66] stated that 240,000 self-employed persons would be affected by the legislation, comprising 200,000 persons assessable under Schedule D (i.e. farmers and others in similar situation) and 40,000 persons assessable under Schedule E (i.e. company directors).

5.24 Of the self-employed affected, it would appear that farmers comprised the majority (estimated at 119,000 self-employed persons in 1988). An extract from a letter sent to the Commission in March 2006 by the spouse of a now incapacitated farmer ineligible for an OACP on the ground of age and ineligible for a non-contributory pension on the basis of the estimated value of his life tenancy in the farm further illustrates the deep sense of injustice felt by persons who were required to make PRSI payments but were ineligible for an OACP.

I would like to state that I feel it is a major injustice that people who were over the qualifying age in 1988, to begin paying into the State Contributory pension scheme, and were therefore prevented by the State from contributing, having no right to any State Pension unless they were/are able to give away sufficient of their business and savings to a son or daughter to enable them to qualify for non contributory pension.

In the farming sector particularly, many proud hard working farmers (who would never have dreamed of drawing the "dole") made themselves, effectively, paupers to qualify for the pension and medical card. This was a gross indignity and left them at the mercy of their families for the "extras" in life.

I would contend that all people who fall into this category and age group, who were categorised as "Self Employed" should by right be given a State Pension, regardless of present income. This is assuming that they lived, worked, in the Republic of Ireland. These people were the backbone of the Irish economy before any Celtic Tiger and should be appreciated for their contribution.

Chapter 6

Background to the Social Welfare Act 1999

Self-Employed Pension Association and other lobby groups

6.1 Throughout the 1990s, an increasing number of self-employed persons aged 56 years or over on 6 April 1988 reached retirement age but were ineligible for an OACP. Various advocacy and lobby groups formed. One such group was the Self-Employed Pension Association. This was a voluntary association which sprang up on foot of a number of letters to newspapers written by P.P., a tradesperson in Chapelizod, Dublin. P.P. was aged 60 years in April 1988 and, on reaching 66 years in February 1994, he discovered that he was ineligible for an OACP.

6.2 P.P.'s first letters to daily newspapers date from 1994. On reading one such letter, the complainants wrote to him in February 1995 outlining their position and seeking details of the Association. P.P. received similar letters from hundreds of self-employed persons, and these letters were produced to the Commission. By 1996 the Association was holding meetings around the country and P.P. was producing a newsletter and briefing materials with which members could lobby their local TDs and approach the media to raise the issue.

6.3 Members of the Association came from a variety of backgrounds. Many were shopkeepers, vintners and farmers. Members included persons who emigrated from Ireland to the United Kingdom in the 1940s or 50s and who returned in the 1960s. It included some women who were required to give up employment when they married in the 1950s (including S.G.). Members or supporters of the Association sent small contributions, typically in the region of £5–£10 to cover photocopying, postage and other expenses to P.P. In 1996, larger organisations who themselves had made representations to Government formed a loose group, together with the Association, entitled Alliance of Self-Employed Taxpayers for Equity in State Pensions. These groups were:

- Irish Farmers Association
- Small Firms Association
- Irish Auctioneers & Valuers Institute
- Irish Countrywomen's Association
- The Vintners' Association of Ireland

6.4 In addition to pointing out the ineligibility of those aged 56 years or over on 6 April 1988 for an OACP, some of the contentions put forward by the Association in 1996 and 1997 were as follows:

- Up to 1988 the self-employed in Ireland were debarred by statute from contributing to a State PRSI scheme;

- A White Paper outlining the proposed scheme was introduced, and successive Governments promised its introduction, so much so that financial advisors to the self-employed advised them not to bother to take out private pensions pending the introduction of the State scheme;

- Those affected were not made aware that they would not obtain a pension;

- The qualifying conditions rule is discriminatory against a specific age group and a specific occupation;

- The qualifying conditions rule is inequitable as it denies a pension to those nearing retirement age and denies them access to or use of substantial sums of money which they could have put into a private pension scheme. Instead they were forced by law to contribute to the PRSI fund from which they would get no benefit and from which they would get 53% refunded without interest;[67]

- Some self-employed persons made representations to the Department to make voluntary contributions prior to 1988 and were refused as the legislation was not in place;

- The group of elderly persons affected is a dwindling one;

- The 1988 Act differs from the 1960 legislation which was introduced for employees[68] and under which special transitional arrangements were made for those affected to allow them to qualify for the OACP on their "stamps" on which there was no element of a contribution

towards an OACP. These transitional arrangements have been denied to the self-employed;

- The facility whereby employees who subsequently became self- employed were given the facility to continue their social insurance by making voluntary contributions was not made available to self-employed persons;[69]

- Women were forced to retire from work by the marriage bar back in the 1950s onwards and were never told they could sign for credits and thus keep their prospects of a pension in their own right alive.

6.5 Not all of these assertions are entirely accurate. The Department strongly denies that the qualifying conditions rule is inequitable. However, the points were well made and the sense of injustice felt, as evidenced in correspondence produced to the Commission, is clear.

6.6 The Association recommended that the Government:

a) allow contributors to "buy in" to the State's pension scheme;

b) allow contributors to continue paying contributions beyond age 66 in order to meet existing qualification requirements;

c) provide a pro rata pension based on the number of contributions made by a taxpayer on reaching retirement age.

6.7 Information furnished to the Commission during the enquiry suggests that these points were repeatedly urged on Government by members of the Association and representative groups during the 1990s.

6.8 On foot of the lobbying by the Association and other groups, there appears to have been a change in Government attitude towards the question of refunds and, from documentation produced to the Commission, it would appear that some members of the Association received refunds from 1997 on, after having applied to the Department.[70]

Refunds

6.9 Initially there was some hesitancy about refunding contributions, and refunds appear to have been envisaged only where a person did not qualify for an old age (non-contributory) pension. The then Minister informed the Dáil in 1988:

> Up to the present persons who entered insurance for the first time within ten years of reaching pension age have been entitled to a refund of the old age pension element of the contribution on the basis that they would be unable to qualify for a pension. Such refunds were paid irrespective of whether the persons concerned subsequently qualified for an old age non-contributory pension. As self-employed persons were not compulsorily insurable and as the majority did qualify for the old age non-contributory pension, refunding contributions to employed contributors in this situation was clearly justifiable.
>
> However, it would now be difficult to justify such refunds when virtually all persons whether employed or self-employed with an independent income are required to contribute. Persons who qualify on means grounds for a pension receive a substantial entitlement fully financed by the Exchequer. If they have contributed for even a short period as insured persons, such contributions should, in equity, be regarded as in part contributing to the cost of the old age pension. The National Pensions Board referred to this matter in their report and recommended that the refund of the old age pension element of the contribution should only be made, provided the person concerned does not qualify for a pension on a means-tested basis. I am accepting the advice of the National Pensions Board in this regard and the necessary provision will be made in regulations.[71]

6.10 The Committee Stage brief provided by the Department to the Minister states that the relevant sub-section of the 1988 Act is "a technical amendment which will be used, for example, to provide for the making of refunds of self-employment contributions to persons who enter insurance after the prescribed age".[72] The sub-section provides:

> The Minister may by regulations apply (with or without modification) to self-employed contributors and self-employment contributions payable under … section 17C of the Principal Act any provisions of the Principal Act which apply to employed contributors or employment contributions.[73]

6.11 It was not until 1996 and 1997 that regulations were introduced to allow for refunds to be given to those ineligible for the OACP on account of not meeting the requirement of entry into insurance before the age of 56. The provision of refunds had been available under the pre-existing law in relation to employees who entered social insurance within 10 years of compulsory retirement.

6.12 The Department informed the Commission that where self-employed persons seek refunds of PRSI contributions made, the regulations provide for the return of 53% of the monies contributed,[74] that being the pension element of PRSI paid by the self-employed who were aged 56 years or over on 6 April 1988 and who did not qualify for a contributory, non-contributory or retirement pension. The Department also informed the Commission that the "proportion of the overall PRSI contribution attributed to pension is calculated from time to time by reference to the total expenditure on pensions as a proportion of social insurance expenditure overall" and that "the calculation of 53% is based on an estimate of expenditure of Old Age Contributory Pension and Survivors Pension on a year by year basis over a ten year period". The 1996 regulations allow the Minister to pay interest on refunds made on or after 1 November 1990.[75]

6.13 Both the 1996 and 1997 regulations render the making of refunds dependant upon an application to that effect being made in writing to the Minister within such time as s/he may determine.[76]

Chapter 7

The Impact of the Social Welfare Act 1999 on the Self-Employed

Special half-rate pension

7.1 The concession on refunds was followed by a more substantial change to the law. The 1999 Act addressed the greater perceived injustice when it introduced an amendment to the law whereby a special half-rate OACP would be granted to self-employed persons who had entered social insurance on or after 6 April 1988 and who had made at least 260 weekly (5 years') contributions to the social insurance fund before reaching 66 years of age, i.e. it applied to those contributors who had attained the age of 56 years but had not attained the age of 62 years on 6 April 1988.[77]

7.2 The rationale for the threshold of 260 weekly contributions was stated by the Department to reflect "a certain consistency of commitment to the social insurance fund, over a given period of time".[78]

7.3 Accordingly, those who had 260 or more weekly contributions before reaching retirement age (and had entered insurance only on or after attaining the age of 56 years) would benefit from a half-rate OACP, while those with less than 260 weekly contributions would not qualify for the pension, though they may have qualified for the other benefits available.

7.4 The then Minister informed the Dáil in 1999 that 10,000 people would benefit from the special half-rate pension (which was referred to as a "pro rata" pension) at a cost of £18m.[79]

The complainants

7.5 J.J.G. continued to work after age 66 and make tax returns until the tax year 1996/97. He was not, however, permitted to make voluntary PRSI contributions in those years towards PRSI benefits. The complainants applied for the half-rate OACP but were advised by the Department on 10 August 1999 that they did not qualify.[80] While both fell within the age bracket 56 to 61 on 6 April 1988, neither reached the 260 contributions mark individually. According to them, their cumulative contributions exceeded the required 260 contributions (in fact they would, on their account, have had 27 payments over that figure). According to the Department, the number of their contributions, when aggregated, totalled 260. They were not, however, allowed to "aggregate" their contributions. Also, the legislation did not permit J.J.G. to make additional contributions to make up his shortfall or to pay by way of a capital sum so that he might qualify for the special half-rate pension. A pro rata pension based on the number of years of contributions made (in his case 4 years and 4 months) was not available.

7.6 On the face of it, there would appear to be something of a lack of co-ordination between the age bracket to which the 1999 Act applied (those who, on or before 6 April 1988, had attained 56 years of age but had not attained 62 years of age) and the number of weekly contributions required (260, i.e. 5 years). To fulfil the requirement of 260 weekly contributions, a contributor would have to have made contributions since reaching the age of 61 years. J.J.G. was 61 years and 7 months old on 6 April 1988, i.e. he had not attained 62 years of age. However, being over 61 when he began making contributions, it was not possible for him to make the required number of contributions before retiring at age 66.

7.7 While refunds of 53% were payable to OACP-ineligible self-employed persons for the pension element of their contributions from 1996/97 onwards, persons such as the complainants were not advised of the fact unless they inquired of the Department. No application form for a refund was in fact sent to the complainants until 29 June 2004, after the Department had received the Commission's pre-enquiry questions.

7.8 After receiving correspondence from the Department, the complainants applied for a pro rata OACP in December 1997 but were informed that they did not qualify for this benefit. In relation to the half-rate OACP, they were informed in August 1999 that they did not qualify for this benefit. The Department confirmed to the Commission that, based on their individual PRSI records, J.J.G. has not established an entitlement to an OACP or a half-rate OACP but has an entitlement to a Widower's Contributory Pension and a Bereavement Grant, and that while S.G.

has not established an entitlement to a Widow's Contributory Pension, she could qualify for this pension on the record of her husband.[81] Neither of the complainants has received any benefits in the period 1988 to date. The complainants informed the Commission that they felt the offer of a 53% refund on the PRSI paid by them to be unjust. For them the issue was and remains the perceived injustice of their ineligibility for an OACP or even a half-rate OACP.

Numbers excluded from the half-rate pension

7.9 The cohort of self-employed persons excluded from the 1999 special half-rate OACP was much smaller than the original cohort excluded by virtue of the 1988 Act. The Department provided the Commission with the numbers of persons affected by both laws. Whereas 61,517 persons were excluded in 1988 from receiving an OACP on account of their age on 6 April 1988, in 1999 those excluded from receiving either a full or a half-rate OACP numbered only 734 persons who would have been over 61 years of age on that date. Of this group, J.J.G. was in a smaller category numbering 82 persons who had made 208 contributions or more but less than 260, being less than a year short of qualifying.

7.10 In the statistics provided to the Commission, the Department indicated the number of self-employed contributors in the period 1988/89 to 1992/93 who were aged (a) 56 years or over and (b) 61 years or over on 6 April 1988. These are set out in Table D.[82] The Department also indicated the contributions received from the various groups in the years 1988/89 to 1992/93. These are set out in Table E.

TABLE D

Year	# PRSI Contributors	# Self-Employed	# Self-Employed 56+ yrs in 1988	# Self -Employed 61+ yrs in 1988	PRSI Receipts (£IRL)
1988/89	1,493,960	156,405	61,517	734	£1,092,173,000
1989/90	1,466,342	161,161	53,019	482	£1,167,958,000
1990/91	1,476,198	172,941	58,352	252	£1,351,669,000
1991/92	1,510,993	180,155	60,509	82	£1,407,648,000
1992/93	1,473,164	186,964	56,941	N/A	£1,506,376,000

TABLE E

Year	PRSI Receopts (£IRL)	All Self-Employed PRSI Receipts (£IRL)	All Self- Employed 56+ yrs PRSI Receipts (£IRL)	All Self- Employed 61+ yrs PRSI Receipts (£IRL)
1988/89	£1,092,173,000	£57,529,000	£20,913,000	£111,715
1989/90	£1,167,958,000	£76,267,000	£26,878,000	£105,564
1990/91	£1,351,669,000	£88,335,000	£31,052,000	£109,701
1991/92	1,407,648,000	£97,696,000	£34,326,000	£85,202
1992/93	1,506,376,000	£111,716,000	£38,905,000	£59,265

7.11 The Central Statistics Office ("CSO") also provided to the Commission general population statistics covering the period 1987 to 2005.[83] Table F sets out the estimated number of self-employed persons aged 56 years or over in 1998 who survived (or were projected to survive) to 1999, based on these statistics.

TABLE F

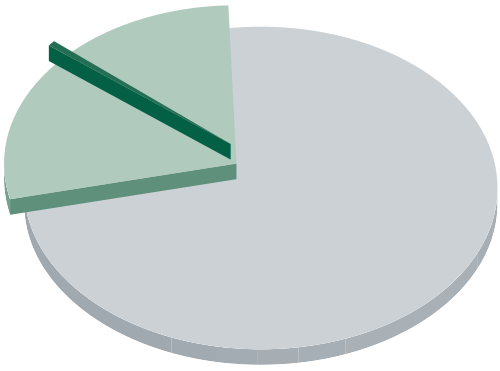
Age	1988	1999		Comment
Total population 56–60 years	138,900	122,286	88%[84]	Of the 138,900 aged 56–60 years in 1988, 88% (122,286) were alive and aged 67–71 years in 1999.
Self-Employed 56–60 years	60,783	53,513		Of the estimated 60,783 contributors aged 56–60 in 1988 as advised by the Department, it is estimated that 53,513 were alive in 1999, based on a survival rate of 88%.
Total population 61–65 years	136,800	103,840	75.9%	Of the 136,800 aged 61–65 years in 1988, 75.9% (103,840) were alive and aged 72–76 years in 1999.
Self-Employed 61–65 years	734	557		Of the estimated 734 contributors aged 61–65 in 1988 as advised by the Department, it is estimated that 557 were alive in 1999, based on a survival rate of 75.9%.

7.12 From Table D, it can be seen that 734 contributors were 61 years or over on 6 April 1988 and were excluded from a half-rate OACP. In contrast, some 60,783 persons between the ages of 56 and 60 years (that is, 61,517 minus the 734) would have theoretically benefited from the special half-rate pension if they survived until 1999.[85]

7.13 Based on the CSO figures, the Commission estimates that of the 60,783 contributors aged 56 to 60 years (inclusive) on 6 April 1988, 53,513 survived until 1999 and were accordingly entitled to the half-rate OACP. The Commission also estimates that of the 734 self-employed contributors aged 61 or over on 6 April 1988, 557 survived until 1999 but were excluded from the benefit. The Commission therefore estimates that approximately 1.0% of self-employed contributors aged 56 years or over on 6 April 1988 who survived until 1999 (i.e. 557 out of 53,513) were ineligible under the 1999 Act for the half-rate pension.

7.14 The following Pie Chart indicates the approximate size of the ineligible group when compared to both the total number of self-employed contributors in 1988 and those aged 56 years and over in that year.

Total number of self-employed contributors on 6 April 1988, (i.e. 156,405).



Key

Portion of contributors aged 56 years and over on 6 April 1988,	i.e. 61,517.
Portion of contributors aged 61 years and over on 6 April 1988,	i.e. 734.

(Pictorial representation only)

Self-Employed Pension Association

7.16 The Self-Employed Pension Association continued to lobby for further changes to the law after the introduction of the half-rate OACP in 1999, charging the Government with incorrectly promising a pro rata or sliding scale pension whereas, in its view, the half-rate pension of 50% was something different, namely a flat-rate pension.[86] The Association raised with Government those persons in the 3–5 year contribution category, which it estimated at 4,000 persons,[87] and claimed that the annual cost of paying a pro rata pension of 3/10 of the standard rate to this group would cost the Exchequer £4.5 million. The Association argued that those born before 1927 were still being denied a contributory pension as they could not make the required 5 years' contributions. It argued that a sliding scale of pro rata pension should be introduced from 3/10 to 9/10 depending on contribution levels made. It pointed out that someone with 9 years' contributions received a 50% pension, while someone with 5 years' contributions received the same pension.

7.17 The Association's arguments, and indeed those of the complainants, were rejected by the Government, whose response was that the special half-rate OACP was designed to extend contributory pension coverage to people who narrowly failed to qualify for a pension on the basis that they were aged 56 years or over on 6 April 1988 and could not satisfy the requirement of entry into insurance before the age of 56 years.[88] The rationale for the change to a half-rate pension calculated on the basis of 260 weekly contributions was that entitlement to a pension should be limited to those who had made some reasonable level of contributions to the Social Insurance Fund during their careers and that those who did not qualify might be eligible for a means-tested Old Age Pension.

Chapter 8

Relevant International Human Rights Standards

8.1 At least three international human rights standards are relevant to the matters considered in this enquiry.[89] They are:

- the right to adequate social security, including social insurance;
- the right to the peaceful enjoyment of one's possessions without arbitrary interference; and
- the right to equality before the law and non-discrimination in the enjoyment of rights.

The right to adequate social security, including social insurance

8.2 The State is party to three international agreements which provide for or regulate the right of everyone to social security, including social insurance; one of them at the universal level and two at the European regional level.

8.3 At the universal level, Ireland is party to the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[90] Article 9 of the Covenant provides:

> The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

8.4 All the rights guaranteed by the Covenant may be subject "only to such limitations as are

determined by law" and "only in so far as this may be compatible with the nature of these rights" and "solely for the purpose of promoting the general welfare in a democratic society".[91]

8.5 At the regional level, Ireland is party to the Revised European Social Charter ("RESC").[92] Article 12 of the RESC provides:

> With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake:
>
> 1 to establish or maintain a system of social security;
>
> 2 to maintain the social security system at a satisfactory level at least equal to that required for ratification of the European Code of Social Security;
>
> 3 to endeavour to raise progressively the system of social security to a higher level.[93]

8.6 Ireland's obligations under the RESC have now replaced earlier obligations under the European Social Charter ("ESC").[94] The latter Charter contained a similar provision on the right to social security. The only substantive difference between the comparable provisions relates to the level at which a Party must maintain its social security system. Under the ESC, a Party must maintain its social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention No. 102 Concerning Minimum Standards of Social Security. Under the RESC, a Party must maintain its social security system at a satisfactory level at least equal to that required for ratification of the European Code of Social Security.

8.7 The European Code of Social Security has in fact been binding on Ireland since 17 February 1972,[95] and the self-employed are protected persons under the Code. While the State was not obliged in becoming a party to the Code to accept all its provisions, it has specifically agreed to comply with Part V relating to old age benefit.[96]

8.8 The Code provides that an old age benefit be at least secured to insured persons who meet prescribed qualifying periods of contributions.[97] Significantly, the Code also provides that where a benefit is conditional upon a minimum period of contribution, a reduced benefit shall be payable under prescribed conditions to a person protected who, by reason only of their advanced age when the provisions concerned come into force, has not satisfied the conditions prescribed.[98]

8.9 Five points of relevance to this enquiry may be made on the basis of these international human rights provisions.

8.10 Firstly, everyone has a right to social security, including social insurance.

8.11 Secondly, the State must endeavour to raise progressively the system of social security to a higher level.[99]

8.12 Thirdly, it is permissible to tie the right to social insurance benefits to the accumulation of insurance or employment periods prescribed by legislation, and the State has discretion in setting criteria and entry requirements for such benefits.

8.13 Fourthly, where there is no universal coverage, there must be provision of old age benefit for persons who meet the contingency of reaching statutory retirement age and who meet prescribed qualifying periods of contributions, employment or residence or a prescribed yearly average number of contributions.

8.14 Fifthly, where a benefit is conditional upon a minimum period of contributions, a reduced benefit must be available under prescribed conditions to a person who, by reason only of his or her advanced age when the provisions come into force, has not satisfied the conditions prescribed.

The right to the peaceful enjoyment of one's possessions without arbitrary interference

8.15 Article 1 of Protocol No. 1 to the European Convention on Human Rights ("ECHR")[100] provides that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

8.16 The European Court of Human Rights ("the European Court")[101] has identified three distinct but interconnected rules in interpreting Article 1 of Protocol No. 1:

> The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest ... The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.[102]

8.17 The construction of the second and third rules in the light of the general principle laid down in the first rule has led to a tendency by the European Court to merge its analysis of issues arising under the three "rules".[103]

8.18 As a preliminary matter, the Court will inquire as to whether there has been an interference with a possession. The concept of "possessions" under the Protocol has an autonomous meaning which is independent from the formal classification under domestic law. It is not limited to the ownership of material goods. Certain other rights and interests constituting assets can also be regarded as property rights and thus as "possessions" for the purposes of Article 1 of Protocol No. 1.[104] With specific regard to social welfare schemes, it is now clear that both contributory and non-contributory schemes fall within the scope of this provision.[105] However, Contracting States are entitled to subject the payment of benefits to certain conditions.[106]

8.19 Once the Court has established that there is a "possession", it inquires as to whether the deprivation of the possession or the control of its use is in accordance with the conditions prescribed by national law. In doing so, the Court considers not merely formal compliance with national law, but also whether the law is of a particular "quality" – whether it is sufficiently accessible, precise and foreseeable in its consequences:

> The Court has consistently held that the terms "law" or "lawful" in the Convention "[do] not merely refer back to domestic law but also [relate] to the quality of the law, requiring it to be compatible with the rule of law".[107]

8.20 The Court then looks at whether the general principles of international law are respected. The Court has held that the general principles of international law apply only to the deprivation of a non-national's possessions and do not extend to the deprivation of the possessions of a State's nationals, since Article 1 of Protocol No. 1 already prescribes that deprivations concerning a State's nationals must be justified in the "public" or "general" interest.[108]

8.21 The Court then examines whether an interference with the right to the peaceful enjoyment of possessions pursues a legitimate aim in the public interest.[109] It is for the national authorities to make the initial assessment in this regard and the Court will not lightly second-guess the view of the authorities.

8.22 Lastly, the Court considers whether an interference with the peaceful enjoyment of possessions strikes a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights.

> ... there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures depriving a person of his or her possessions. In each case involving the alleged violation of [Article 1 of Protocol No. 1] the Court must, therefore, ascertain whether by reason of the State's action or inaction the person concerned had to bear a disproportionate and excessive burden.[110]

The availability of compensation may be relevant in assessing whether a fair balance was achieved.[111]

8.23 It is well established in the case law of the European Court of Human Rights that the discharge of States' duties under the ECHR and Protocols may entail positive obligations in order to ensure the effective exercise of the guaranteed rights.[112] With specific regard to Article 1 of Protocol No. 1, the Court has stated that the boundaries between the State's positive and negative obligations under this Article do not lend themselves to precise definition, and that the applicable principles are similar:

> ... Whether the case is analysed in terms of a positive duty of the State or in terms of an interference by a public authority which needs to be justified, the criteria to be applied do not differ in substance. In both contexts regard must be had to the fair balance to be

> struck between the competing interests of the individual and of the community as a whole. It also holds true that the aims mentioned in that provision may be of some relevance in assessing whether a balance between the demands of the public interest involved and the applicant's fundamental right to property has been struck. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.[113]

8.24 Eight points of relevance to this enquiry may be made on the basis of these international human rights provisions.

8.25 First, everyone has a right to the peaceful enjoyment of one's possessions.

8.26 Secondly, the concept of "possessions" is not limited to the ownership of material goods, and social security schemes fall within the scope of Article 1 of Protocol No. 1.

8.27 Thirdly, the State may deprive a person of his or her possessions in the public interest.

8.28 Fourthly, the State may also control the use of a person's property where this is in the general interest or to secure the payment of taxes or contributions.

8.29 Fifthly, any deprivation of one's possessions, or control of one's property, by the State must be regulated by law, the law being sufficiently accessible, precise and foreseeable in its application.

8.30 Sixthly, the interference with the peaceful enjoyment of one's possessions must pursue a legitimate aim in the public interest. The State has a 'margin of appreciation' in this regard, i.e. the European Court will not readily second-guess the State in its assessment of the public interest.

8.31 Seventhly, in deciding whether or not the interference is acceptable, a test of proportionality is applied, i.e. a balance is drawn between the person's interest in their possessions and the public interest in depriving them of the possessions or controlling the use of the property. In drawing this balance, the Court will have regard, among other things, to the State's "margin of appreciation" as well as to the consequences for the individual, including the availability of compensation.

8.32 Eighthly, the criteria to be applied to the State's positive duty to ensure the right to the peaceful enjoyment of one's possessions do not differ in substance from those to be applied to the State's negative duty not to interfere with the peaceful enjoyment of one's possessions. In both cases regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole.

The right to equality before the law and non-discrmination in the enjoyment of rights

8.33 Three international agreements to which the State is party contain equality and non-discrimination provisions of relevance to this enquiry, two of them at the universal level and one at the regional, European, level.

8.34 At the regional level, Article 14 of the ECHR provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

8.35 This Article prohibits discrimination only in the enjoyment of the rights set out in the ECHR and its Protocols. It is not a free-standing guarantee of non-discrimination.

8.36 Not all difference of treatment is prohibited under Article 14 of the ECHR:

> [T]he principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 ... is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[114]

8 (i) whether the matter falls within the ambit of a substantive Convention right;

(ii) whether a difference of treatment on the basis of status can be demonstrated;

(iii) whether any difference of treatment pursues a legitimate aim; and if so,

(iv) whether the measure in question is proportionate to the aim. The latter test includes an examination of whether the difference of treatment extends beyond the State's margin of appreciation.

Whether the matter falls within the ambit of a substantive Convention right

8.38 The European Court has held that "there can be no room for [the] application [of Article 14] unless the facts at issue fall within the ambit of one or more" of the substantive provisions of the ECHR and its Protocols.[115] Accordingly, in considering an allegation of discrimination in relation to a social security benefit, the European Court will inquire first as to whether the matter comes within the ambit of Article 1 of Protocol No. 1 before proceeding with its analysis of the difference of treatment in the case.

Whether a difference of treatment on the basis of status can be demonstrated

8.39 Article 14 proscribes discrimination on certain non-exhaustive grounds such as race, language, religion or birth.[116] The prohibitory words "on any ground such as" in Article 14 clarify that the enumerated grounds for discrimination set out in Article 14 are not exhaustive. Thus, in James v United Kingdom,[117] the European Court found that "differences of treatment in regard to different categories of property owners in the enjoyment of the right safeguarded by Article 1 of Protocol No. 1" brought the matter within the scope of Article 14. Accordingly a difference of treatment on the ground of age or category of contributions may come within the ambit of Article 14 of the ECHR, although "the scope of the intensity of the European Court's review may vary" according to the prohibited ground of differentiation.[118]

8.40 At times the European Court will eschew any naming of a prohibited ground but will focus instead on any comparisons with persons in an analogous situation.[119]

8.41 Article 14 covers direct discrimination, where the difference in treatment between a member of one group and a member of another group is clear (e.g. between a woman and a man), and indirect discrimination, where the same requirement applies to both groups but a significant number of one group cannot comply with the requirement in question. Where there is a difference in treatment, the European Court inquires whether the measure in question has any objective and reasonable justification, i.e. whether the difference of treatment pursues a legitimate aim and, if so, whether the measure in question is proportionate to the aim.[120]

Whether a difference of treatment pursues a legitimate aim

8.42 Once a difference of treatment is demonstrated, the European Court will consider whether it pursues a legitimate aim. Often the aim(s) invoked by the State are accepted as legitimate, account being taken of democratic principles, but, occasionally, an aim is rejected.[121]

Whether the measure in question is proportionate to the aim

8.43 In the case of Willis v United Kingdom,[122] which concerned discrimination in the payment of widows' benefits which were unavailable to widowers, the European Court did not consider it significant "that the statutory condition requiring payment of contributions into the National Insurance Fund required the contributions to have been made, not by the applicant, but by his late wife".[123] It considered the argument that there were finite resources in the social insurance fund as lacking in justification: "[It] did not justify concentrating all the resources which were available on the protection of bereaved women to the detriment of widowed men."[124]

8.44 In finding a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1, the European Court noted the fact that women and men paid similar contributions to the social insurance fund, but that widowers enjoyed fewer benefits than widows. It also noted the arguments advanced of "the less discriminatory approaches taken by the majority of the other member States of the Council of Europe in the context of survivors' benefits".[125] The Government did not make submissions on the point, and the Court repeated its earlier pronouncements that while States enjoyed a "margin of appreciation", "weighty reasons" would be required to justify a difference of treatment on the ground of sex alone.

8.45 Similarly, at the universal level, the ICESCR prohibits discrimination in the exercise of Covenant rights. Article 2(2) of the Covenant provides:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

8.46 Since the right to social security is a "right enunciated in the Covenant", the ICESCR guarantees this right to everyone, without discrimination on the basis of the person's status.

8.47 The second international agreement of relevance at the universal level is the International Covenant on Civil and Political Rights ("ICCPR").[126] In contrast to Article 14 of the ECHR and to Article 2(2) of the ICESCR, the guarantee of equality in Article 26 of the ICCPR is not limited to the enjoyment of the rights covered by the ICCPR. It requires non-discrimination in any area of the law, including the law relating to economic and social matters, such as social security. To the extent that a matter is regulated by the law, that law must not discriminate between persons. It applies to any law, whether or not the law in question relates to a right protected under an international agreement.[127] Article 26 provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

8.48 In its General Comment 18 of 1989,[128] the Human Rights Committee, which monitors the implementation of the ICCPR,[129] clarified the scope of "discrimination" under Article 26 of the ICCPR. It made it clear that this equality guarantee is an autonomous right, and is not linked to the enjoyment of the other rights secured by the ICCPR.[130] It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. When legislation is adopted by a State party, its content should not be discriminatory. Nor should the application of the legislation be discriminatory. Difference of treatment is assessed by reference not merely to the purpose of the law in question, but also to the impact or effect of the law. Both direct and indirect discrimination are prohibited.

8.49 The General Comment also recognises that not all difference of treatment constitutes discrimination (para. 13):

> [T]he Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[131]

8.50 Accordingly, the test applied by the Human Rights Committee in considering Article 26 complaints is to inquire:

> (i) whether there was any difference of treatment between categories of person based on the ground of a person's status; and if so,
>
> (ii) whether the criteria for such differentiation were reasonable and objective and whether the aim was to achieve a purpose which is legitimate under the Covenant.[131]

Whether there was any difference of treatment between persons based on status

8.51 Under the first limb of the test, the Human Rights Committee has considered that where a law provided for women but not men to prove that they were a "breadwinner" to secure a social security benefit, there was a difference of treatment on the basis of the person's status (sex).[132] Similarly, it has found a difference of treatment where conscientious objectors to military service were obliged to undertake a longer term of national alternative service than those who underwent military service and also where a law provided for restricted pension entitlements for retired soldiers on the basis of their so-called "new nationality".[133] The Human Rights Committee has demonstrated a willingness in its jurisprudence to consider claims of discrimination on the "other status" ground. It is thus likely that discrimination on the grounds of a person's age and/or employment status comes within the ambit of Article 26.[134]

Whether the difference of treatment was reasonably and objectively justified

8.52 The test employed by the Human Rights Committee to determine whether a difference in treatment is justified is similar to that employed by the European Court in relation to Article 14 of the ECHR. A difference of treatment may be justified if the measure in question has an aim which is legitimate.[135] There must also be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. However, in contrast to the European Court, the Human Rights Committee's consideration of the proportionality of any difference of treatment has tended to be somewhat summary in nature.[136]

8.53 As a self-standing provision, Article 26 is unaffected by whether the matter in question is covered by other human rights provisions. Thus in 1987, in the case of Zwaan-de Vries v The Netherlands,[137] the Human Rights Committee found a violation of Article 26 in relation to discrimination suffered by married women in applying for unemployment benefits despite the fact that the right to social security without discrimination was covered by another international instrument, namely Articles 2 and 9 of the ICESCR.[138]

8.54 Four points of relevance to this enquiry may be made on the basis of these equality and non-discrimination provisions.

8.55 First, not all differential treatment constitutes discrimination.

8.56 Secondly, differential treatment is prohibited if it is based on a particular ground and has no reasonable and objective justification.

8.57 Thirdly, objective and reasonable justification is assessed by reference to whether or not the differential treatment pursues a legitimate aim/objective and whether or not it draws a fair or reasonable balance between the interests of the individual concerned and the interests of society.

8.58 Fourthly, discrimination may be direct (by reference to purpose) or indirect (by reference to effect).

Chapter 9

Analysis

A Summary of the facts

9.1 A perceived injustice as a result of certain provisions of social welfare legislation was drawn to the Commission's attention by an elderly married couple. They ran a small factory and, being self-employed, they were required by legislation to contribute to a scheme of social insurance from 6 April 1988. Subject to certain conditions, contributors to the scheme were entitled to the following benefits:

- Widow's and Widower's (Contributory) Pension
- Orphan's (Contributory) Allowance
- Old Age (Contributory) Pension.

From 1998 the available benefits were extended to include:

- Maternity Benefit
- Adoptive Benefit
- Bereavement Grant.

9.2 The main purpose of the 1988 Act was to bring the self-employed within the system of social insurance and, in particular, to address an inadequacy in the pension cover of the self-employed by extending to them social benefit cover similar to that available to employees.

9.3 The perceived injustice relates to the OACP element of the benefits. One of the conditions attaching to the payment of this benefit is that a contributor have entered insurance before attaining the age of 56 years in order to be eligible for the benefit. Contributions are compulsory up to age 66, and it was not possible, and remains impossible, to continue making contributions beyond this age.

9.4 This meant that it was not possible for a certain number of self-employed persons who were legally required to contribute to the scheme of social insurance to benefit from the OACP: namely, those aged 56 years or over on 6 April 1988. The complainants fell into this group.

9.5 The law was changed in 1999 to provide a special half-rate pension for the self-employed who were 56 years or over but under 62 years of age on 6 April 1988. While one of the complainants, J.J.G., was within this age bracket on 6 April 1988, he was excluded from the half-rate pension by virtue of his inability to meet the required number of weekly contributions, i.e. 260 (5 years' contributions). The reason he could not meet this requirement was his age on 6 April 1988, i.e. he was over 61. The other complainant, S.G., while also within the specified age bracket on 6 April 1988, only made one year's PRSI contributions up to retirement age. Had she continued to make contributions up to retirement age, she would have been entitled to the half-rate pension.

9.6 The 1988 Act made no provision for refunds of contributions to the self-employed who had contributed to the social insurance scheme but who could not qualify for the OACP by virtue of their age at the time contributions became compulsory.

9.7 This Act did, however, allow for regulations to be made by the Minister applying to the self-employed the provisions of earlier legislation which were applicable to employed persons. And, in 1996 and 1997, the Minister made regulations providing for the refund of contributions to the self-employed. Those affected by these regulations were not directly contacted and informed of them; but persons could seek a refund from the Department and the Department would send them a claim form.

9.8 A form for claiming a refund of their contributions was sent to the complainants on 29 June 2004, but the complainants have decided not to request a refund because they believe a refund would not address the injustice of their exclusion from the OACP benefit.

9.9 The OACP element of the contributions has been calculated at 53%.

B Application of relevant international human rights standards to the facts

The right to adequate social security, including social insurance

9.10 Both the RESC and the ESC guarantee a right to social security and contain a similar provision whereby Parties undertake certain obligations to ensure the effective exercise of this right.[139] Under the RESC, a Party must maintain its social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security. It must also endeavour to raise progressively the system of social security to a higher level.[140]

9.11 The European Code of Social Security has in fact been binding on Ireland since 1972, and the self-employed are 'protected persons' under the Code.

9.12 The RESC and the Code provide that eligibility for an old age benefit may be linked to contribution criteria and entry requirements.[141] Of particular relevance to this enquiry, however, is the fact that the Code provides for reduced benefits to be paid in certain circumstances. More specifically, the Code provides that where a benefit is conditional upon a minimum period of contributions, a reduced benefit shall be payable under prescribed conditions to a person protected who, by reason only of their advanced age when the provisions concerned came into force, has not satisfied the condition.

9.13 The full-rate OACP is conditional upon entry into insurance before the age of 56 years, and one of the complainants, J.J.G., has not been able to satisfy the conditions specified for the payment of the OACP by reason only of his advanced age when the 1988 Act came into force. The minimum period of contributions under this Act when J.J.G. reached retirement age was only 3 years and J.J.G. did satisfy this condition, i.e. he satisfied the condition of the minimum period of contributions. On the other hand, the minimum period of contributions under the 1999 Act in order to qualify for the half-rate pension is 5 years (260 weekly contributions) and he has not satisfied this condition by reason only of his advanced age at the relevant time. It would therefore appear that, under the Code, a reduced benefit is payable to him and to others in his position. In contrast, S.G., while not having entered into insurance before the age of 56 years, would have been eligible for the half-rate pension for the self-employed had she continued to pay the required contributions up to her retirement.

9.14 In its response to the draft enquiry report, the Department contended that the State had complied with its obligations under that part of the RESC which pertains to the Code, and it cited as evidence of compliance the fact that the European Committee of Social Rights, which reviews State compliance with the RESC, had not raised any issue in this regard.[142] The Commission is not, however, satisfied that the European Committee specifically considered this matter when reviewing the State's compliance with the RESC.

9.15 While everyone's right to social security, including social insurance, is recognised in the ICESCR, the scope of this right is unclear since the Committee on Economic and Social Rights, which oversees this Covenant, has not issued any General Comment on it. It therefore offers little guidance as to the social welfare provisions under consideration here.[143]

The right to the peaceful enjoyment of one's possessions without arbitrary interference

9.16 Article 1 of Protocol No. 1 to the ECHR guarantees a right to the peaceful enjoyment of one's possessions, and social security schemes fall within the scope of this Article. In order to consider further the relevance of this guarantee to the situation of persons like the complainants, it is necessary to address a number of questions.

Can the OACP element of the PRSI contributions be regarded as possessions?

9.17 The main rationale for the 1988 legislation was to make pension provision for the self-employed. Moreover, it was described by the Department as a "pay as you go" entitlement system. The pension element of the contributions was capable of being estimated at 53% and, from 1996, refundable on that basis.

9.18 The pension element of the contributions can therefore be regarded as "possessions" within the meaning of Article 1 of Protocol No. 1.

Was the requirement to pay contributions towards an OACP a deprivation of possessions or control of the use of property?

9.19 The requirement to pay PRSI contributions, including a contribution towards an OACP, deprived of financial possessions those self-employed persons who were subject to the requirement. In so far as the requirement was ongoing rather than once-off, it constituted a continuing deprivation of possessions. It may also be regarded as a control of the use of property in that the contributions were used by the State for the purposes of the Social Insurance Fund. However, it is immaterial whether the requirement resulted in a deprivation of possessions or a control of the use of property in that the same conditions apply to both in assessing their compatibility with the right to the peaceful enjoyment of one's possessions.

Was the deprivation of possessions / control of the use of property in accordance with conditions provided for by law?

9.20 The requirement to contribute towards an OACP from 6 April 1988 was laid down in the 1988 Act (amending the 1981 Act[144]). The relevant legislative provisions were detailed, specifying who among the self-employed were required to pay the contribution and how much. They were accessible, precise and the requirement to pay the contribution was foreseeable, if need be with professional advice, and was known by the complainants. The deprivation of possessions / control of the use of property can therefore be regarded as in accordance with conditions provided for by law.

Did the deprivation of possessions / control of the use of property serve a legitimate aim in the public interest?

9.21 The requirement that the self-employed pay contributions to the Social Insurance Fund clearly serves a public interest in that it was designed to bring the self-employed within the social insurance system and, in particular, to ensure better pension coverage for them. Moreover, Article 1 of Protocol No. 1 explicitly allows a State to control the use of property to secure the payment of taxes or other contributions or penalties. The deprivation of possessions / control of the use of property therefore served a legitimate aim in the public interest.

Was the fair balance, or proportionality, test satisfied?

9.22 In applying the fair balance test, it is necessary to consider both the particular public interest served by the measure in question and the individual circumstances of those concerned.

9.23 As to the public interest, the Social Insurance Fund is intended to meet people's needs in the event of certain contingencies occurring, such as maternity, invalidity, sickness, unemployment, retirement or death. Not only does such a fund serve a legitimate social purpose, it is also a feature of modern western democracies. Contributions to the Fund are not private investments.

9.24 Nevertheless, the existence of such a fund does raise legitimate expectations on the part of the public, and clearly a deep sense of injustice was felt by self-employed persons who reached 66 years of age in the 1990s only to find that they were ineligible for an OACP.

9.25 There is a difference between being required to contribute towards a benefit which one may never enjoy and being required to contribute towards a benefit which one can never enjoy. One may never enjoy an old age pension to which one has contributed because one may die before retirement age. Death at a particular time is one of the happenstances of life, and a requirement that one contribute towards a pension for one's retirement years even if one does not in fact benefit from the pension because of early death would generally be regarded as reasonable and as serving the public interest. On the other hand, J.J.G., S.G., and others in their position were required in 1988 to contribute towards an OACP even though they could never benefit from it in that they could never fulfil the conditions attaching to it, and this was known to the authorities when the 1988 Act was passed.

9.26 When provision was made in 1999 for a half-rate pension, eligibility was limited to those self-employed who, on or before 6 April 1988, had attained the age of 56 years but had not attained the age of 62 and who had made at least 260 weekly (5 years') contributions to the Social Insurance Fund. Although J.J.G. had not attained the age of 62 on or before 6 April 1988, he had not by pensionable age made at least 260 weekly contributions, nor was it possible for him to do so since, on 6 April 1988, he was aged 61 years and 7 months. The earliest he could have made 260 weekly contributions was April 1993, yet he reached the retirement age of 66 on 30 August 1992. That approximately 1% of contributors aged 56 years or over but under 62 on 6 April 1988 would be excluded from eligibility for this special pension must have been known

to the authorities in 1999, as well as the fact that the age of the persons concerned was between 67 and 76 years. On the other hand, S.G. was 57 years of age on 6 April 1988, and it would have been possible for her to make the required number of contributions. She, however, did not do so.

9.27 In addition, not only were persons in the position of J.J.G. not eligible for the payment of an OACP upon reaching pensionable age, there was no possibility at the time for them to receive a refund of their OACP contributions. The Minister did state at the time the 1988 Act was passed that regulations would be introduced as recommended by the National Pensions Board, but provision for refunds was not made until 1996. The Social Welfare (Consolidation) Act 1993, which was relied on in 1996 and 1997 for the making of regulations, states, in so far as relevant, that regulations shall provide for the return of so much of any self-employment contribution paid by a self-employed contributor who entered into insurance after attaining the age of 56 years, as is determined in accordance with regulations to have been paid in respect of an OACP.[145] The 1996 regulations came into operation on 1 November 1996. J.J.G. reached the retirement age of 66 on 30 August 1992 and therefore there was no provision in law for him to receive a refund at the time of his retirement. There was a gap of over 4 years between J.J.G. reaching pensionable age and becoming eligible for a refund of his OACP contributions. On the other hand, S.G. reached retirement age on 25 December 1996 and would have been immediately eligible on retirement for a refund of the contributions she had made.

9.28 When the possibility of claiming a refund was introduced, it does not appear that there was any attempt to inform those concerned, but it would be reasonable to assume that those who were members of the Self-Employed Pension Association or other lobby groups would have been alerted to this possibility.

9.29 It is also of relevance that, in interpreting the provisions of the ECHR and the Protocols thereto, the European Court of Human Rights may have regard to the provisions of other agreements concluded within the framework of the Council of Europe, and seek to interpret the ECHR and Protocols in a manner consonant with States' obligations under these other agreements. Other Council of Europe agreements to which Ireland is party include the European Code of Social Security. The Code provides that the contingency covered by old age benefit is survival beyond a prescribed age.[146] It also provides for the payment of a reduced benefit where the benefit is conditional upon a minimum period of contribution and a person has not satisfied this condition by reason of advanced age when the condition came into force.[147]

9.30 The European Court of Human Rights allows a wide margin of appreciation to national authorities in social welfare matters. Nevertheless, there has to be doubt as to whether the fair balance test was met in the case of self-employed persons who were required to contribute towards an OACP when they could not possibly receive this benefit. The non-availability of a refund of contributions for some time in the case of persons such as J.J.G. reinforces this doubt. At the very least, it is questionable whether the fair balance test was met in the case of those self-employed contributors for whom it was impossible to qualify for an OACP by virtue of the eligibility conditions and who reached pensionable age without the possibility at the time of claiming a refund of their contributions.

May an entitlement to an OACP be derived from Article 1 of Protocol No. 1?

9.31 J.J.G. and S.G. claim an entitlement to an OACP by virtue of their contributions to the Social Insurance Fund, contributions which were required by law. Clearly they have no entitlement to a full OACP as States may subject entitlement to a full OACP to a minimum number of contributions, and contributions by J.J.G. over 4 years and 7 months and by S.G. over 1 year could not, on any reasonable view, be regarded as sufficient to ground such an entitlement. But might persons in their position be entitled to a pro rata pension?

9.32 The criteria applied in assessing whether or not an entitlement exists are essentially the same as those applied in assessing whether or not an interference by a public authority with the peaceful enjoyment of one's possessions is justified. Besides the considerations mentioned in the latter regard, it may be noted that provision already exists in law for the payment of a pro rata pension where the condition of 48 average weekly contributions per year is not met. The introduction of a pro rata pension for persons in the position of J.J.G. and S.G. would not therefore be entirely without precedent and may warrant Government consideration.

The right to equality before the law and non-discrimination

9.33 The ECHR guarantees the right of everyone to the peaceful enjoyment of his or her possessions without discrimination on any ground. Since the view can reasonably be held that the OACP element of the PRSI contributions of the self-employed to the social welfare scheme

constitute possessions, it is necessary to consider whether they have experienced any discrimination in their enjoyment of these possessions.

9.34 The ICESCR similarly guarantees the right of everyone to social security without discrimination on the basis of status. While the European Court employs well-established criteria to determine whether or not discrimination has occurred under the ECHR, the Committee on Economic, Social and Cultural Rights has given little guidance on the scope of the right to social security under the ICESCR. The non-discrimination guarantee of the ICESCR will therefore not be considered here.

9.35 Consideration will, however, be given to the guarantee of equality before the law and the equal protection of the law contained in the ICCPR. Although the analysis by the Human Rights Committee of whether or not discrimination has occurred under the ICCPR is similar to that employed by the European Court, the guarantee of equality under the ICCPR is broader than that under the ECHR in that it applies to any "law", not merely to the enjoyment of the rights set forth in the Covenant.

9.36 Taking the ECHR first, it is necessary to consider:

(i) whether a difference of treatment on the basis of status can be demonstrated; and, if so,
(ii) whether the difference of treatment pursues a legitimate aim; and, if so,
(iii) whether the difference of treatment is proportionate to the aim.

Whether a difference of treatment on the basis of status can be demonstrated

9.37 Within the category of the self-employed, some were treated differently to others. First, those aged 56 years or over on 6 April 1988 could not benefit from the OACP by reason of the requirement of entry into insurance before the age of 56 years, whereas those under 56 could benefit. Secondly, the introduction of a half-rate pension with a requirement of 260 weekly contributions in 1999 meant that those aged 61 or over on 6 April 1988 could not fulfil the conditions for a half-rate pension, whereas those under 61 were eligible for this pension. The qualifying condition under the 1988 Act of entry into insurance before the age of 56 years was clearly age-based. Self-employed contributors under the age of 56 years on 6 April 1988 could

qualify for an OACP; those 56 years of age or over on that date could not. The qualifying condition under the 1999 Act of 260 weekly contributions for the half-rate OACP was not, on the face of it, age-based. It was, however, indirectly age-related in that those aged 61 years or over on 6 April 1988 could not qualify for this benefit, whereas those aged 56 years or over and under 61 could benefit. There was therefore a difference of treatment based on age in respect of both the full OACP and the half-rate OACP.

Whether the difference of treatment pursues a legitimate aim

9.38 The purpose of the 1988 Act was to bring the self-employed within the social security net and, in particular, to provide a pension benefit for them in their old age. This would generally be regarded as a legitimate social purpose.

9.39 The purpose of the 1999 Act was to extend a pension benefit to some self-employed persons who would otherwise not qualify for any pension under the scheme to which they had contributed. This also would generally be regarded as a legitimate social purpose.

Whether the difference of treatment was proportionate to the aim

9.40 As to the difference in treatment between self-employed persons aged 56 and over on 6 April 1988 and those under the age of 56, it is permissible for a State to require a minimum number of contributions for the payment of a benefit. In 1988, the minimum number of qualifying contributions was 156 weekly (i.e. 3 years') contributions since entry into insurance. It would have been possible for many of those aged 56 or over as well as those under 56 years of age on 6 April that year to make the required minimum number of contributions prior to retirement age. It was also a requirement that a claimant have a yearly average of not less than 48 contributions. Again, it was possible for many of those aged 56 or over as well as for those under 56 years of age to meet this requirement. The significant requirement was the cut-off age of 56 for entry into insurance. There is the possibility that a self-employed person who entered into insurance before the age of 56 might have made less contributions than a person aged 56 or over on 6 April 1988 (e.g. if the person took early retirement). Given the stark consequences for those self-employed aged 56 or over on that date (i.e. ineligibility for the OACP), the proportionality of the difference in treatment to the aim of the legislation is questionable.

9.41 As to the difference in treatment between self-employed persons aged 62 years and over on 6 April 1988 and those under the age of 62 with respect to the half-rate pension in 1999, can the cut-off age of 62 be justified?

9.42 Based on the figures supplied by the Department and by the CSO, the Commission estimates that those excluded in 1999 from eligibility for the half-rate pension comprised approximately 1% of self-employed contributors aged 56 or over on 6 April 1988.

9.43 In terms, therefore, both of numbers and of the percentage of self-employed contributors, those excluded from the half-rate pension were a relatively small group, and a group becoming progressively smaller with the years, in view of mortality.

9.44 It should also be noted that the effective cut-off age was 61, not 62, given the requirement that a person had to have made 260 weekly (5 years') contributions to qualify for the half-rate pension. Moreover, there was no possibility for those aged 61 years and over on 6 April 1988 to receive a truly pro rata pension.

9.45 There must therefore likewise be some doubt as to whether it was necessary to introduce a measure which resulted in the effective exclusion of those aged 61 years and over on 6 April 1988 from the half-rate OACP, given the overall purpose of the legislation of bringing the self-employed within the social security net.

9.46 Moving to consideration of the guarantee of equality before the law and equal protection of the law under the ICCPR, it is necessary to consider:

(i) whether there was any difference of treatment between persons on the basis of status; and, if so,
(ii) whether the difference of treatment can be reasonably and objectively justified.

Whether there was any difference of treatment based on status

9.47 This question was considered in relation to the non-discrimination provision of the ECHR; and it was concluded that there was a difference of treatment based on age. Clearly those persons in the situation of J.J.G. could not qualify for a pension under either the 1988 Act or the 1999 Act. They were denied any entitlement to a pension to which they had been obliged by law

to contribute. In contrast, it was possible for those under 56 years of age on 6 April 1988 to qualify for the full OACP on retirement and, from 1999, it was possible for those under 61 years of age on 6 April 1988 to qualify for a half-rate pension. Those aged 56 years or over and those under 56 years of age on 6 April 1988 were not placed on an equal footing with regard to the possibility of benefiting from an OACP. Similarly, those over 61 years of age and those under 61 years of age on 6 April 1988 were not placed on an equal footing by the 1999 Act with regard to the possibility of benefiting from a half-rate pension.

Whether the difference of treatment can be reasonably and objectively justified

9.48 Essentially, the same considerations apply in answering this question as in determining whether the difference of treatment was justified under the ECHR; and there must therefore also be some doubt as to whether the difference of treatment can be reasonably and objectively justified.

Chapter 10

Conclusions and Recommendations

10.1 There are a number of elderly persons in Ireland today who feel a deep sense of injustice because they were obliged by the law to contribute to a social insurance scheme which was primarily designed to afford those who contributed to it an OACP but in fact denied them this benefit. It seems that many of those for whom this benefit was illusory were unaware of the fact until they reached retirement age and sought to claim it. Some, like the complainants, have no pension. They are not eligible for the Old Age (Non-Contributory) Pension. The amount they paid in contributions to the State scheme could have been invested by them in a private scheme from which they would have derived some benefit.

10.2 Of course, not all injustice entails a violation of human rights; and it is the task of the Commission, when a complaint is made, to assess whether or not human rights standards have been respected. The Commission has therefore examined the application of international human rights standards to the situation of the complainants and of other persons in a similar position.

10.3 In general, the requirement that specified workers, including the self-employed, contribute towards the Social Insurance Fund which is intended to meet people's needs in the event of certain contingencies, such as sickness or retirement, is regarded by human rights standards as serving a legitimate public interest.[148] However, it would appear that international human rights standards have not been entirely respected. First, the European Code of Social Security provides that where a benefit is conditional upon a minimum period of contributions, a reduced benefit shall be payable under prescribed conditions to a contributor who, by reason only of their advanced age when the provisions concerned came into force, has not satisfied the condition. This was the situation of persons like J.J.G., but they did not receive a reduced benefit. Secondly, it seems that not all of the conditions required under Article 1 of Protocol No. 1 to the European Convention on Human Rights for the deprivation by the State of a person's possessions may have been met, at least in the case of those self-employed contributors for whom it was impossible to qualify for an OACP by virtue of the eligibility conditions and who reached pensionable age without having the possibility at the time of claiming a refund of their contributions. Lastly, there may be discrimination on the basis of

age under both the European Convention on Human Rights and the International Covenant on Civil and Political Rights in respect of those self-employed contributors excluded from the OACP (both the full-rate and the half-rate).

10.4 Many of the international human rights instruments considered in this report are not enforceable in Irish law. Persons may not rely on them before the courts to gain a remedy for their grievances. It is therefore especially important in these circumstances that the relevant law in the State mirror the standards set forth in such instruments.

10.5 The Commission has on occasion recommended that the Government incorporate particular international human rights agreements into domestic law.[149] It is recognised that the State is not obliged to incorporate into Irish law all the international human rights agreements to which it is party. However, it is required to give effect to the obligations which it has assumed under these agreements. This places a special onus on the State, when it has not incorporated an agreement, to ensure that the standards guaranteed by it do have legal effect in the State.

10.6 Careful consideration needs to be given in drafting legislation and in the passage of legislation through the Oireachtas to any relevant international human rights standards so that these standards are fully reflected in the legislation. The Commission is conscious of its role in this regard, but this is not solely, or even primarily, the province of the Commission. Civil servants, Ministers and politicians generally have a responsibility in this regard. They need to be alert to, and committed to implementing, the international human rights standards to which the State subscribes.

10.7 The Commission therefore recommends that the relevance of international human rights standards be closely examined in the formulation of public policy and legislative proposals in the field of social security. This would include examination of the impact of the measures in question on discrete groups of individuals (such as on grounds of a person's sex, sexual orientation, race, nationality, disability or age) in order to guard against discrimination. While this may occur at times at present, the examination should be routinely done and in a rigorous fashion.

10.8 In this connection, it is worthy of note that effect was given in Irish law to provisions of the ECHR and Protocols on 31 December 2003. Under the relevant legislation, every organ of the State is required, subject to certain exceptions, to perform its functions in a manner compatible with the State's obligations under the ECHR and associated Protocols.[150]

10.9 With regard to those elderly persons who contributed to the social insurance scheme as self-employed persons expecting, on retirement, to receive an OACP but who were denied this benefit because they did not satisfy the minimum period of contributions by reason only of their advanced age when the relevant legislative provisions came into force, the Commission recommends that they be afforded a reduced benefit. The number of such persons today must be relatively small, with survival rates decreasing each year, and the cost to the State would be minimal. The Commission moreover recommends that every effort should be made by the authorities to trace these persons so that they are aware of the possibility of receiving a reduced benefit.[151]

10.10 While it might be reasonable to expect that those who have sought and been afforded a refund of their contributions repay the amount involved before receiving a reduced benefit, it should be recognised that this may cause hardship in individual cases. Where it would entail hardship, there should be no such requirement. Even where no hardship would be incurred, the Commission is inclined to the view that the repayment of refunds should not be required in recognition of the State's failure to provide a reduced benefit to those concerned.

10.11 With specific regard to J.J.G., the Commission recommends that, given the particular circumstances of his situation whereby he was only a few months short in contributions from qualifying for the half-rate pension and would have qualified for the pension had it been legally possible to credit him with his wife's contributions, he be paid a half-rate pension.

10.12 The Commission acknowledges that there is at present no provision in Irish law for the payments it recommends, but believes that there is no obstacle to the making of ex gratia payments or to the introduction of legislation which would permit such payments. Moreover, the Commission is aware of at least one extra-statutory scheme of redress for complainants.[152]

10.13 Because of the human rights concerns raised in this enquiry report, the Government may, in any event, wish to consider amending the relevant legislation to provide for a pro rata OACP for the self-employed instead of requiring that a self-employed contributor have entered insurance before attaining the age of 56 years.

10.14 The Commission recognises the hurt felt by persons in the situation of the complainants as a result of the State not providing them with an OACP and hopes that, in the light of this report, the Government will act speedily to alleviate the hurt, thereby respecting the dignity and worth of these older citizens.

Appendix 1

Guidelines for dealing with requests under section 9(1)(b) of the Human Rights Commission Act, 2000[153]

Requests for an Enquiry

Under section 9(1)(b) of the Human Rights Commission Act, 2000 (the Act), the Irish Human Rights Commission (the Commission) can decide to conduct an enquiry into a relevant human rights matter at the request of any person, subject to certain conditions.[154] Although the Commission has wide discretion in deciding whether to conduct an enquiry or not, it can only do so where the purpose of the enquiry is clearly linked to at least one of the following functions of the Commission, namely:

1. a review of law and practice or
2. the Commission consulting with national or international bodies or agencies or
3. making recommendations to the Government or
4. the promotion of understanding and awareness of the importance of human rights.[155]

If the purpose of an enquiry is not clearly linked to one of these four functions, the Commission cannot conduct an enquiry as to do so would be to act beyond its powers.

The Commission can also decide to conduct an enquiry into any relevant human rights matter at the request of any person if the Commission considers it necessary or expedient to do so, subject to certain conditions (outlined below). The Commission can only conduct an enquiry if the purpose[156] of the enquiry is clearly linked to one of the four functions outlined above. In conducting an enquiry, the Commission can require persons to furnish relevant information, documentation or things to the Commission and it can require such persons to attend before

the Commission for that purpose. An enquiry may be conducted in public or in private as the Commission, in its discretion, considers appropriate and the Commission can determine the procedure for conducting an enquiry.[157]

How does the Commission decide whether to conduct an enquiry?

Under section 9(1)(b) of the Act, a person can request the Commission to conduct an enquiry into a relevant matter.

The Act sets out strict criteria which the Commission must apply in deciding whether to accede to a request for an enquiry. If a request comes within the jurisdiction of the Commission, the Commission exercises its discretion in conformity with the Act when making a decision whether to conduct an inquiry into a relevant matter. The consideration of a request will ordinarily follow a four-stage process, which is carried out before the decision is made.

Stage 1: Does the subject matter of the request come within the competence of the Commission?

- Is the matter a human rights matter?
- Does the matter come within the jurisdiction of the State?
- Is the purpose of an enquiry clearly linked to either:
  - a review of law and practice or
  - the Commission consulting with national or international bodies or agencies or
  - the making of recommendations to the Government or
  - the promotion of understanding and awareness of the importance of human rights
- Is an enquiry considered either necessary or expedient for the purpose of the performance of any of the abovementioned Commission functions (Could any of these four functions be otherwise performed in relation to the matter)?
- Is the matter one that should be more appropriately referred to another body (e.g. a court, tribunal or other body which can award redress or grant relief?)

- Is the matter before or likely to be before another competent body (in which case the Commission must postpone considering the request)?

Stage 2: Exclusionary provisions

The Act does not allow the Commission to conduct an enquiry under section 9(1)(b), and requires the Commission to discontinue an enquiry if any of the following circumstances apply, in the opinion of the Commission:

- is the matter to which the request relates trivial or vexatious?
- is any alleged violation of human rights manifestly unfounded?
- has the person making the request an insufficient interest in the matter concerned?
- have the human rights issues concerned been addressed and properly and finally determined by a court, tribunal or other person in whom powers are vested to award redress or grant relief in respect of the matter?

The criteria at Stages 1 and 2 must be satisfied in order for the Commission to consider exercising its discretion to conduct an enquiry into a relevant human rights matter. If these criteria are satisfied, the Commission will consider the following stages:

Stage 3: Issues relating to the specific complaint

- Is the request anonymous?
- Is the information provided by the person seriously inadequate, seriously incorrect or seriously misleading?
- Has the person co-operated with the Commission in relation to the request?
- Would it be very difficult to establish facts accurately due to the lapse of time since the events complained of?
- What are the projected costs of conducting an enquiry?

Stage 4: Strategic test

- Would the enquiry fall within the key areas of work set out in the Commission's Plan for 2003–2006?
- Does the request relate to a right which is adequately protected in the State?
- Does the request raise urgent, long-standing or systemic human rights issues?

The Commission may exercise its discretion to conduct an enquiry under section 9(1)(b) of the Act into a relevant matter notwithstanding that the matter does not conform to all or some of the sub-heads set forth at Stages 3 and 4 above.

Discontinuance

Persons requesting an enquiry should be aware that the Commission reserves the right to rescind the decision to conduct an enquiry and/or to discontinue the enquiry. For example, if, having decided to conduct an enquiry into a relevant matter under section 9(1)(b) of the Act, the Commission, in the light of information coming to its attention (including information which could have been disclosed to the Commission by the person requesting the conduct of the enquiry), considers that it would not have exercised its discretion to conduct an enquiry had it been appraised of such information at the outset, the Commission reserves the right to rescind the decision to conduct an enquiry and/or to discontinue the enquiry. This right is in addition to that outlined at Stage 2 above.

Appendix 2

Relevant Legislative Provisions

Social Welfare (Consolidation) Act, 1981

79 (1) The contribution conditions for an old age (contributory) pension are—

(a) subject to subsection (2), that the claimant has entered into insurance before attaining the age of 56 years,

(b) that the claimant has qualifying contributions in respect of not less than 156 contribution weeks since his entry into insurance, and

(c) that the claimant has a yearly average of not less than 48.

Social Welfare Act, 1988

11 The Principal Act is hereby amended by the insertion in Part II after Chapter 1 of the following Chapter:

"Chapter 1A
INSURED PERSONS, SELF EMPLOYMENT CONTRIBUTIONS

Self-employed contributors.
17A.—(1) Subject to this Act—

(a) every person who, being over the age of 16 years and under pensionable age (not being a person included in any of the classes of person specified in Part IIA of the First Schedule) who has reckonable income or reckonable emoluments shall be a self-employed contributor for the purposes of this Act, regardless of whether he is also an employed contributor,

(b) every person becoming for the first time either an employed contributor or a self-employed contributor shall there by become insured under this Act and shall thereafter continue throughout his life to be so insured, and

(c) in the case of a person who, not having been an employed contributor at any time, becomes for the first time a self employed contributor the first day of the contribution year in which he becomes a self-employed contributor shall be regarded as the date of entry into insurance.

(2) Subject to this Act, where a person ceases to be a self-employed contributor otherwise than by reason of attaining pensionable age and has qualifying contributions in respect of not less than 156 contribution weeks, he shall, on making application in the prescribed manner and within the prescribed period, be entitled to become an insured person paying contributions under this Act voluntarily (in this Act referred to as a voluntary contributor).

(3) A voluntary contributor shall if he becomes a self-employed contributor cease to be a voluntary contributor.

(4) Regulations may provide for—

(a) including among self-employed contributors classes of person or part of any such class of person specified in or included in Part IIA of the First Schedule,

(b) adding to the classes of person specified in Part IIA of the First Schedule,

(c) the modification of any of the provisions of this Act relating to self-employed contributors.

(5) Where regulations are proposed to be made for the purposes of subsection (4), a draft thereof shall be laid before each House of the Oireachtas and the regulations shall not be made until a resolution approving of the draft has been passed by each such House.

(6) Subsection (1) shall come into operation on 6th April, 1988.

Payment of contributions into Social Insurance Fund

17B—(1) For the purposes of section 9 there shall, in addition to the contributions

provided for by that section, be contributions (in this Act referred to as self-employment contributions) in respect of self-employed contributors.

(2) Self-employment contributions shall be paid into the Social Insurance Fund.

Rates of self-employment contributions and related matters.
17C.—Self-employment contributions shall be paid by self-employed contributors in accordance with the following provisions:

(a) Subject to paragraphs (b), (d) and (k), where in any contribution year a self-employed contributor has reckonable income there shall be payable by him a self-employment contribution which shall—

(i) with effect from 6th April, 1988, be of an amount equal to 3 per cent. of the reckonable income or the amount of £208, whichever is the greater,

(ii) with effect from 6th April, 1989, be of an amount equal to 4 per cent. of the reckonable income or the amount of £208, whichever is the greater, and

(iii) with effect from 6th April, 1990, be of an amount equal to 5 per cent. of the reckonable income or the amount of £208, whichever is the greater.

(b) Where for any contribution year a self-employed contributor is informed by the Revenue Commissioners that he is not required to make a return of income within the meaning of section 48 (1) of the Finance Act, 1986, self-employment contributions shall be paid by the self-employed contributor (whether by instalments or otherwise as may be prescribed) amounting to £104 in respect of that contribution year.

(c) Subject to paragraphs (d) and (k), where in any contribution year a payment is made to a self-employed contributor in respect of reckonable emoluments of that self-employed contributor, there shall be payable by him a self-employment contribution which shall—

(i) with effect from 6th April, 1988, be of an amount equal to 3 per cent. of the reckonable emoluments or the amount of £208, whichever is the greater,

(ii) with effect from 6th April, 1989, be of an amount equal to 4 per cent. of reckonable emoluments or the amount of £208, whichever is the greater, and

(iii) with effect from 6th April, 1990, be of an amount equal to 5 per cent. of reckonable emoluments or the amount of £208, whichever is the greater.

(d) Contributions under paragraph (a) or (c) shall not be payable in any contribution year on so much (if any) of the reckonable income or reckonable emoluments for that year of a self-employed contributor as is in excess of £16,200.

(e) The self-employment contribution payable by a self-employed contributor in accordance with paragraph (a), (b) or (c), whichever is appropriate, shall not be payable in the case of a self-employed contributor who is in receipt of any of the following:

(i) a widow's (contributory) pension;

(ii) a widow's (non-contributory) pension;

(iii) deserted wife's benefit;

(iv) deserted wife's allowance;

(v) death benefit by way of widow's pension under section 50;

(vi) a social assistance allowance under section 197; or

(vii) a payment corresponding to a pension referred to in subparagraph (i) or (v) from the competent authority of a Member State (other than the State) of the European Communities under legislation to which the regulations of the Communities on the application of social security schemes to employed persons and their families moving within the territory of the European Communities apply.

(f) During the period of three months beginning on 1st October, 1990, the Minister shall, in consultation with the Minister for Finance, review the provisions of this Chapter and of Chapters 7 and 11 insofar as they relate to self-employed contributors.

(g) Subject to regulations under section 17D, where a self-employment contribution has been paid by a self-employed contributor of not less than the amount that he is liable to pay under paragraph (a) or the amount specified in paragraph (b), whichever is appropriate, he shall be regarded as having paid contributions for each contribution

week in that contribution year and, where the contribution paid is less than the appropriate amount aforesaid no contribution shall be regarded as having been paid by the self-employed contributor in respect of any week of that contribution year.

(h) The Minister may by regulations vary the sum specified in paragraph (d) and such variation shall take effect from the beginning of the contribution year following that in which the regulations are made.

(i) Where regulations under paragraph (h) are proposed to be made, a draft of the proposed regulations shall be laid before each House of the Oireachtas and the regulations shall not be made until a resolution approving of the draft has been passed by each such House.

(j) Subject to subsection (3) of section 17G, self-employment contributions shall be disregarded in determining whether the contribution conditions for any benefit other than old age (contributory) pension, widow's (contributory) pension or orphan's (contributory) allowance are satisfied.

(k) A person who but for this paragraph would be liable for contributions of £208 under both paragraph (a) and paragraph (c) shall be liable only for a single contribution of £208.

Regulations providing for determination of contributions payable.
17D.—(1) Subject to subsection (2), regulations may provide for the determination of the contributions payable, the amount or rates of such contributions, and the contribution weeks in respect of which such contributions shall be regarded as having been paid, in the case of a person who—

(a) becomes for the first time a self-employed contributor,

(b) ceases to be a self-employed contributor,

(c) is both an employed contributor and a self-employed contributor whether concurrently or not,

(d) in any contribution year has reckonable emoluments but does not have reckonable income,

(e) in any contribution year has both reckonable emoluments and reckonable income,

(f) in any contribution year has reckonable emoluments which relate to a period less than the full year, or

(g) in respect of the contribution year ended 5th April, 1989, is liable to pay a self-employment contribution of £104.

(2) Regulations made under subsection (1) shall not cause an insured person to pay contributions on the excess over £16,200 of the aggregate of his total reckonable earnings, reckonable emoluments and reckonable income in any contribution year.

(3) For the purposes of this section 'contributions' means employment contributions payable under section 10 and self-employment contributions payable under section 17C.

Regulations varying rates of payment of self-employment contributions.
17E.—(1) Regulations may alter the rates or amounts of self-employment contributions.

(2) Where regulations under subsection (1) are proposed to be made, a draft thereof shall be laid before each House of the Oireachtas and the regulations shall not be made until a resolution approving of the draft has been passed by each such House.

Regulations for collection of self-employment contributions, etc.
17F.—(1) For the purposes of self-employment contributions payable under section 17C (b) and (c), regulations may provide for—

(a) the time and manner of payment of self-employment contributions,

(b) the collection and the recovery of and the furnishing of details in relation to self-employment contributions,

(c) the charging of interest on arrears of self-employment contributions,

(d) the waiving of interest due on arrears of self-employment contributions,

(e) the estimation of amounts due in respect of self-employment contributions and appeals in relation to such estimates,

(f) the furnishing of returns by employers in relation to periods of insurable self-employment,

(g) the deduction by an employer from the reckonable emoluments of a self-employed contributor of any self-employment contribution reasonably believed by the employer to be due by the contributor, and adjustment in any case of overdeduction, and

(h) any matter ancillary or incidental to any of the matters referred to in any of the preceding paragraphs of this sub-section.

(2) Without prejudice to the generality of sub-section (1), regulations under that subsection may provide for the assignment of any function relating to a matter referred to in that subsection to the Collector-General or to such person as may be specified.

(3) The provisions of any enactment or instrument made under statute relating to the estimation, collection or recovery of income tax or the inspection of records for those purposes or relating to appeals in relation to income tax shall with any necessary modifications apply in relation to self-employment contributions in respect of reckonable emoluments that the Collector-General is obliged to collect as they apply in relation to income tax.

(4) Self-employment contributions payable by a self-employed contributor for a contribution year under section 17 C (a)in respect of reckonable income shall be assessed, charged and paid in all respects as if they were an amount of income tax and they may be stated in one sum (hereafter in this subsection referred to as the 'aggregated sum') with the income tax contained in any computation of or assessment to income tax made by or on the self-employed contributor for the year of assessment (within the meaning of the Income Tax Acts) which coincides with the contribution year and for this purpose the self-employed contributions may be so stated notwithstanding that there is no amount of income tax contained in the said computation or assessment and all the provisions of the Income Tax Acts, other than any such provisions in so far as they relate to the granting of any allowance, deduction or relief, shall apply as if the aggregated sum were a single sum of income tax.

(5) Where an election made or deemed to be made under section 195 of the Income Tax Act, 1967, has effect for the year of assessment the self-employment contributions

payable by a wife shall be charged, collected and recovered as if they were the contributions of her husband provided that the question as to the amount of the self-employment contributions so payable in respect of the husband or the wife shall not be affected by the provisions of this subsection.

(6) In any proceedings instituted by virtue of this Act, a certificate purporting to be signed by the Collector-General or by an officer duly appointed by the Minister in that behalf which certifies that an amount in respect of employment or self-employment contribution is due and payable by the defendant shall be evidence until the contrary is proved that that amount is so due and payable.

Voluntary contributions.

17G.—(1) A voluntary contribution in the case of a person who becomes a voluntary contributor under section 17A (2) shall be at the rate of £208 in a contribution year payable at such time or times and in such manner as the Minister may prescribe.

(2) Subject to subsection (3), voluntary contributions paid by a person under subsection (1)shall be disregarded for all benefit other than old age (contributory) pension, widow's (contributory) pension and orphan's (contributory) allowance.

(3) Self-employment contributions paid by a person who, being a voluntary contributor becomes a self-employed contributor on or after 6th April, 1988, and any subsequent voluntary contributions paid by such persons, shall also be, reckonable for—

(a) in the case of a person whose rate of voluntary contribution, immediately before ceasing to be a voluntary contributor, was determined under section 11 (1) (b) (i), deserted wife's benefit,

(b) in the case of a person whose rate of voluntary contribution, immediately before ceasing to be a voluntary contributor, was determined under section 11(1) (b) (ii), retirement pension, deserted wife's benefit and death grant, and

(c) in the case of a person whose rate of voluntary contribution, immediately before ceasing to be a voluntary contributor, was determined under section 11 (1) (b) (iii), retirement pension and death grant.

(4) A voluntary contribution paid under sub-section (1) shall be regarded as having been paid for each contribution week in that contribution year.

(5) This section shall come into operation on 6th April, 1988.".

[...]

13 The Principal Act is hereby amended by the insertion after section 78 of the following section:

"78A. For the purposes of this Chapter in the case of a person who becomes a self-employed contributor on 6th April, 1988, and who at any time prior to that date was an employed contributor the date on which the person first entered into insurance or 6th April, 1988, whichever is the more favourable to him shall be regarded as the date of entry into insurance:

Provided that where a date other than that on which the claimant first entered into insurance is so regarded, that date shall be regarded as the date of entry into insurance for the purposes of paragraphs (a) and (c)of section 79 (1).".

14 The Principal Act is hereby amended by the insertion after section 93 of the following section:

"93A. For the purposes of section 93 (1) (b) in the case of a person who becomes a self-employed contributor on 6th April, 1988, and who at any time prior to that date was an employed contributor the date on which the person first entered into insurance or 6th April, 1988, whichever is more favourable shall be regarded as the date of entry into insurance.".

15 Any question—

(a) as to whether an employment is or was an insurable self-employment,

(b) as to whether a person is or was in insurable self-employment, or

(c) as to what rate of self-employment contribution is or was payable by a self-employed contributor,

shall be decided by a deciding officer in accordance with Part VIII of The Principal Act.

16 (1) The Minister may by regulations apply (with or without modification) to self-employed contributors and self-employment contributions payable under paragraph (a), (b) or (c) of section 17C of the Principal Act any provisions of The Principal Act which apply to employed contributors or employment contributions.

(2) Regulations may provide for adjustments in the calculation of amounts payable in respect of self-employment contributions to facilitate computation and for the elimination from self-employment contributions of amounts of not more than 5p and for the rounding up of amounts of more than 5p but less than 10p to 10p.

17 The following shall be subject to the sanction of the Minister for Finance—

(a) regulations for the purposes of sections 10, 17D and 17F of, and paragraphs 1 and 3 of Part IIA of the Second Schedule to, The Principal Act and section 16 (1) of this Act,

(b) a draft of regulations made under sections 17A (4), 17C (h) and 17E of The Principal Act.

18 (1) If in any respect any difficulty arises in bringing into operation this Part, the Minister may, with the consent of the Minister for Finance, by order do anything which appears to be necessary or expedient for bringing this Part into operation, and any such order may modify the provisions of this Part so far as may appear necessary or expedient for carrying the order into effect.

(2) Every order made by the Minister under this section shall be laid before each House of the Oireachtas as soon as may be after it is made, and if a resolution is passed by either House of the Oireachtas within the next twenty-one days on which such House has sat after (the order is laid before it annulling such order, such order shall be annulled accordingly, but without prejudice to the validity of anything previously done under such order.

(3) No order may be made under this section after the expiration of one year after the commencement of this section.

Social Welfare Act, 1999

21 Section 84 of the Principal Act is hereby amended by—

(a) the insertion in subsection (2) after paragraph (d) of the following paragraph:

"(e) In the case of a person who became a self-employed contributor for the first time on or after the 6th day of April, 1988, and was not previously an employed contributor under this Act or the National Health Insurance Acts 1911 to 1952, prior to becoming so insured, and who on or before the 6th day of April, 1988, had attained the age of 56 years but had not attained the age of 62 years, subsection (1)(a) shall be construed as if '62' were substituted for '56' for the purposes of qualifying for a pension under subsections (16) and (17).",

(b) the insertion after subsection (15) of the following sub-sections:

"(16) Subject to subsection (17), a pension shall be payable in the case of a person who—

(a) became a self-employed contributor for the first time on or after the 6th day of April, 1988, and who on or before that date had attained the age of 56 years and who fails to satisfy the contribution conditions at section 84(1)(c) or 84(7), or

(b) satisfies the contribution condition at section 84(1)(a) by virtue of section 84(2)(e) and who, but for section 84(2)(e) fails to satisfy the contribution conditions at section 84(1) or 84(7), and who has qualifying contributions in respect of not less than 260 weeks since becoming a self-employed contributor.

(17) The rate of pension payable in accordance with subsection (16) shall be payable at half the rate specified in column (2) at reference 3 of Part I of the Second Schedule and any increases payable under section 87 (1) or (2) shall be payable at half the rate specified in columns (3) and (4) at reference 3 of Part I of the Second Schedule.

(18) The total amount payable by way of pension in accordance with subsections (16) and (17) shall be rounded up to the nearest 10p where it is a multiple of 5p but not also a multiple of 10p and shall be rounded to the nearest 10p where it is not a multiple of 5p or 10p.",

and

(c) the substitution in section 87 (1) and (2) for "The weekly rate" of "Subject to this Part, the weekly rate".

Social Welfare (Consolidated Contributions and Insurability) Regulations, 1996

77 (1) Subject to these Regulations, where a contribution is paid by an insured person who is or was a self-employed contributor or who is or was a voluntary contributor by virtue of section 21(1) (b) and whose entry into insurance occurred after he had attained the age of 56 years, the amount of such contribution calculated in accordance with sub-article (2) to have been paid in respect of old age (contributory) pension shall be returned to the insured person if application to that effect is made in writing to the Minister within such time as he may determine.

(2). The amount of a contribution to be returned to an insured person under sub-article (1) shall be 53 per cent. of

(a) the amount of the self-employment contribution paid in accordance with section 18 (1) (a), 18(1) (b) or 18(1) (c), or

(b) the amount of the voluntary contribution paid in accordance with section 23(1).

78 (1) No contributions shall be returned under articles 73, 75 or 77 in respect of an insured person who is entitled to or in receipt of a retirement pension, an old age (contributory) pension or an old age (non-contributory) pension.

(2) Where —

(a) contributions have been returned on or after the 1st day of November, 1990 under articles 73, 75 or 77 in respect of an insured person who subsequently becomes entitled to an old age (non-contributory) pension, the amount so returned, together with any interest paid under article 80, shall be repayable by such person to the Social Insurance Fund or may be treated as a payment to him on account of that pension,

(b) contributions have been returned under articles 73, 75 or 77 in respect of an insured person who subsequently becomes entitled to a retirement pension or an old age (contributory) pension, the amount so returned, together with any interest paid under article 80, shall be repayable by such person to the Social Insurance Fund or may be treated as a payment to him on account of that pension.

Social Welfare (Consolidated Contributions and Insurability) (Amendment) (no. 2) (Refunds) Regulations, 1997

3 The Social Welfare (Consolidated Contributions and Insurability) Regulations, 1996 (S.I. No. 312 of 1996) are hereby amended by—

(b) the insertion after article 77 of the following article:

"Refund of contributions paid in respect of old age (contributory) pension to self-employed contributors and formerly self-employed voluntary contributors aged 56 years on 6 April, 1988.

77A. (1) Subject to these Regulations, where a contribution is paid by an insured person who is or was a self-employed contributor or who is or was a voluntary contributor by virtue of section 21 (1) (b) and who—

(a) had attained the age of 56 years on the 6th day of April, 1988, and

(b) became a self-employed contributor within the meaning of section 17 on or after the 6th day of April, 1988,

the amount of such contribution calculated in accordance with sub-article (2) to have been paid in respect of old age (contributory) pension shall be returned to the insured person if application to that effect is made in writing to the Minister within such time as he may determine.

(2) The amount of a contribution to be returned to an insured person under sub-article (1) shall be 53 per cent. of—

(a) the amount of the self-employment contribution paid in accordance with section 18 (1) (a), 18 (1) (b) or 18 (1) (c), or

(b) the amount of the voluntary contribution paid in accordance with section 23 (1).", and

(c) The substitution in articles 78, 79 and 80 for—
"articles 73, 75 or 77" of
"articles 73, 75, 77 or 77A" in each place where it occurs.

Appendix 3

Enquiry Procedure

Pursuant to sections 9(12), (13), (14) and (15) of the [Human Rights Commission] Act [2000], the following procedure will be followed in the course of the enquiry (subject to the need to maintain a degree of flexibility in responding to matters which may arise, as considered appropriate by the Commission):

1) The enquiry will be conducted in private.

2) The enquiry will be inquisitorial and not adversarial in nature. It will be directed towards keeping under review the adequacy and effectiveness of the relevant law and practice in the State relating to the protection of human rights and the making of any appropriate recommendations to the Government. As such, the enquiry will not be directed towards establishing wrong-doing by any person.

3) Every effort will be made to ensure fairness of procedure, including allowing any relevant person[1] the opportunity to make their views known to the Commission on a matter raised in the course of the enquiry.

4) Upon request from the Commission, any evidence required of a person under section 9(6) of the Act will be verified in the form outlined in section 9(8)(b) of the Act; i.e. by a signature of a declaration of the truth of his or her answers to any question or questions put to him or her by the Commission (other than a question or questions the answer to which may incriminate the person).

5) Given the private nature of the enquiry, all communications in connection with this enquiry, including the contents of any document, evidence or information produced to the Commission in the course of the enquiry, shall be regarded as confidential and shall not be disclosed to any person unless otherwise authorised by the Commission or required in accordance with law.

6) Every effort will be made to complete the enquiry as expeditiously as possible.

7) The findings of the enquiry will be published.

8) This procedure is subject to any further procedure which may be made in the course of the enquiry pursuant to sections 9(12), (13), (14) and (15) of the Act and any person wishing to clarify the application of the procedure to them, should in the first instance raise the matter with the Senior Caseworker.

Adopted 7 February 2005

1 A relevant person includes a person who is named in the course of the enquiry and can also include a Government Department or a Statutory Body.

Appendix 4

Comparison of Social Insurance Contributions payable by workers insured at either PRSI Class A or Class S and coverage for benefits 1988/89–2005

Year	PRSI Class A			PRSI Class S			
	Contributions Due	Benefits	Ceiling	Contributions Due	Benefits	Ceiling	Min. Con.
1988/89	ER 12.4% EE 5.5%[a]	All	£16,200	3%	OACP, W&OPS	£16,200	£108
1989/90	ER 12.2% EE 5.5%	All	£17,300	4%	OACP, W&OPS	£17,300	£208
1990/91	ER 12.2% EE 5.5%	All	£18,600	5%	OACP, W&OPS	£18,600	£208
1991/92	ER 12.2% EE 5.5%	All	£18,000	5%	OACP, W&OPS	£18,000	£234
1992/93	ER 12.2% EE 5.5%	All	£19,000	5%	OACP, W&OPS	£19,000	£234
1993/94[b]	ER 12.2% EE 5.5%	All	£20,000	5%	OACP, W&OPS	£20,000	£250
1994/95	ER 12.2% EE 5.5%	All	£20,900	5%	OACP, W&OPS	£20,900	£250
1995/96	ER 12.2% EE 5.5%	All	£21,500	5%	OACP, W&OPS	£21,500	£230
1996/97	ER 12.0% EE 5.5%	All	£22,300	5%	OACP, W&OPS	£22,300	£215
1998/99	ER 12.0% EE 4.5%	All	£23,200	5%	OACP, WOPS, Mat/Adp.Ben Brv. Grant[c]	£23,200	£215
1999/00	ER 12.0% EE 4.25%	All	£25,400	5%	OACP, WOPS, Mat/Adp.Ben Brv. Grant	£25,400	£215
2000/01	ER 12.0% EE 4.25%	All	£26,500	5%	OACP, WOPS, Mat/Adp.Ben Brv. Grant	£26,500	£215
2001	ER 12.0% EE 4.0%	All	£28,250	3%	OACP, WOPS, Mat/Adp.Ben Brv. Grant	Ceiling removed	£200
2002[d]	ER 10.75% EE 4.0%	All	€38,740	3%	OACP, WOPS, Mat/Adp.Ben Brv. Grant	None	€253
2003	ER 10.75% EE 4.0%	All	€40,420	3%	OACP, WOPS, Mat/Adp.Ben Brv. Grant	None	€253
2004	ER 10.75% EE 4.0%	All	€42,160	3%	OACP, WOPS, Mat/Adp.Ben Brv. Grant	None	€253
2005	ER 10.75% EE 4.0%	All	€44,180	3%	OACP, WOPS, Mat/Adp.Ben Brv. Grant	None	€253

Source: Department of Social and Family Affairs, SW 14 Rates Books

Abbreviations: **ER** – Employer; **EE** – Employee; **OACP** – Old Age Contributory Pension; **WOPS/W&OPS** – Widows and Orphans Pension Scheme; **Mat/Adp.Ben** – Maternity and Adoptive Benefit; **Brv. Grant** – Bereavement Grant

a 4.44% on earnings between £15,500 and £16,200 per annum.

b An income levy of 1% was payable to PAYE workers where reckonable earnings were in excess of £173 per week and to the self-employed returning income under self-assessment up to a threshold of £9,000 per annum.

c OACP, W&OPS, Mat/Adp.Ben, Brv Gnt: Coverage to include entitlement to claim Maternity and Adoptive Benefits and Bereavement Grant.

d Euro Changeover.

Endnotes

1 This report has been drawn up pursuant to sections 13 and 19 of the Human Rights Commission Act, 2000.

2 Department of Social and Family Affairs, Dublin, July 2005.

3 See para. 3.7 of the National Strategy Report.

4 At para. 3.30 of the National Strategy Report. This baseline projection assumes an ambitious participation rate of 80%.

5 See further Chapter 4 below.

6 In its response to the draft of this enquiry report, the Department argues that the Irish system of social welfare is not that different in concept from that which applies in other EU countries. It states that almost all countries operate a system of social insurance which is supported by some type of minimum income provision based on length of residence in a country, means testing, or a combination of both.

7 National Strategy Report, at para. 2.8.

8 The (maximum) standard-rate non-contributory pension (under age 80) from 1 January 2007 is €200, while the standard-rate contributory pension (under age 80) is €209.30. The rates are €210 and €219.30 respectively for persons aged 80 years or over: see Annex C, Budget 2007, Department of Finance, Dublin, December 2006.

9 According to a recent economic report, "The rise in the immigrant population accounted for 30% of the total increase in the population between 1996 and 2002. We estimate it may account for as much as 50% of the growth in the total population between now and 2020 ... Immigrants accounted for 7% of the population in 2002 and we estimate they could form 19% of the population, or about 1 million people, in 2020." 2020 Vision: Ireland's Demographic Dividend, NCB Stockbrokers, Dublin, March 2006, p. 10. The Central Statistics Office produced preliminary findings based on the 2006 Census of Population (19 July 2006) which tentatively suggest that those persons defined as "non-Irish nationals" resident in Ireland comprise approximately 10% of the population (namely, 400,000 out of a total population of 4,234,925). This compares to a figure of 220,000 "non-Irish nationals" in 2002: see Census 2006 Preliminary Report, Dublin, 2006, p. 9 at footnote 10.

10 According to the Department, all the main categories are covered by the social insurance system.

11 Sections 8(f) and 9(1)(b) of the Human Rights Commission Act, 2000, read together with sections 8(a), (c), (d) and (e) of the Act.

12 See further for an explanation of the enquiry function of the Commission, Appendix 2 of its Annual Report 2003, Dublin, November 2004.

13 The competence of the Commission to conduct an enquiry is circumscribed by the Human Rights Commission Act, 2000, and the Commission has adopted guidelines in respect of the exercise of the discretion afforded to it by the Act: see Appendix 1 below.

14 As of 29 September 2006, the State Pension (Contributory) replaced the OACP: see section 4(3) of the Social Welfare Law Reform and Pensions Act, 2006. The term OACP will be used throughout this report as this was the name of the relevant pension during the period of the enquiry.

15 In its response to the draft of this enquiry report, the Department pointed out that PRSI is not levied on all income derived from assets, citing the examples of land (only the income earned from land would be subject to PRSI) and those capital assets not subject to PRSI, such as income from life assurance policies and foreign fund and investment policies.

16 See Chapter 6 below on this campaign.

17 On the Department's account, the couple's cumulative contributions totalled 260, i.e. they satisfied the required minimum number of weekly contributions.

18 See paras 6.9–6.13 below regarding refunds.

19 Section 2.

20 See further in Chapter 8 below.

21 Reproduced in Appendix 2.

22 Section 9(6) of the Human Rights Commission Act, 2000.

23 Section 9(12).

24 Section 9(13).

25 See the Commission's Strategic Plan for 2003–2006, Promoting and Protecting Human Rights in Irish Society, Dublin, 2003, p. 7.

26 This being the Minister to whom the Commission is required, under section 23 of the Human Rights Commission Act, 2000, to submit an annual report on its activities.

27 Dáil Debates, vol. 378, 9 March 1988.

28 Letter from the Minister to Deputy Noel Ahern, 7 May 1999.

29 See section 39 of the Social Welfare Act, 1952.

30 The Department has clarified that where there is a shortfall in the current account to meet the payment of benefits in a particular year, the shortfall is funded either from the investment account or by the Exchequer as the ultimate guarantor of the Fund.

31 See section 9 of the 1981 Act.

32 Report of the Commission on Social Welfare, Dublin, July 1986, pp. 270–273.

33 Social Insurance for the Self-Employed – A Discussion Paper, Department of Social Welfare, Dublin, 1978, p. 45. In its response to the draft enquiry report, the Department stated that most European social insurance systems operate on a "Pay as You Go" basis, and that where the Irish system differs from others is that the social insurance element of the pensions system in most countries is pay related, whereas flat-rate benefits not linked to previous earnings are paid in Ireland. The Department also referred to an increasing international trend to put in place some element of pre-funding to help cope with the aging of populations and that in Ireland this is being done through the National Pensions Reserve.

34 See 1978 Department Discussion Paper (as at note 33 above), p. 26, and Investigation Report on the Non-Payment of Arrears of Contributory Pensions, Report of the Investigation by the Ombudsman, Dublin, 14 March 1997, at para. 29, citing the Report of the Expert Working Group on the Integration of the Tax and Social Welfare Systems (1996), p. 84.

35 See Ireland's National Strategy Report to the European Union on Adequate and Sustainable Pensions, Dublin, July 2005, at para. 1.16.

36 See section 22 of the 1952 Principal Act.

37 See section 7 of the 1960 Act, which amended the 1952 Principal Act.

38 See Social Welfare Acts, 1973, 1975 and 1977.

39 See section 79(1) of the 1981 Act.

40 See para. 10.6 of 1986 Report (as cited at note 32 above)

41 In its report entitled Report on the Extension of Social Insurance to the Self-Employed, Dublin, 1988.

42 National Pensions Board Report (cited at note 41 above), p. 8.

43 See section 12 of the Social Welfare Act, 1988.

44 National Pensions Board Report (cited at note 41 above), p. 6.

45 Ibid.

46 Dáil Debates, vol. 378, 9 March 1988. Subsequent to the 1988 legislation, part-time workers entered social insurance in 1991, while the "modified insurance status" of new public servants ended in 1995.

47 They had previously paid PRSI on any employees' earnings. In 1988, self-employed persons were required to pay 11.8% social insurance contributions on employee earnings.

48 See section 17A(1)(a) and (b) of the Social Welfare (Consolidation) Act, 1981, as inserted by section 11 of the Social Welfare Act, 1988. This is subject to those excepted self-employed contributors as provided by section 12 of the Social Welfare Act, 1988.

49 Sections 17C(a) to (c) of the 1981 Act, as inserted by section 11 of the Social Welfare Act, 1988.

50 See National Pensions Board report (cited at note 41 above), p. 32. The "earnings ceiling" would rise from £16,200 (1988/89) to £17,300 (1989/90) to £18,600 (1990/91). The figures do not include the additional health contributions or employment and training levies paid by employed or self-employed persons.

51 See section 17E(1) of the Act.

52 Sections 17C(a)(i), 17C(d) and 17(C)(h) of the Act.

53 In its response to the draft enquiry report, the Department suggested that this may be misleading, since persons aged 56 years or over in 1988/89 may have been entitled to an OACP if they had paid prior contributions as employees. The Department, however, gave no indication of the numbers to which this would apply.

54 See para. 4.20 above.

55 A lesser employment and training levy (0.7%) is now required of employees. However, the health levy continues at 2%. It should be noted that the 1986 Report of the Commission on Social Welfare (see note 32 above), citing an early Commission on Taxation recommendation that additional levies be abolished, recommended that additional levies be separated from PRSI contributions and instead integrated into the tax system: see p. 278 of the Report.

56 In its 1978 Discussion Paper (see note 33 above), at p. 45, the Department noted that the contributions payable by the self-employed would be related to the more limited range of benefits available to them. This appears to be borne out in the lesser PRSI rates payable by the self-employed under the 1988 Act.

57 From 1998, the benefits available to the self-employed were extended to include a maternity benefit, an adoptive benefit and a death benefit: see sections 10, 11 and 14 of the Social Welfare Act, 1997.

58 Increased to 260 weekly contributions from 2002: see section 12(1)(a) of the Social Welfare Act, 1997. The Department advised the Commission that the number of required weekly contributions is expected to increase to 520 in 2012.

59 From 1997, an OACP was also available where between 10 and 47 yearly average payments were made, provided 260 qualifying contributions were made: section 12(1)(b) of the Social Welfare Act, 1997, and Article 2 of Statutory Instrument No. 490 of 1997.

60 Neither the available benefits nor the relevant qualifying conditions are mentioned in the 1988 Act. They are to be found in section 79 of the 1981 Act.

61 In its response to the draft enquiry report, the Department stated that there was no legislative provision permitting of these options. Moreover, there was no scope for couples to aggregate their contributions as such an approach "would be contrary to the basic premise behind social insurance, wherein coverage is gained by individual workers on foot of their own attachment to the labour force and the contributions paid by them individually towards their own retirement benefits". The Department further stated that voluntary "top up" payments could not be received by it as they would not be properly due and any acceptance of them would be "ultra vires"

62 Section 10 of the 1988 Act. The 1988 Committee Stage Brief clarified, at p. 6, that:

> The definition of reckonable income contained in section 10 of the Bill provides that, for the purposes of determining liability for social insurance, Chapter 1, Part 1X of the Income Tax Act 1967 will be disregarded and that the joint income of a married couple may not be aggregated except where one of the couple is an assisting relative.

Although the 1967 Tax Act (as amended) treated married couples as single persons for tax purposes, this concession was not available to contributory pensions from their first introduction in 1960. In its response to the draft enquiry report, the Department pointed out that the income tax code and the PRSI code have separate legislative frameworks and should not be confused.

63 Dáil Debates, vol. 378, 9 March 1988.

64 Section 10 of the Social Welfare (Amendment) Act, 1960, inserted a new provision into the Principal Act as follows:

(1) Subject to the provisions of this section, regulations made with the sanction of the Minister for Finance may provide for entitling to old age (contributory) pension persons who would be entitled thereto but for the fact that the relevant contribution conditions are not satisfied as respects the average number of contributions paid or credited per contribution year.

(2) Regulations for the purposes of this section shall provide that old age (contributory) pension payable by virtue thereof shall be payable at a rate less than that specified in the Third Schedule to this Act, and the rate specified by the regulations may vary with the extent to which the contribution conditions are satisfied, but any increase of benefit payable under subsection (2) of section 26 of this Act shall be the same as if the relevant contribution conditions had been fully satisfied.

Section 79(7) of the 1981 Act and section 84(7) of the Social Welfare (Consolidation) Act, 1993 (as amended by section 26 of the Social Welfare Act, 1996, and section 12 of the Social Welfare Act, 1997), made similar provision provided the person had made 260 weeks' contributions from 2002 (as opposed to the earlier requirement of 156

weeks' contributions in 1988). In its response to the draft enquiry report, the Department stated that pensions are payable on the basis of different averages under the Social Welfare Consolidation Act, 2005:

> ... A max payment is available for an average of 48, 98% pension for an average from 20 to 47, 75% for 15 to 19 and 50% for 10 to 14. These payments are available to all claimants including self-employed. S109 of the Social Welfare Consolidation Act 2005 provides for reduced benefits where the yearly average is >48.

65 In addition to 0.60% redundancy insurance in that year.

66 Cited at note 41 above.

67 Article 80(1) of the 1996 regulation did in fact provide for interest to be paid on refunds.

68 See para. 4.12 above.

69 Section 5 of the Social Welfare (Consolidation) Act, 1981 allowed employed contributors to become voluntary contributors and voluntary contributors to become employed contributors. Section 17A(3) of the 1988 Act provided that voluntary contributors who became self-employed contributors would cease to be voluntary contributors.

70 In its response to the draft enquiry report, the Department stressed the fact that the then Minister, in his speech to the Dáil on 24 February 1999 (2nd Stage Social Welfare Bill reading) referred to the rationale for the 1999 Act as extending back to the Government's time in Opposition. It quoted the Minister as saying:

> The Government is delivering on the commitment made to this group [certain self-employed persons aged 56 years or over in 1988] in our election manifesto by introducing a special rate of contributory pension for those with at least five years' paid contributions since that date. This is delivering on something we promised when we were in Opposition.

71 Dáil Debates, vol. 378, 9 March 1988. "If persons retire at age 66 after a period of less than 10 years since entry into insurance under the new arrangements, they should be entitled to receive a refund of the element of their contributions attributable to old age pension, provided they did not qualify for a pension on the basis of contributions already made or on a means-tested basis"; otherwise refunds should be deducted from the person's future pension entitlements, National Pensions Board Report (cited at note 41 above), p. 11.

72 Brief provided to the Commission by the Department.

73 Section 16(1).

74 Article 77 of Statutory Instrument No. 312 of 1996 and Article 77A of Statutory Instrument No. 291 of 1997.

75 The 1996 regulations provide for interest on refunds of contributions by reference to the Consumer Price Index: Article 80(1).

76 Dáil Debates, vol. 501, 24 February 1999. At the time of the debate on the amendments to the Social Welfare Bill, 1999, the Minister estimated that refunds made to 3,000 self-employed persons would be "recouped" by October 1999.

77 See section 21 of the 1999 Act, which provides:

> Section 84 of the Principal Act is hereby amended by—
>
> (a) the insertion in subsection (2) after paragraph (d) of the following paragraph:
>
> > "(e) In the case of a person who became a self-employed contributor for the first time on or after the 6th day of April, 1988, and was not previously an employed contributor under this Act or the National Health Insurance Acts 1911 to 1952, prior to becoming so insured, and who on or before the 6th day of April, 1988, had attained the age of 56 years but had not attained the age of 62 years, subsection (1)(a) shall be construed as if '62' were substituted for '56' for the purposes of qualifying for a pension under subsections (16) and (17).",
>
> (b) the insertion after subsection (15) of the following sub-sections:
>
> > "(16) Subject to subsection (17), a pension shall be payable in the case of a person who—
> >
> > (a) became a self-employed contributor for the first time on or after the 6th day of April, 1988, and who on or before that date had attained the age of 56 years and who fails to satisfy the contribution conditions at section 84(1)(c) or 84(7), or
> >
> > (b) satisfies the contribution condition at section 84(1)(a) by virtue of section 84(2)(e) and who, but for section 84(2)(e) fails to satisfy the contribution conditions at section 84(1) or 84(7), and who has qualifying contributions in respect of not less than 260 weeks since becoming a self-employed contributor ..."

78 Standard phrasing in Ministerial/Departmental letters to members of the Association in the period 1999–2000.

79 Dáil Debates, vol. 501, 24 February 1999. The cost involved was estimated to be £13.5m in the Department's Committee Stage Brief to the Minister.

80 The complainants had been deemed ineligible for the non-contributory pension by the Department in 1998.

81 This would appear to be a reference to sections 124–125 of the Social Welfare Consolidation Act, 2005.

82 In its response to the draft enquiry report, the Department suggested that many self-employed persons aged 61 years or over in 1988/89 availed of the 1999 Act to supplement their earlier PRSI contributions as employees to secure a special half-rate OACP. However, no figures were supplied to the Commission in this regard; and section 21 of the 1999 Act precludes previous employee contributions from being counted towards the special half-rate pension.

83 Estimations are based on 'Population Estimates by Single Year of Age' data provided by the CSO.

84 The actual percentage is 88.03887%. The percentage has been rounded down in Table F.

85 These figures contrast sharply with the estimated number of 10,000 persons who, it was stated, would benefit from the special rate pension when the 1999 Social Welfare Bill was introduced in the Dáil. Dáil Debates, vol. 501, 24 February 1999

86 Letter from the Association to the Minister for Finance, 26 July 1999.

87 The Departmental figures produced to the Commission suggest that the figure was in fact only several hundred.

88 Letter from the Minister for Social, Community and Family Affairs to a TD, 29 February 2000.

89 Information on the agreements, treaties and conventions to which Ireland is party is available on the Commission's website, www.ihrc.ie, and at www.unhchr.ch.

90 Ireland ratified the ICESCR on 8 December 1989. The Committee on Economic, Social and Cultural Rights (CESCR) is the supervisory body charged with monitoring the implementation of the ICESCR by virtue of Resolution 1985/17 of 28 May 1985 of the United Nations Economic and Social Council (ECOSOC), which established the CESCR and mandated it to carry out the monitoring functions assigned to ECOSOC in Part IV of the ICESCR. The Committee performs this function through the adoption of General Comments on the Covenant's provisions and examination of periodic State reports under Article 16. In contrast to other international treaties, no individual or collective complaints system exists at present, although a draft Optional Protocol to the Covenant is under consideration which could give the Committee competence to consider individual communications.

91 Article 4. At the universal level, Ireland is also party to the International Labour Convention (No. 102) concerning Minimum Standards of Social Security but has not accepted Part V thereof, which relates to old age benefit.

92 Ireland ratified the Revised European Social Charter on 4 November 2000.

93 Previously entitled the Committee of Independent Experts, the European Committee of Social Rights is the body which judges the conformity of national law and practice with the RESC and its predecessor, the 1961 European Social Charter, through adopting conclusions on national reports and adopting decisions on collective complaints made to it. Further to a 1995 optional protocol, complaints of violations of the ESC/RESC may be lodged with the European Committee of Social Rights. However, only certain organisations are entitled to lodge complaints. Overall supervision of the RESC rests with the Committee of Ministers of the Council of Europe. See Confédération générale du travail (CGT) v France, Complaint No. 22/2003, 7 December 2004, where the Committee pointed out:

> ...only the European Committee of Social Rights can determine whether or not a situation is in conformity with the Charter. This applies to any treaty establishing a judicial or quasi-judicial body to assess contracting parties' compliance with that treaty. The explanatory report to the Protocol explicitly states that the Committee of Ministers cannot reverse the legal assessment made by the Committee of independent experts, but may only decide whether or not to additionally make a recommendation to the state concerned. (para. 23)

Of the 32 complaints considered by the Committee to date, none have been under Article 12.

94 Ireland ratified this Charter on 7 October 1964.

95 In accordance with Article 77(3) of the Code.

96 In accordance with Article 2(1)(b) and 3. Part V comprises Articles 25 to 30. Article 12(2) of the RESC only came into force on 1 January 2001 after the State ratified the Revised Charter.

97 See Article 29 of the Code. Persons "protected" under the Code are defined broadly. The Code states that relevant qualifying periods may be as high as "30 years of contributions or employment, or 20 years of residence" for a full benefit (Article 29(1)(a)) or "15 years of contribution or employment" for a reduced benefit (Article 29(2)(a)). In its response to the draft enquiry report, the Department indicated its view that the Irish legislation, in requiring only 5 years of contributions for the half-rate pension, compares favourably in this context.

98 Article 29(5), which states, in so far as relevant:

> Where the benefit ... is conditional upon a minimum period of contribution ... a reduced benefit shall be payable under prescribed conditions to a person protected who, by reason only of his advanced age when the provisions concerned in the application of this part come into force, has not satisfied the conditions prescribed ... unless a benefit ... is secured to such person at an age higher than the normal age.

99 Article 2(1) of the ICESCR requires that a State Party "take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the ... Covenant by all appropriate means, including particularly the adoption of legislative measures". The question of the extent to which the ICESCR requires only a progressive realisation of economic, social and cultural rights has been considered by the CESCR. The Committee stated, in its General Comment No. 3 ("The nature of States parties' obligations"), that although Article 2(1) "provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect". These obligations include taking steps "within a reasonably short time after the Covenant's entry into force for the State concerned." Such steps should be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant" (paras 1–2).

100 The State ratified Protocol No. 1 to the ECHR on 25 February 1953.

101 The ECHR created two organs to ensure its observance: namely the European Commission of Human Rights ("the European Commission") and the European Court of Human Rights ("the European Court"). Since the entry into force of Protocol No. 11 to the ECHR in November 1998, the European Commission has been abolished with the European Court now comprising chambers and a Grand Chamber. Ultimate supervision of the ECHR is exercised by the Council of Europe's Committee of Ministers. The European Court can consider and deliver judgment on individual complaints to it deemed admissible, it can seek to secure friendly settlements in cases and it can deliver advisory opinions at the request of the Committee of Ministers: see new Section II of the ECHR as provided by Protocol No. 11 (ETS No. 155).

102 Allard v Sweden, Judgment of 24 June 2003, (2004) 39 EHRR 321, at para. 49; Sporrong and Lonroth v. Sweden, Judgment of 23 September 1982, (1983) 5 EHRR 35, para. 61.

103 See P. van Dijk and G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, 3rd edn, The Hague, 1998, pp. 618–619; C. Ovey and R.C.A. White, Jacobs and White: European Convention on Human Rights, 3rd edn, Oxford, 2002, p. 301.

104 See Broniowski v Poland, Judgment of 22 June 2004, (2005) 40 EHRR 21, para. 129.

105 See Willis v United Kingdom, Judgment of 11 June 2002, (2002) 35 EHRR 547, at para. 32; and STEC and others v United Kingdom, Judgment of 12 April 2006, at para. 53.

106 See STEC and others v United Kingdom, para. 53.

107 James v United Kingdom, Judgment of 25 March 1986, (1986) 8 EHRR 123, at para. 67. See also Broniowski v Poland, para. 147.

108 See James v United Kingdom, at paras 61–63, and Lithgow v United Kingdom, Judgment of 8 July 1986, (1986) 8 EHRR 329, at paras 111–119, where the Court invoked Articles 31 and 32 of the Vienna Convention on the Law of Treaties. In James, the Court pointed out that the rule:

> ... enables non-nationals to resort directly to the machinery of the Convention to enforce their rights on the basis of the relevant principles of international law, whereas otherwise they would have to seek recourse to diplomatic channels or to other available means of dispute settlement to do so. Secondly, the reference ensures that the position of non-nationals is safeguarded, in that it excludes any possible argument that the entry into force of Protocol No. 1 (P1) has led to a diminution of their rights (at para 62).

109 Broniowski v. Poland, para. 148.

110 Broniowski, para. 150.

111 Holy Monasteries v Greece, Judgment of 9 December 1994, (1995) 20 EHRR 1, where the Court stated:

> Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 (P1-1) only in exceptional circumstances. Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value (see the Lithgow and Others v. the United Kingdom judgment of 8 July 1986, Series A no. 102, pp. 50–51, para. 121). (at para. 71)

112 See, e.g., Johnston v Ireland, Judgment of 18 December 1986, (1987) 9 EHRR 203, at para. 55; Powell and Rayner v United Kingdom,, Judgment of 21 February 1990, (1990) 12 EHRR 355, at para. 41; Keegan v Ireland, Judgment of 26 May 1994, (1994) 18 EHRR 342, at para.49; and Broniowski v. Poland, para. 143.

113 Broniowski v Poland, para. 144.

114 Belgian Linguistics case, Judgment of 23 July 1968, (1968) 1 EHRR 252, para. 10.

115 Abdulaziz, Cabales and Balkandali v United Kingdom, Judgment of 28 May 1985, (1985) EHRR 471, para. 71.

116 See Abdulaziz, Cabales and Balkandali v United Kingdom, at paras 87–89.

117 Para. 74.

118 See van Dijk and van Hoof, Theory and Practice of the European Convention on Human Rights, p. 730.

119 See Engel and others v Netherlands, Judgment of 8 June 1976, (1979–80) 1 EHRR 647, where a distinction based on rank came within the ambit of Article 14 (at para. 72), and Rasmussen v Denmark, Judgment of 28 November 1984, (1985) 7 EHRR 372, para. 34, where the Court deemed it unnecessary to determine on what ground the differentiation was based.

120 See Belgian Linguistics case, para. 10.

121 See, e.g., Abdulaziz, Cabales and Balkandali v United Kingdom, para. 81, where the European Court of Human Rights was not persuaded that the aim of advancing public tranquillity was served by a distinction drawn in immigration rules between husbands and wives.

122 Cited at note 106 above.

123 At para. 35.

124 At para. 37.

125 Ibid.

126 Ireland ratified the ICCPR on 8 December 1989.

127 See General Comment 31 (2004), where the Human Rights Committee clarified that "In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26." (at para. 8)

128 See Human Rights Committee, General Comment No. 18, Non-discrimination, thirty-seventh session (1989).

129 The Human Rights Committee is charged with monitoring the implementation of the ICCPR by virtue of Article 28 of the ICCPR and performs this function through the adoption of General Comments on the ICCPR's provisions, examination of periodic State reports under Article 40 and consideration of alleged human rights violations under Optional Protocol 1 to the ICCPR: see Part IV of the ICCPR.

130 At para. 12 of General Comment 18 (see note 128 above).

131 See also Zwaan-de Vries v The Netherlands, 9 April 1987, 29th Session of the Human Rights Committee, Suppl. No. 40 (A/42/40), at para. 13.

132 Zwaan-de Vries v The Netherlands, at para. 15: see R. Hanski and M. Scheinin, Leading Cases of the Human Rights Committee, Turku/Abo, 2003, pp. 325–326.

133 See Foin v France, 3 November 1999, 55th Session of the Human Rights Committee, Suppl. No. 40 (A/55/40), at para. 10.3, and Gueye v France, 3 April 1989, 35th Session of the Human Rights Committee, Suppl. No. 40 (A/44/40), at para. 9.4. The "new nationality" reference in Gueye v France was related to Senegal acquiring independence from France, the soldiers in question having served in the French army.

134 See description of "other status" cases in A. Lester and S. Joseph, "Obligations of Non-Discrimination", in The International Covenant on Civil and Political Rights and United Kingdom Law, ed. by D. Harris and S. Joseph, Oxford, 1995, chapter 17, p. 568.

135 See M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993), p. 473, cited by Lester and Joseph, p. 586.

136 In Zwaan-de Vries, the Human Rights Committee considered that a subsequent change to the law in the Netherlands was an acknowledgement that the difference of treatment in that case could not be said to be based upon reasonable grounds: see para. 14. Also, in Kavanagh v Ireland, the Committee found that the refusal of the relevant authority to give reasons for a certain practice meant that a decision to try the person by a certain procedure could not be said to be based upon reasonable and objective grounds: 4 April 2001, 71st Session of the Human Rights Committee, CCPR/C/71/D/819/1998, at para. 10.3. In contrast, in Blom v Sweden, 4 April 1988, 32nd Session of the Human Rights Committee, Suppl. No. 40, (A/43/40), a distinction between state subsidies for students at private and students at public schools was found to be reasonable and objective: see para. 10.3.

137 Cited at note 131 above.

138 While there is some validity to claims that the Human Rights Committee subsequently sought to "back-pedal" on its Article 26 jurisprudence in Zwaan-de Vries in respect of social security cases, it remains the case that any difference of treatment in legal measures, including legislative measures, which govern social security benefits as between classes of persons based on a person's status comes within the ambit of Article 26 of the ICCPR. See M. Schmidt, The Complementarity of the Covenant and the European Convention on Human Rights – Recent Developments, in The International Covenant on Civil and Political Rights and United Kingdom Law, ed. by D. Harris and S. Joseph, Oxford, 1995, chapter 19, pp. 637–638, citing the cases of P.P.C. v Netherlands (212/1986), Vos v Netherlands (218/1986), B.d.B. et al v Netherlands (273/1988), Sprenger v Netherlands (395/1990), Pauger v Austria (415/1990), Oulajin and Kaiss v Netherlands (406, 426/1990), Cavalcanti v Netherlands (418/1990), L.v.d.M. v Netherlands (478/1990) and J.A.M.B-R. v Netherlands (477/1991).

139 Article 12 of each Charter.

140 Social welfare benefits should not in principle fall below 50% of the median equivalised income, which in 2001 in Ireland amounted to approximately €590 per month or €137 per week.

141 This point is stressed by the Department in its response to the draft enquiry report. In its view, the fundamental matter at issue concerns the nature of insurance-based schemes and the conditionality which necessarily applies to such schemes. In this regard, it stresses that the requirement that a minimum number of contributions be made to obtain a pension is not an unusual condition in EU member states.

142 See European Social Charter (Revised), European Committee of Social Rights Conclusions 2004 (Ireland), pp. 18–19, European Committee of Social Rights, Council of Europe. The Department also relied on a review of the Code by the ILO Committee of Experts which was endorsed by the Committee of Ministers of the Council of Europe: see Resolution ResCSS (2000) 25 on the application of the European Code of Social Security by Ireland (Period from 1 July 1998 to 30 June 1999), adopted by the Committee of Ministers, 7 December 2000; Resolution ResCSS (2001) 7 on the application of the European Code of Social Security by Ireland (Period from 1 July 1999 to 30 June 2000), adopted by the Committee of Ministers, 6 December 2001; Resolution ResCSS (2003) 7 on the application of the European Code of Social Security by Ireland (Period from 1 July 2000 to 30 June 2001), adopted by the Committee of Ministers of the Council of Europe, 26 March 2003; Resolution ResCSS (2003) 23 on the application of the European Code of Social Security by Ireland (Period from 1 July 2001 to 30 June 2002), adopted by the Committee of Ministers of the Council of Europe, 17 December 2003.

143 In its response to the draft enquiry report, the Department indicated its expectation that the Committee on Economic and Social Rights would probably look for guidance to International Labour Convention No. 102 Concerning Minimum Standards of Social Security, in much the same way as the

144 Part II, Chapter 1A, of the 1981 Act, as inserted by section 11 of the 1988 Act.

145 Article 29(4), which in full reads:

> Regulations shall provide for the return, subject to any conditions, restrictions and deductions specified in the regulations, of so much of any self-employment contribution paid by a self-employed contributor or a voluntary contribution payable under section 23 by a voluntary contributor, who entered into insurance for the purposes of section 84(1) after he had attained the age of 56 years, as is determined in accordance with regulations to have been paid in respect of old age (contributory) pension.

146 Article 26(1).

147 Article 29(5).

148 This argument, made forceably by the Department, carries weight. The social insurance system comprises an implicit intergenerational and solidaristic compact between workers, employers and the State and assists contributors when certain continengies arise, such as sickness, old age or death.

149 See Submission on the European Convention on Human Rights Bill 2001 to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights, June 2002; Submission to the UN Committee on the Elimination of Racial Discrimination, December 2004; Submission to the UN Committee on the Elimination of Discrimination Against Women, January 2005; Submission to the UN Committee on the Rights of the Child, May 2006. These submissions are available on the Commission's website www.ihrc.ie.

150 See section 3(1) of the European Convention on Human Rights Act, 2003.

151 The Department has stated that "appropriate measures" are being introduced to ensure that self-employed contributors who did not qualify for an OACP will be made aware of refund provision and procedures.

152 Investigation Report on the Non-Payment of Arrears of Contributory Pensions (Dublin, 1997), Ombudsman's Report, paras 33–36.

153 Adopted 29 July 2004.

154 It should be noted that the criteria under section 9(1)(b) of the Act are subject to the provisions of the Act and of any amending legislation.

155 These are the functions outlined in sections 8(a), (c), (d) and (e) of the Act.

156 See section 9(6) of the Act.

157 See sections 9(12) and 9(13) of the Act.

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