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Spotlight

Debt Part 3: The imprisonment of civil debtors.

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Editorial

This *Spotlight* is the last in a series of *Spotlights* examining the issue of indebtedness in Ireland.

Over one hundred years after the practice of imprisoning debtors was abolished in Ireland, debtors unable to meet their financial obligations still face the risk of imprisonment where they default on a court instalment order. According to the Law Reform Commission an average of 200 persons per year (276 in 2008) are imprisoned in Ireland in connection with civil debt.

With household debt, including mortgages, currently standing at €147 billion stakeholders are calling for the reform of our entire debt enforcement process so that it focuses more on practical resolution than punishment.

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Introduction

Imprisonment is classically regarded as a legal sanction imposed on a person found guilty of a criminal offence. The justifications for its use and the indicators of its success are based primarily on principles such as punishing and/or rehabilitating the offender and the subsequent rate of re-offending. Seldom do we associate it with people struggling to repay mortgages, car loans, student loans or simple household debts. Loans and credit are regarded as purely contractual/commercial arrangements where civil law remedies exist to protect the rights of those injured by any breach.

Despite abolishing imprisonment for debt over one hundred years ago Ireland retained the sanction as part of its debt enforcement process. Consequently debtors defaulting on repayments could find themselves faced with the prospect of imprisonment.

The *Enforcement of Court Orders Act 1940* drew a distinction between debtors who genuinely could not afford to repay their debts (can't pay debtors) and those who had the means to repay but deliberately refused to do so (won't pay debtors). The recent case of *McCann* however highlighted that despite the intention of the Legislature many can't pay debtors were still being imprisoned for failing to comply with the terms of a court instalment order.

According to the *Sunday Tribune*, figures revealed by Junior Justice Minister John Curran showed that up to the end of June 2009, 186 people were imprisoned for an average of 20 days each for failing to pay a debt – up 33% on 2008 figures¹. The table below sets out the numbers of debtors imprisoned in Ireland between 2006 and 2008.

More than 1,000 people have served prison sentences for failing to repay a debt since 2002².

¹ Frawley, *Victor in landmark debt ruling due to sue over stress*, 12 July 2009 available at <http://www.tribune.ie/article/2009/jul/12/victor-in-landmark-debt-ruling-to-sue-over-stress/>

² *Ibid.*

No. of debtors in Irish prisons, 2006-2008

Year	Debtors countrywide	% of Prison Population
2006	194	3.3%
2007	214	3.3%
2008	255	3.2%

Source: Irish Prison Service³

At present household debt, including mortgages, stands at €147 billion⁴, house prices have fallen to 2002 levels and unemployment is rising - 50,781 extra people were signing on the Live Register in April 2010 compared with April 2009⁵. It is anticipated that these factors will lead to further increases in the level of personal indebtedness, and consequently an increase in the number of debt enforcement proceedings. This in turn will lead to an increase in the number of people at risk of imprisonment.

The origin of imprisonment for civil debt

Throughout the 17th, 18th, and 19th Centuries imprisonment for non payment of debt was used by creditors as a means of coercing debtors to repay their debts. Special debtors' prisons were founded to house those unable to fulfil their contractual obligations. In Dublin alone there were at least eight such prisons⁶. Imprisonment was imposed not only on impoverished debtors who were unable to pay but also on debtors of means who could afford to pay but who chose to conceal their assets instead.

The practice of imprisoning debtors generated persistent calls for legal reform

³ Annual Reports 2006, 2007 and 2008. Available at http://www.irishprisons.ie/Publications-Annual_Reports.htm

⁴ *Debt Part 2 Personal Debt and Consequences*, Spotlight No 3 of 2010, available at http://khiis-a01/library/LibraryandCMS/Spotlight_docs/Personal_Debt_and_Consequences.pdf

⁵ *Economic Indicators*: No. 4, May 2010. Available at http://khiis-a01/library/LibraryandCMS/Economic_Indicators_doc/Economic_Indicators_May_2010.pdf

⁶ Newgate; the Sheriffs Prison; the Four Courts Marshalsea; the City Marshalsea; the Black Dog; Marrowbone Lane Marshalsea; Long Lane Marshalsea and Kilmainham Gaol

throughout much of the eighteenth and nineteenth centuries and the practice was finally abolished in Ireland in 1872 by the *Debtors Act (Ireland)*.

Notwithstanding this, two statutory frameworks still exist in Ireland under which debtors may find themselves in prison – not as a result of failing to discharge their debt but rather for failing to obey a court order in relation to the debt.

Current legislative framework

The Debtors Act (Ireland) 1872

Although this Act abolishes imprisonment for debt, it permits the imprisonment of debtors who have the means to pay but who refuse or neglect to obey a court order in respect of the debt. Debtors can be imprisoned for a period of up to six weeks⁷. The Law Reform Commission (LRC) indicated that '*in practice this procedure is rarely invoked and that the instalment order procedure under the Enforcement of Court Orders Acts 1926-1940 appears to have largely [replaced it]*'⁸. They suggest that if imprisonment is to be retained as a sanction in debt enforcement proceedings that this Act be repealed or consolidated with the following Acts to create a single committal process.

The Enforcement of Court Orders Acts 1926-2009⁹

These Acts provide the District Court with jurisdiction to make instalment orders where a debtor has defaulted on a debt. The court directs the debtor to pay off the sum owed in fixed instalments over a set period. Where the debtor fails to comply with the terms of the instalment order these Acts set out the circumstances in which he may be imprisoned.

⁷ S. 6.

⁸ LRC, Consultation Paper: *Personal Debt Management and Debt Enforcement*, Sept 2009 available at

http://www.lawreform.ie/fileupload/consultation%20papers/Consultation%20Paper%20on%20Personal%20Debt%20Management%20and%20Debt%20Enforcement_FINAL%20DRAFT.pdf

⁹ The *2009 Amendment Act* was introduced to remedy the constitutional defects identified in the committal process following the *McCann* case.

The legislation in practice

In order to legally enforce a debt a creditor must follow a number of steps:

1. Where a debtor has failed or refused to make repayments on a loan etc a creditor can apply to the courts for an order/judgment against him¹⁰. A judgment is made in the amount of the debt owed but this does not guarantee payment. Obtaining a judgment debt is just the first step in the enforcement process.
2. Once a judgment debt has been obtained a creditor can then issue proceedings seeking to enforce the judgment. There are a number of enforcement options open to him, including:
 - Instalment proceedings;
 - Committal proceedings;
 - Registration of the judgment;
 - Bankruptcy proceedings;
 - Execution against goods;
 - Judgment mortgages;
 - Appointment of a receiver by way of equitable execution;
 - Garnishee/Attachment of debt proceedings;
 - An injunction.

As imprisonment follows as a consequence of failing to comply with an instalment order only this *Spotlight* does not propose to examine each of these processes in detail. Below is a short synopsis, for a more in depth review see the LRC's consultation paper¹¹.

Instalment proceedings are proceedings taken in the District Court by a creditor who has been unable to recover money on foot of a judgment debt. The court can order the debtor to pay off the sum owed in fixed instalments over a set period.

¹⁰ Where the debt in question is less than €6,350 proceedings commence in the District Court, where it is for more than €6,350 but less than €38,091 proceedings commence in the Circuit Court, any amount above that and proceedings commence in the High Court

¹¹ *Ibid* at 138

Committal proceedings are court proceedings to determine if a person should be arrested, imprisoned or otherwise deprived of their liberty.

Registration of a judgment is a process which makes the terms of a court order publicly available to anyone to inspect in the Judgment Register. This information can then be published, e.g. in Stubb's Gazette.

Bankruptcy proceedings are court proceedings taken by either a creditor or a debtor to have the debtor declared bankrupt. The term also covers subsequent proceedings dealing with payments to creditors and discharge from bankruptcy.

Execution against goods is a procedure available to creditors to have the debtor's goods seized and sold by the sheriff in order to satisfy a judgment debt.

A Judgment mortgage is an order that secures payment of a judgment debt by creating a charge over land owned by the debtor.

Appointment of a receiver by way of equitable execution is another means by which a creditor can secure payment of a judgment debt. The court can appoint a receiver to take possession of monies that third parties are expected to owe to the debtor (e.g. where the debtor is suing a third party in a personal injury action).

Garnishee/Attachment of debt proceedings are where a court orders that an existing debt owed by a third party to the debtor is to be paid instead to the creditor.

An Injunction is a court order forbidding a person from acting or conducting themselves in a way that infringes the rights of the person who obtained the order (e.g. reducing their assets below a certain amount).

The Instalment Procedure

Once a creditor has obtained a judgment in relation to a debt (regardless of which court granted the judgement) he can apply to the

District Court in which the debtor resides for an instalment order.

The debtor will be summonsed to attend court so that he can be examined in relation to his means. He must provide the court with details of:

- all his assets and liabilities;
- all his income (real & potential); and
- a list of his dependants.

Having examined the debtor the court will then make an instalment order based on his ability to pay. The order directs the debtor to repay not only the judgment debt but also the court costs in such amounts and at such times as the Judge decides. The order will remain in force for a period of twelve years unless the monies are paid in full before that date.

Although official figures in relation to the number of debtors who attend the examination procedure are not available FLAC suggest that they are very low¹². In the majority of the 38 cases surveyed by them in their study, no examination of means was carried out before an instalment order was made. There is currently no requirement that a debtor attend to be examined, nor is there any restriction on a judge making an instalment order in their absence without the necessary information as to their means and/or ability to meet the instalments.

The LRC support FLAC's contention that it is a waste of both creditors and the courts time/resources granting instalment orders in the absence of the debtor as they are unlikely to be complied with. Consequently they have called for reform of the procedure, recommending that instalment orders should only be made where the court has accurate information about the debtor's means and his ability to pay.

Failure to comply with an instalment order can lead to imprisonment.

The Committal Procedure

Where a debtor, for whatever reason, fails to obey an instalment order a creditor can apply

¹² FLAC, *To No One's Credit, A study of the debtor's experience of Instalment and Committal Orders in the Irish legal system*, June 2009, at 152, available at http://www.flac.ie/download/pdf/to_no_ones_credit_june09.pdf

to the District Court to have him arrested and committed to prison.

As a result of the recent *McCann* case¹³ (which is examined in more detail at p. 6) a number of procedural safeguards were introduced in the committal process to protect debtors, and to reduce the number of those at risk of imprisonment. These include:

- that a debtor must now be summonsed to appear at the committal hearing. The summons must be personally served on him informing him of the possible consequences of failing to comply with the instalment order i.e. the risk of imprisonment.

Where the debtor fails to attend (without reasonable excuse) the Court may issue a warrant for his arrest or fix a new date for the hearing. Where the debtor is arrested and brought before the court the judge will set a new date and inform the debtor of his right to apply for legal aid. Failure to appear at this hearing amounts to contempt of court.

At the hearing the Court has a number of options open to it. It may:

- vary the original instalment order (e.g. reduce the amount or vary the frequency of payments);
- request the parties attend mediation in an attempt to resolve the dispute¹⁴;
- make an order for imprisonment, which is then deferred on condition that the debtor make the required repayments; or
- make an order for the arrest and imprisonment of the debtor.

The *2009 Act* imposes liability on a debtor for the costs incurred in committal proceedings.

¹³ *McCann v Judges of Monaghan District Court & Ors* [2010] ILRM 17 available at http://www.westlaw.ie/westlawie/wisearchframes?edit_doctype=all&searchFreeText=mccann+v+judges+monaghan

¹⁴ The *2009 Act* makes no further provision in relation to mediation e.g. as to who the mediator should be. FLAC however has recommended the establishment of a Debt Rescheduling and Mediation Service, which would sit in private to facilitate parties to reach an agreement on affordable repayments.

These costs are added to the existing debt and become part of the terms of the instalment order. However an omission appears in the Act where mediation is requested. No provisions exist in relation to costs of the mediation¹⁵. A failed mediation may well result in a separate debt outside the terms of the instalment order, leaving the debtor open to new debt enforcement proceedings being brought against him.

Where mediation has failed, or a debtor has defaulted on an instalment order which the court has varied, a creditor can re-apply to have the debtor imprisoned.

Where imprisonment is considered, the courts must first determine whether the debtor is one who genuinely can't afford to meet the repayments or one who simply won't.

Can't pay v Won't pay debtors

The *2009 Act*¹⁶ provides that an order for imprisonment can only be made after a creditor has satisfied the Court, beyond reasonable doubt, that a debtor's failure to make repayments is due not to his inability to pay but rather due to his wilful refusal or culpable neglect¹⁷. This places a huge burden on creditors which may prove hard to satisfy, particularly as won't pay debtors will have gone to great lengths to dispose of any assets/property which they may have. There is currently no official means of obtaining information on a debtor's means, and the LRC indicated that this absence leads to wasted costs and futile enforcement proceedings being brought against can't pay debtors¹⁸.

The underlying principle for distinguishing between debtors developed at the same time as the abolition of imprisonment for debt. Depriving debtors of their liberty created further economic and social problems as families were left destitute and creditors

¹⁵ See s. 6(7)(b)

¹⁶ S. 8(a)

¹⁷ The creditor must also prove that the debtor has no assets/goods which could be seized under the execution process.

¹⁸ See the LRC Report; *op. cit.* at 314 for a discussion of the various methods of obtaining information on debtor's means and their recommendation that a fundamental aim of the reform of debt enforcement procedures should be that more information on debtors means be available to creditors.

empty handed. However in order for business to survive creditors had to have legal redress against debtors, particularly those who had the means to pay but refused to do so. Imprisonment as a result of economic misfortune was seen as inequitable and ineffective and was therefore abolished, but imprisonment was retained as a sanction for those who deliberately defaulted.

The recent *McCann* case highlighted that although the intention of the Legislature may have been to distinguish between the two, many can't pay debtors were still being imprisoned for failing to comply with the terms of an instalment order. This was due primarily to the lack of procedural safeguards in the committal process.

Our international obligations

Article 1 of the Fourth Protocol of the European Convention on Human Rights (ECHR) provides that:

*'no-one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.'*¹⁹

This fundamental right is additionally protected by Article 11 of the *UN International Covenant on Civil and Political Rights* (ICCPR) which provides that:

*'no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.'*²⁰

FLAC in its Report, *To No One's Credit* drew attention to the fact that Ireland's compliance with these international obligations had come to the attention of the Human Rights Committee²¹ on more than one occasion. However successive Irish governments justified the use of imprisonment as a sanction in debt enforcement on the grounds

¹⁹ Ireland ratified the *European Convention on Human Rights* (ECHR) in 1953 and incorporated it into Irish law through the *European Convention on Human Rights Act 2003*.

²⁰ Ireland ratified ICCPR in 1989 and is bound by the requirement to file State Reports with the Human Rights Committee as to how its provisions are being implemented.

²¹ The Human Rights Committee is a body of independent experts that monitor implementation of the International Covenant on Civil and Political Rights by State parties.

that it is not used as a sanction for non payment of a debt but rather for failure to obey a court order:

*'imprisonment [for debt] has not been a feature of the Irish legal system since debtors' prisons were abolished in the nineteenth century... The suggestion that Ireland imprisons for debt is a misunderstanding. No legal provisions entitle a court to do so. Ireland has, as every State does, and is entitled to have, a mechanism for enforcing court orders in the face of the wilful and obstinate refusal to obey same. That legal entitlement is an essential part of the administration of justice and the independence of the judiciary. Furthermore, enforcement of court orders is essential to maintain public confidence in the judicial system, since the administration of justice would be undermined if an order of any court could be disregarded with impunity. A person can only be imprisoned if it is proved beyond a reasonable doubt that the person concerned is able to pay, but is refusing to do so.'*²²

In July 2008 the Human Rights Committee stated that it was concerned that Ireland did not intend to amend laws which may in effect permit imprisonment for failure to fulfil a contractual obligation and it called on Ireland to ensure that its laws are not being used for this purpose²³.

Two years previously, Ms McCann, a debtor, had already started judicial review proceedings in the High Court challenging an order for her imprisonment on constitutional and ECHR grounds. One of her arguments, which proved successful, was that Ireland's committal process allowed for imprisonment of a debtor merely on the grounds of their inability to pay contrary to Article 1 of the ECHR.

The McCann Judgment

In 2002 Monaghan Circuit Court granted the Credit Union a judgment order in the sum of €18,063.09 against Ms. McCann²⁴ who was

²² See *To No One's Credit op. cit.* at 107

²³ See *To No One's Credit, op. cit.* at 118

²⁴ Ms. McCann's only source of income was social welfare payments.

not present or represented at the hearing. In 2004 the District Court granted an instalment order in respect of this sum directing Ms. McCann to repay €82pw to the Credit Union. Again Ms. McCann had not been present or represented in court. After Ms. McCann had defaulted on a number of instalments the Credit Union applied for her arrest and imprisonment under s. 6 of the *Enforcement of Court Orders Act 1940*. An order was made again in Ms. McCann's absence that she be arrested and imprisoned in Mountjoy for one month (or until such time as she paid the outstanding monies). In 2006 the Gardai arrested Ms. McCann on foot of the warrant for her arrest.

Ms. McCann brought judicial review proceedings challenging the validity of the order for her arrest and imprisonment and the validity of the legislation under which the order was made on the grounds that they were unconstitutional and incompatible with the ECHR. Ms. McCann argued *inter alia* that:

1. the absence of a requirement in s. 6 that a debtor be present in Court before an order for their imprisonment could be made infringed her rights under Article 1 of Protocol 4 of the ECHR;
2. the absence of any positive obligation on a judge prior to making an order for imprisonment to ascertain the means of a debtor or his ability to pay, and the absence of a requirement that a judge should desist from making any such order until he ascertains whether the failure to pay is due to wilful refusal or culpable neglect rather than inability to pay was a further infringement of Article 1.

Ms. McCann contended that without procedural safeguards in place preventing an order for imprisonment being made in the absence of the debtor, or in the absence of information as to the debtor's means s. 6 effectively allowed for imprisonment of a debtor merely on the grounds of inability to pay, thus the State was in contravention of Article 1. She argued further that:

3. where a person is at risk of being sent to prison the fair procedure safeguards guaranteed by Articles 34, 38, 40.3 and 40.4.1 of the Constitution should be applied throughout the entire process, including:

- the right not to be tried *in absentia*;
- the right to have the legal burden of proof rest with the prosecution;²⁵
- the right to fair procedures;
- the right to defend oneself; and
- the right to be legally represented (incl. the right to legal aid in appropriate circumstances.)

4. the absence of legal aid for debtors potentially facing a term of imprisonment was contrary to Article 6.3 of the ECHR which provides:

'Everyone charged with a criminal offence has the following minimum rights...to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.'

5. finally, Ms. McCann argued that imprisonment was not being used as a remedy of 'last resort' as there is no requirement on a creditor to pursue other remedies with less serious consequences for the debtor such as attachment of earnings/social welfare payments.

The High Court found in Ms. McCann's favour and ruled that s. 6 contained a number of fundamental deficiencies which rendered it unconstitutional and invalid. However the Court went on to state that there was an accepted reasonable and legitimate public interest in having an effective system for the enforcement of contractual obligations which included a role for imprisonment:

*'Having in place an effective statutory scheme for enforcement of contractual obligations, including the payment of debt, is unquestionably a reasonable and legitimate objective in the interests of the common good in a democratic society. The means by which effectiveness is achieved may reasonably necessitate affording a creditor a remedy which entitles him or her to seek to have a debtor imprisoned...'*²⁶

This case resulted in a massive lacuna in Irish debt enforcement legislation and the

²⁵ Ms. McCann argued that by requiring the debtor to prove that his failure to repay the debt was not due to wilful refusal or culpable neglect, s.6 reversed the legal burden of proof.

²⁶ *McCann, op.cit.* at 58

Government quickly introduced the *Enforcement of Court Orders (Amendment) Act 2009* to deal with the situation.

Introducing the Bill in the Seanad, the Minister of State, John Curran, explained that the new Act was intended to address the deficiencies identified by Laffoy J, while at the same time keeping open the possibility of arresting and imprisoning defaulting debtors. Minister Curran stated:

*'The Bill still allows for the possibility of imprisonment, and there are those who will think this is harsh. The Minister gave detailed consideration to that issue. However, we have to live in the real world and consider the effect of abolishing imprisonment on the process of debt enforcement between two contracting parties ... The majority of people who may ignore every other step of the process find the means to pay their debts when faced with the threat of imprisonment. It should be remembered that this process is always preceded by an instalment order granted by the court.'*²⁷

The 2009 Act replaces the provisions of 1940 Act rectifying the defects identified in *McCann*. Accordingly the procedures have been changed so that:

- the summons directing a debtor to attend the committal hearing must be personally served on him. Where a debtor fails to attend the judge must either issue a warrant for his arrest or fix a new date for the hearing. This amendment guarantees that every effort will be made to ensure the attendance of a debtor at the hearing so that an order of imprisonment can no longer be made in his absence;
- the burden of proof in relation to non-compliance no longer rests with a debtor: s.6 (8) now requires a creditor to establish 'wilful refusal' or 'culpable neglect' on the part of the debtor;
- a debtor of insufficient means is entitled to apply for legal aid but more importantly

²⁷ Seanad Debates Vol 196 No. 11, 7 July 2009. Available at <http://debates.oireachtas.ie/DDebate.aspx?F=SEN20090707.xml&Page=1&Ex=475#N475>

there is a requirement that a debtor be advised of this right;

- imprisonment is to be used only as a last resort when mediation or a variation of the original instalment order has failed, where the debtor has no assets/goods available for execution and where the default is due to the debtors wilful refusal or culpable neglect.

FLAC in its briefing paper on the Bill²⁸ felt that the provisions, although welcome, were confined to addressing what is only the last step in a complex and non user friendly enforcement process. They continue their call for comprehensive reform of debt enforcement in Ireland, particularly in relation to the instalment procedure.

The rationale for imprisonment post *McCann*

Following the *McCann* case the number of debtors facing imprisonment should reduce considerably. However many commentators argue that imprisonment has absolutely no part in a process designed to enforce private contractual debt and is wholly inappropriate in a modern society.

Creditors, who are owed money on the other hand, argue that they are entitled to seek legal redress and have their rights vindicated by the Courts. This entitlement was touched on by Laffoy J in *McCann*, and by the Minister for Justice who indicated that there will be no change in the law as it stands:

'Where a person refuses to obey a court order relating to providing a remedy for contractual default to another person or organisation, imprisonment may be one of a number of remedies ultimately for non-compliance. The imprisonment of such defaulters is very much a last resort. The person will generally have been given every opportunity to fulfil the contract or to discharge the debt. There are no proposals in the current Government Legislative Programme to reform the law in regard to

²⁸ FLAC, *Briefing Paper on the Enforcement of Court Orders Bill 2009* available at http://www.flac.ie/download/doc/09.07.02_briefing_paper_on_enforcement_of_court_orders_bill_2009.doc

*civil contempt and how it might be applied to default of contractual obligations or failure to pay a civil debt.*²⁹

Given that imprisonment does not discharge the debt owed, it is arguably of little or no use to creditors as a means of debt recovery. Section 20 of the *Enforcement of Court Orders Act 1926* provides that:

'imprisonment of a debtor ...shall not operate as a satisfaction or extinguishment of the debt or any part thereof or deprive the creditor of any other rights or remedies for the recovery thereof.'

The reality is that imprisoning debtors incurs huge expense on the part of the State while leaving the creditor empty handed. This has led stakeholders, including FLAC, to question whether using a criminal sanction in civil proceedings can be justified on the grounds used to endorse it in criminal proceedings i.e. punishment; deterrence; retribution; incapacitation and/or rehabilitation?³⁰

The LRC have also questioned whether imprisonment is capable of economic justification in circumstances where the cost of imprisoning a debtor far exceeds the amount of the instalment order that the debtor had failed to pay. According to the Minister for Justice:

*'a total of 276³¹ citizens were imprisoned in 2008 for debtor offences... These 276 citizens were responsible for 306 debt offences as some had been imprisoned on more than one occasion... The average length of sentence imposed on each offence was 27 days. The average length of sentence served was 20 days... The cost of all said detentions for 2008 is not yet available...'*³²

²⁹ Dail Debates, Written Answers 25 February 2009

Questions 104 and 105. Proposed Legislation

³⁰ See *Spotlight on Sentencing Policy and Practice*, No 3 of 2008, for a detailed discussion of the rationales for punishment, available at http://khiis-a01/library/LibraryandCMS/Spotlight_docs/Sentencing_Policy_and_Practice.pdf

³¹ According to the Irish Prison Service the figure for 2008 is 255. There is no obvious reason for this discrepancy.

³² Dail Debates, Written Answers 27 January 2009 Q. 608 Prison Committals.

According to the Irish Prison Service Annual Report 2008³³ the average annual cost of providing a prison space in 2008 was €92,717 which is approximately €254 per day. If we take it that in 2008, 306 prison spaces were taken up by debtors who spent on average 20 days in prison the cost to the exchequer was in excess of €1.5m (€5,080 per prisoner).

According to the *Sunday Tribune* figures, at the end of June 2009, 186 people were imprisoned for an average of 20 days each for failing to pay a debt³⁴. Official figures are not available for 2009 until the publication of the Irish Prison Service's Annual Report in mid/late 2010. However if we assume that a further 186 people were imprisoned between July and December the estimated cost³⁵ to the exchequer of imprisoning 372 debtors for an average of 20 days each in 2009 is almost €1.9m³⁶.

In addition there are the extra costs incurred by the Garda in arresting the debtor, the judicial costs involved in hearing the case, and the associated opportunity costs. Opportunity costs are hard to quantify primarily because they involve assessing the economic benefits that are lost by choosing a particular course of action. In this instance the opportunity costs are the 6,120 days which were lost detaining debtors in 2008 (estimated at 7,740 days in 2009) which could have been used to detain more serious offenders, and the resources used by the Gardaí and the Judiciary in dealing with these types of cases.

The LRC pointed out that the criminalisation of debtors can often result in unseen costs for society in general, particularly in terms of stress, illness, relationship break down and anti-social behaviour. Bearing in mind the costs involved and the arguments against using a criminal sanction in civil debt enforcement procedures the LRC in its

³³ Available at

http://www.irishprisons.ie/documents/IPSAnnualreport2008e_000.pdf

³⁴ Frawley, *Victor in landmark debt ruling due to sue over stress*, 12 July 2009 available at

<http://www.tribune.ie/article/2009/jul/12/victor-in-landmark-debt-ruling-to-sue-over-stress/>

³⁵ Using the 2008 average annual cost of providing a prison space.

³⁶ €1,889,760

Consultation Paper invited submissions as to whether:

'imprisonment should be entirely removed from the debt enforcement system, or whether it should be retained as a last resort for wont pay debtors who have persistently and deliberately sought to evade their obligations.'

The LRC published an Interim Report on 17th of May 2010³⁷ examining the initiatives that have been put in place since the publication of its Consultation Paper. However its Final Report, which will contain proposals for long term legislative reform, is not expected until the end of 2010.

An alternative to imprisonment

Post *McCann* and the safeguards introduced in the 2009 Act we can assume that the number of debtors imprisoned in Ireland as a consequence of debt enforcement should reduce significantly. Nevertheless a major problem remains with our current debt enforcement procedures. They were introduced in an era which predates the modern credit society within which we live and are therefore largely ineffective as a solution for creditors. Stakeholders have been calling for reform, and in particular for the introduction of an alternative method of enforcement i.e. attachment of earnings orders (AEOs). The banks have indicated their support to finding alternatives to debtor imprisonment and have welcomed the LRC consultation paper³⁸.

AEOs would offer creditors at least some chance of recouping their money, albeit in small amounts over long periods.

³⁷ Available at <http://www.lawreform.ie/fileupload/Reports/irDebt.pdf>

³⁸ The Irish Banking Federation (IBF) in association with the Money Advice and Budgeting Service (MABS) developed the IBF/MABS Protocol on Debt Management which came into effect in September 2009 as a method of dealing with personal debt in a non court based setting. Available at <http://www.ibf.ie/pdfs/Working Together to Manage Debt.pdf>

Attachment of Earnings

As far back as 1998 there were calls for the introduction of an attachment of earnings (AEO) procedure as part of the Irish debt enforcement process³⁹.

An AEO is directed against the debtor's employer requiring them to deduct specified payments from the debtor's salary. These payments are then used to repay the debt owed to the creditor. The order will direct that the debtor's income not be reduced below a certain amount taking into account his day to day needs, these are deemed protected earnings.

AEOs are widely used in the debt enforcement processes of other European countries⁴⁰. According to various commentators in the U.K. AEOs are and have always been extremely popular as an enforcement mechanism because they are easily made, low cost and effective⁴¹. Their effectiveness must be balanced however with the fact that AEOs may result in negative consequences for an employee in terms of promotion etc, and unlike other enforcement mechanisms where an AEO is in force a creditor can not pursue any other means of enforcement.

AEOs have been available in Ireland as an alternative to imprisonment when seeking to enforce maintenance orders in family law proceedings since 1976⁴². Originally these orders could only be sought when a party defaulted in relation to a maintenance order, now both orders can be granted simultaneously.

There is mixed feedback on the effectiveness of AEOs. According to the LRC, anecdotal evidence suggests they are working

³⁹ See the Fine Gael sponsored Private Members Bills - *Enforcement of Court Orders Bill 1998, Enforcement of Court Orders Bill 2004 and Enforcement of Court Orders Bill 2007*.

⁴⁰ See FLAC, *An End based on Means* (2003) for a comparative analysis of the Attachment of Earnings mechanisms used in other European jurisdictions. Available at http://www.flac.ie/download/pdf/an_end_based_on_means.pdf

⁴¹ Sandbrook, *Debt Recovery through the Courts*, Thomson Reuters (2008) and Levaggi et al, *Enforcement and Debt Recovery*, Law Society Publishing (2008)

⁴² *Family Law (Maintenance of Spouses and Children) Act 1976*

reasonably well. FLAC in their 2003 Report *An End based on a Means*⁴³ examined AEOs and did not recommend their introduction in the debt enforcement process. They did however accept that attachment is infinitely preferable to imprisonment and that if imprisonment for non-payment of an instalment order is to be brought to an end, then from the creditor's perspective, a new method of enforcement would need to be put in place.

Accordingly, they put forward a number of proposals for an attachment of earnings model:

- attachment of earnings should not be permitted in relation to social welfare payments;
- attachment of earnings orders should not be granted at the same time as instalment orders, so that debtors have the opportunity of meeting the terms of the instalment order prior to their employer being contacted given the negative consequences that might result;
- where an attachment of earnings order is sought by a creditor, a court can look at the entirety of the debts owed by a debtor and order a consolidated AEO.

AEOs are not new to the Irish legal system and have proven more successful than committal orders in family law proceedings⁴⁴.

Conclusion

Since 2002 over 1,000 debtors have been imprisoned in Ireland as a consequence of debt default.

It was not until *McCann* and the consequent safeguards introduced in the *2009 Act* that much needed protection was afforded to debtors who found themselves embroiled in committal proceedings. Although there are no figures available on the number of debtors

imprisoned post *McCann* we can assume that they have dropped.

However years of economic growth led to a massive increase in the extension of consumer credit in Ireland⁴⁵. In the current economic downturn this will inevitably lead to an increase in the number of debt enforcement cases being brought before the courts. Stakeholders, including FLAC and the LRC are recommending the reform of our entire debt enforcement system. They recommend the introduction of less court based, more holistic procedures which focus on practical resolution rather than punishment.

Removing imprisonment entirely from our debt enforcement process, introducing AEOs as an alternative enforcement mechanism, and introducing a system whereby creditors can access information about a debtor's means prior to instigating enforcement proceedings are some of the changes being proposed. In light of the deliberations of the LRC the Government has given a commitment to reform debt enforcement in their *Renewed Programme for Government* agreed in October 2009⁴⁶.

⁴³ *Op. cit.*

⁴⁴ See LRC, *op. cit.*, at 364 for a discussion on the effectiveness of AEOs in family law proceedings.

⁴⁵ See *Spotlights 2 and 3 of 2010 Personal Debt and Consequences*, *ibid* and *Mortgage Debt* available at http://khiis-a01/library/LibraryandCMS/Spotlight_docs/Debt_Part_1_Mortgages.pdf

⁴⁶ Available at http://www.taoiseach.gov.ie/eng/Publications/Publications_2009/Renewed_Programme_for_Government_October_2009.html

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