

Submission on

Civil Debt (Procedures)

Bill 2015

FLAC, 15 July 2015

About FLAC

FLAC (Free Legal Advice Centres) is a non-governmental, voluntary organisation which exists to promote the fundamental human right of access to justice. As an organisation, FLAC focuses on the use of law as a tool for social change and on the right of equal access to justice for all. We work particularly on the protection of economic, social and cultural rights. FLAC is an affiliate member of the FIDH.

In our work, we identify and make policy proposals on how the law excludes marginalised and disadvantaged people, principally around social welfare law, personal debt & credit law and civil legal aid. We advance the use of law in the public interest and we co-ordinate and support the delivery of basic legal information and advice to the public for free and in confidence.

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Towards achieving our stated aims, FLAC produces policy papers on relevant issues to ensure that government, decision-makers and other NGOs are aware of developments that may affect the lives of people in Ireland. These developments may be legislative, government policy-related or purely practice-oriented. FLAC may make recommendations to a variety of bodies drawing on its legal expertise and bringing in a social inclusion perspective.

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Introduction

As an initial observation, the lack of consultation on this Bill with debtor (and other) advocates and the speed at which it is being run through the parliamentary process is deeply disturbing at a time of much financial and related personal difficulty for many. This means that there is a very short window to react to the Bill which makes it difficult for organisations, especially those with limited resources, to make a comprehensive submission.

The following is an examination of the bill as it deals with non-payment of debt from the point of view of FLAC's experience and analysis, followed by a short commentary on the process and production of this draft legislation.

1. Analysis of Civil Debt (Procedures) Bill 2015

a) An end to imprisonment for non-payment of debt?

Under the heading of role of imprisonment in the enforcement of judgments, the Law Reform Commission report of 2010 recommended that the Debtors (Ireland) Act 1872 and the Enforcement of Court Orders Acts 1926 – 2009 should be repealed in the context of a reformed system of court-based enforcement.¹

Section 26 of this Bill purports to repeal Parts I and IV of the Debtors (Ireland) Act 1872 **but does not repeal any provisions of the Enforcement of Court Orders Acts 1926 – 2009**. Thus, it would appear that the threat of imprisonment is not removed from the system whereby a debtor is ordered by the District Court to repay a judgment debt by instalments, but still remains in the limited circumstances for which the State had to legislate after the decision of the High Court in the *McCann* case². In effect, therefore, this Bill does not alter the current position, apart from to repeal provisions of a now largely unused piece of legislation.

b) To which debts will the Bill apply?

There has been speculation that the bill is at least partially intended to provide a method for recovering payment of state levies, such as unpaid water charges through the attachment of a person's income or a deduction from his or her social welfare payments.

Under the definition of debt in Section 1, it is clear that attachment of earnings will not be available to a lender authorised by the Central Bank – a bank, credit union or retail credit firm. At second stage, however, the Minister explained that *'It applies to creditors such as small or sole traders, sub-contractors and other small businesses that have supplied goods and services and provides them with new avenues to get paid what is owed to them by those who can afford to pay. Equally, it applies to debts that fall within the lower and upper limits,*

¹ Law Reform Commission (2010) Report: Personal debt management & debt enforcement, p. 330. Available online at <http://www.lawreform.ie/fileupload/Reports/rDebtManagementsFinal.pdf>.

² *McCann -v- Monaghan District Court & Ors* [2009] IEHC 276

respectively, of €500 to €4,000.” The Minister goes on to say that the legislation would equally apply to ‘*Irish Water charges and the charges of energy and telecommunications companies*’.

It should be pointed out that attachment will not of course be available against self-employed debtors, as they have no employer who can be ordered to make the appropriate deductions. Given that one of its aims is to allow small businesses to recover small debts through attachment, it is ironic that the legislation will not apply to self-employed individuals who might be considered to be more likely to incur debt to other small businesses by availing of goods or services on credit.

What is clear nonetheless is that this Bill provides access to attachment procedures for creditors who have provided goods and services and have obtained judgments for unpaid bills against PAYE workers. According to Section 6 (1) (b), the lower limit of €500 and the higher limit of €4,000 refer to the amount of a judgment debt that **remains due**. Thus, it would appear that the original judgment may be obtained for an amount of debt above and even substantially above the €4,000 limit; it is the amount outstanding that potential attachment may be levied against. **This opens up the prospect of the attachment of earnings against people who may have paid substantial amounts off the relevant judgments.** Credit institutions, on the other hand, will have no such avenue.

c) Ability to pay issues

The question of how the District Court will determine whether a person can afford to pay is absolutely critical in any debt enforcement procedure. On this issue, the Bill proposes a number of ‘safeguards’:

- A debtor in employment will be obliged to provide a **statement of means** (Section 7 (1)) to the court, which will then be used in assessing his or her capacity to pay.
- Where the debtor relies on social welfare payments, this statement of means will have attached to it a verification statement from the Department of Social Protection setting out exactly what payments are being made to the debtor and any deductions already being applied.

Judgment debtors are currently invited to provide a statement of means in relation to Instalment Order applications. Many do not do so; in some instances, this is due to fear of court processes, a failure to understand documentation and the general stress of ongoing financial difficulties.³ It is worth noting that it will be an offence not to comply with Section 7 (1) without reasonable cause and conviction carries a potential class C fine of a maximum €2,500 - another potential debt.

- The debtor will be offered an **opportunity to make representations to the court on his or her behalf** before the court may make a decision on the matter.

³ Please see FLAC’s 2009 report, ‘*To No One’s Credit*’, for a series of interviews with debtors and their feedback on how they perceived existing debt enforcement processes and their effect upon them. Available at <http://www.flac.ie/publications/to-no-ones-credit/>.

Judgment debtors currently have also this opportunity in relation to instalment order applications, but there is anecdotal evidence that significant numbers do not do so, particularly as such applications are heard in public in court. The Civil Debt (Procedures) Bill makes no explicit reference to any services that might be available to support and advise the debtor on making such an appearance; further, as such appearances are not compulsory, there is a greater chance that people will not attend.

- In making a decision the court will be required to take into account the debtor's capacity to repay the debt in terms of the amount of the attachment or deduction that would be ordered.
- The debtor's circumstances must be assessed by the court deciding on enforceability so the attachment of earnings or deduction from social welfare cannot cause him or her undue hardship or encroach on basic income sustainability to ensure basic living costs can still be met by the debtor.
- The court must for the purposes of its assessment establish a 'protected earnings rate' below which the particular debtor's relevant earnings should not be reduced by attachment, having regard to his or her needs and, if applicable, a 'normal deduction rate' allowing an attachment that secures payment of the judgment debt within a reasonable period.⁴

The Bill does not offer guidance on how a court is to discharge these functions, particularly if the debtor is not present in court to make representations in person. The Bill makes no reference to the 'reasonable living expenses' guidelines to which the Insolvency Service of Ireland and the Official Assignee must have regard (under the personal insolvency and bankruptcy legislation respectively) to ensure that a debtor's income does not fall below an acceptable minimum income standard.

If the District Court is expected to carry out this specialised task, FLAC suggests that it must have access to the required expertise on financial and budgeting matters and over-indebtedness. In fact, in its 2010 report the Law Reform Commission proposed that a specialist debt enforcement office be set up to deal with enforcement matters rather than leaving it to the existing courts.

d) Employment protection issues

FLAC examined the issue of attachment of earnings related to non-payment of civil debts in considerable detail in its 2003 report, 'An End based on Means'. We focused particularly on examining legislative schemes in operation in other jurisdictions, including the United Kingdom, the United States and right across Europe.

Many difficult issues around the mechanics of attachment became apparent in the course of this examination, including the potential effect of an Attachment of Earnings Order upon the employment prospects of the relevant debtor. This is an order directed at the debtor's employer (and not at the debtor) obliging it to make the prescribed deductions. It is clear that this may have an adverse effect in some cases on the employee's opportunities for promotion and advancement; it may even impact on the continuation of the debtor's

⁴ Note: the reference here to judgment debt appears to omit 'or remainder of the judgment debt' if our reading of Section 6 (1) (b) – see above - is correct.

employment, with employers in some case drawing conclusions about trustworthiness, particularly regarding money matters.

Many countries have therefore factored this possibility into their legislative schemes and FLAC's recommendations from 2003 reflect this as follows:⁵

- An Attachment of Earnings Order should only follow the debtor's failure to meet the terms of an Instalment Order - in other words, as a last resort.
- Varying the Instalment Order downwards (due to the debtor's inability to pay) should be examined before any Attachment of Earnings Order should be made.
- Any Attachment of Earnings Order should be capable of being suspended to allow the employee to voluntarily make the payments.
- Where an Attachment of Earnings Order is made, substantial employment protection measures should be in place. In this regard, the LRC's 2009 Consultation Paper noted that FLAC had recommended that the Unfair Dismissals Acts 1977 to 1993 should be amended, so that dismissal on the grounds of being subject to an attachment of earnings order should be added to the list of unfair reasons for dismissal.⁶ Ultimately, in its final 2010 report the LRC recommended that '*legislation should prohibit not only the dismissal of an employee on the ground that he or she has become subject to one or more attachment of earnings orders, but should also prohibit any other adverse action being taken against the employee on this sole ground*'. It also recommended that an employer should be guilty of an offence under this heading.

The present Bill does not take any of these issues into account; it even allows a District Court judge to make an attachment of earnings order without first requiring the creditor to apply for an Instalment Order. There is no protection for the debtor against adverse treatment by his or her employer. All of these are substantial employment protection issues which should be provided for in any progressive scheme of debt enforcement.

e) Deductions from social welfare payments

At Section 16, the Bill provides for a 'Deduction from Payments order' which allows a court to make an order directing the Minister for Social Protection to make deductions from certain 'net scheme payments'. In the course of her speech at second stage, the Minister for Justice & Equality stated that *'these are payments which are prescribed by the Minister for Social Protection as being suitable for deductions on the basis of their being stable payments to long-term recipients and taking into account any deductions which are already being made. Deductions may be also ordered only from a recipient's personal rate, which is the portion of the person's social welfare payment which does not include payments or elements of payments which might relate to dependants. The Minister for Social Protection will be in a position to designate those benefits to which a deduction order may be applied and it is expected that these would be broadly similar to those from which deductions in respect of*

⁵ FLAC (2003) *An End Based on Means?*, Section 11.2.3, pp. 118 – 122, available at <http://www.flac.ie/publications/an-end-based-on-means/>.

⁶ Law Reform Commission (2009) Consultation paper LRC CP 56 – Personal Debt Management & Debt Enforcement, p. 243. Available at http://www.lawreform.ie/_fileupload/consultation%20papers/cp56.htm.

local property tax may be deducted at present. It may be that in assessing affordability a court will be in a position to order only very small deductions from the payments of social welfare recipients or indeed in some cases none at all'.

Subsection (3) b provides that *'having regard to the particular circumstances of the judgment debtor, compliance with the order **will leave a sufficient amount to the debtor to maintain himself or herself and anyone dependant on him or her' (our emphasis added).***

In 'An End based on Means', FLAC stated its view that *'the potential attachment of social welfare payments is unconscionable and should not be included in any attachment of earnings legislation. Social Welfare payments are designed to meet the subsistence needs of those who are currently unemployed and should not be allowed to be diverted to any other purpose'.⁷ It remains our view that it is hard to see therefore how any deduction, no matter how small, could leave the debtor with a sufficient amount to live on.*

In its final report, the Law Reform Commission made *'no formal recommendation in respect of the question of whether social welfare payments should be capable of being attached, but instead suggests that this decision should be made by the Oireachtas in conjunction with the relevant policy-makers'.⁸*

FLAC suggests that comprehensive consultation with relevant actors and more consideration of the available evidence, domestically and internationally, would help ensure the legislation meets basic human rights standards on income and social security.

f) Instalment Orders

The bill does not reform procedures in respect of the setting of Instalment Orders. As a result of the outcome of the *McCann* case,⁹ the previous government was forced to introduce the Enforcement of Court Orders (Amendment) Act 2009. However, that legislation confined itself to remedying the deficiencies identified by Laffoy, J in the High Court in the *McCann* case. Thus, it

- provided that a person could not be committed to prison in his or her absence for failure to pay court-ordered instalments on a judgment debt;
- provided that a debtor faced with a creditor's application to imprison for failure to pay instalments was entitled to legal representation; and lastly
- specified that the onus would be firmly on the judgment creditor to show that non-payment of the instalment by the debtor was due to his or her wilful refusal or culpable neglect (a 'won't pay' scenario) as opposed to financial inability (a 'can't pay' scenario).

What the amending legislation in 2009 failed to do was try to prevent the need for the application to be made in the first place. In *'An End based on Means'* in 2003, FLAC had noted the absurdity of holding District Court

⁷ 'An End Based on Means'? p.122.

⁸ Law Reform Commission (2010) Report: Personal debt management & debt enforcement, p. 241. Available online at <http://www.lawreform.ie/fileupload/Reports/rDebtManagementsFinal.pdf>

⁹ See report by Mary Carolan in the *Irish Times*, 19 June 2009, <http://www.irishtimes.com/news/woman-jailed-over-credit-union-debt-wins-action-1.787182>.

hearings to set instalment payments to repay judgment debts where the debtor was not obliged to be present and where his or her up-to-date financial details were not before the court. We argued that such Instalment Orders were doomed to fail, necessitating further time-consuming and costly applications.

In its 2009 Consultation Paper, the Law Reform Commission accordingly '*identified a problem arising under the current instalment order procedure whereby instalment orders may be made by a District Court in the absence of the debtor. This has the consequence that instalment orders may be made without sufficient accurate information being made available to the court concerning the debtor's financial circumstances to allow the court to make a realistic and appropriate order. The Commission therefore provisionally recommended that an instalment order should not be capable of being made in the absence of accurate information about the debtor's means and ability to pay*'.¹⁰

In its final report in 2010, the Law Reform Commission noted that this '*provisional recommendation was based on the failings of the current system as clearly identified by the Free Legal Advice Centres reports on this area of the law*'.¹¹ However, it went on to note '*that under its (the LRC's) proposed reforms to the enforcement system as a whole, it is envisaged that enforcement orders will only be made following a comprehensive assessment of the debtor's means. Enforcement orders will also be the result of a decision by the Debt Enforcement Office as to the debtor's ability to satisfy the judgment debt, and the most appropriate mechanism for so doing. The Commission has recommended that in order to facilitate the making of such decisions, improved procedures for obtaining information about the debtor's financial circumstances should be made available to the Debt Enforcement Office. The Commission takes the view that these new procedures should be sufficient to achieve the aim of ensuring that an instalment order is not made in the absence of adequate information concerning the debtor's ability to satisfy the debt, and should prevent unsustainable instalment orders from being made. The Commission therefore considers it unnecessary to make any further recommendation in relation to this point*'.¹²

As of July 2015, no (specialist) Debt Enforcement Office has been put in place and Instalment Orders can still be made in a debtor's absence. This Bill presented a good opportunity to remedy the latter deficiency in particular which has not been availed of.

g) Execution against goods

The 2009 Consultation Paper from the Law Reform Commission noted '*that the procedure of execution against goods as it currently exists is generally regarded as ineffective, providing low returns to creditors while at the same time imposing considerably on debtors*'.¹³ This comment is thought to particularly refer to privacy concerns in terms of a consumer debtor's dwelling and the potential seizure of low value items that many would now view as essential but which are not protected from removal, as the regulations governing this form of enforcement have remained unaltered for decades.

¹⁰ Law Reform Commission (2009) Consultation paper LRC CP 56 – *Personal Debt Management & Debt Enforcement*, at paragraphs 6.211 to 6.212. Available at <http://www.lawreform.ie/fileupload/consultation%20papers/cp56.htm>.

¹¹ LRC CP 56, p. 223.

¹² LRC CP 56, p. 223.

¹³ LRC CP 56, paragraphs 3.342 to 6.331.

The Law Reform Commission noted that despite its flaws, this procedure remains the most widely used enforcement mechanism. Its recommendations in this area included that guidelines should be prepared by its proposed Debt Enforcement Office (which, as noted above, has never materialised), *'indicating the types of circumstances in which the use of execution against goods would be appropriate and proportionate'* and *'that a Code of Practice should be introduced to regulate the conduct of enforcement officers when carrying out the process of execution against goods'*.¹⁴

The Law Reform Commission also recommended that *'that primary legislation should establish a general rule that any assets of the debtor reasonably necessary to ensure that the debtor and his or her dependents may maintain a reasonable standard of living should be exempt from seizure'*.¹⁵

To FLAC's knowledge, none of these proposals have been acted upon and it is submitted that they should be included in any overhaul of debt enforcement procedures.

2. Concerns around process for Civil Debt (Procedures) Bill 2015

In her speech at the second stage of the above Bill, the Minister for Justice, Equality and Law Reform, Frances Fitzgerald TD stated that *'The provisions in the Bill arise from the recommendations made by the Law Reform Commission in its 2010 report entitled Personal Debt Management and Debt Enforcement. That report made a number of recommendations for reform of the existing personal insolvency and debt enforcement regimes. Key elements of the report were implemented through the enactment of the Personal Insolvency Act 2012'*.

The stated intention of this Bill is to enhance our legal system for the recovery of debts; its explanatory memorandum sets out that it *'seeks to implement further recommendations of the LRC report aimed at enforcement and recovery of debts which could be developed to streamline the existing enforcement procedures'*.

The implication is that the Civil Debt (Procedures) Bill 2015 will deal with the debt enforcement side of the Law Reform Commission (LRC) report, the Personal Insolvency Act 2012 having dealt with 'key elements' of the personal insolvency side.

However it is difficult on reading the bill to discern which recommendations the drafters are picking up from the LRC report. Given the Commission's intention that any debt enforcement regime be based on best international practice, offering humane and constructive paths out of debt and through the debt enforcement system, FLAC would argue that the present Bill does not meet this aim and must include a wider portion of the Commission's recommendations.

It is also our view that the Personal Insolvency Act 2012 has unfortunately not dealt adequately with the key elements of personal insolvency, so much so that at the same time as this Bill is being rushed through the

¹⁴ LRC CP 56, p. 327.

¹⁵ LRC CP 56, p. 328.

parliamentary process, amendments to the Personal Insolvency (Amendment) Bill 2014 will belatedly provide for a process to challenge the creditor veto that has undermined the efficacy of that legislation as a balanced debt resolution mechanism. FLAC has separately made comments on these amendments but, in summary, we remain very concerned that they will not remedy fundamental problems of access to the insolvency process for many insolvent debtors. Even where the debtor has the means to engage his or her Personal Insolvency Practitioner to challenge creditor rejection, the amendments appear to provide for a quite limited review.

The Law Reform Commission proposed a very wide suite of reforms to the system of debt enforcement in Ireland and this Bill represents a very selective isolation of small elements of that report, particularly in respect of attachment of earnings, as discussed above. While it would appear that this bill is intended to put an end to imprisonment for non-payment of civil debt, we have above drawn a major question mark over whether it actually achieves this. Equally, the bill contains no overarching proposals to review the system of enforcing judgments generally in Ireland.

The lack of any legislative reform in two key subject areas of the Law Reform Commission recommendations – Instalment Orders or Execution against Goods by Sheriffs/County Registrars – is notable.