

FLAC briefing note - Personal debt and insolvency law reform

29 June 2012

FLAC (Free Legal Advice Centres) is a human rights organisation which exists to promote equal justice for all. As a non-profit, non-governmental organisation, FLAC relies on a statutory funding, contributions, donations and grants to support its work. FLAC offers basic legal information through a telephone information line (1890 350250) and free legal advice through its network of 80 volunteer evening advice centres (www.flac.ie/gethelp). It campaigns on a range of issues including personal debt, fairness in social welfare law, public interest law and civil legal aid.

The launch on Friday 29 June of the Personal Insolvency Bill 2012 represents a major milestone in the development of debt law reform in Ireland. FLAC has been pressing for reform in this area for more than a decade, with a particular emphasis on consumer debt law.

1. The progress towards debt law reform

While progress has undoubtedly been slow, with many thousands of people urgently requiring the options the new legislation will bring, it is worth tracking how the movement for recent reform of Ireland's debt laws has evolved.

- **Background:** Our laws as they stand are based on outdated legislation. These include the Judgment Mortgages (Ireland) Act 1850, the Enforcement of Court Orders Act 1926-1940 (slightly varied in 2009 as a result of the High Court case of *McCann v DJ McBride and Monaghan Credit Union and others*, brought by Northside Community Law Centre) and the Bankruptcy Act 1988. This last piece of legislation was principally drafted in the 1960s although it was not enacted into law until 1988 and comes from a Victorian, punitive approach to bankruptcy.
- **FLAC research on debt:** In 2003, FLAC published 'An End Based on Means' (bit.ly/endmeansrep03), a report pointing to the likely consequences of a boom-inspired surge in consumer credit coupled with a lack of any available systems for dealing with unmanageable debt.
- **Changing debt enforcement:** FLAC issued a report, *To No-One's Credit*, in July 2009 (bit.ly/flacdebtrep09), giving the debtor's experience of enforcement in the Irish legal system. It called for an end to imprisonment for failing to fulfil a court order to pay a debt and made further proposals for settling debt outside the court system.
- **Law Reform Commission intervenes:** These themes were eventually taken up by the state funded but independent legal expert group, the Law Reform Commission (www.lawreform.ie) in a series of reports:
 - [Consultation Paper on Personal Debt Management and Debt Enforcement](#) (Sept 2009).
 - [Interim Report on Personal Debt Management and Debt Enforcement](#) (May 2010)
 - [Report on Personal Debt Management and Debt Enforcement](#) (Dec 2010)

The final Law Reform Commission report in December 2010 not only made recommendations for the reform of the law on debt management and enforcement, but also included a draft Personal Insolvency Bill and the draft Heads of a Bill to amend the Bankruptcy Act 1988. The Commission acknowledged FLAC's work in this area, and at the report's launch FLAC Senior Policy Researcher Paul Joyce called for a national strategy to deal with over-indebtedness (bit.ly/PJpaper2010).

- **Changing economic context:** These recommendations had acquired additional significance in the years during which the Law Reform Commission was working. When it commenced its research in 2008, the initial signs of difficult economic circumstances ahead had become apparent. By the time its final report issued at the end of 2010, Ireland was fully in recession and the problem of personal debt, in particular mortgage debt, and its management had reached crisis proportions.
- **International funding conditions:** In November 2010, Ireland availed of monetary assistance from a combination of EU and IMF funds on strict conditions. Even then, the IMF recognised that there was a need for personal insolvency resolution for a limited number of people. At the same time, the Irish state invested some 80 billion to

support and maintain the banks, money which the people of Ireland are committed to repaying over a very long period.

- **Central Bank engagement:** One of the Central Bank's functions is to “ensure that the best interests of consumers of financial services are protected”. In that capacity, and also as the regulator of the banks, in 2009, it issued its first 'Code of Conduct on Mortgage Arrears' for the banking sector, which was then strengthened in 2010 and came into force in 2011 (bit.ly/CCMA2010). The Code of Conduct required bank lenders to work with borrowers to seek to maintain borrowers in their family homes. The code did not apply to local authority housing loans.
- **Government involvement - the Cooney Group:** With mortgage arrears mounting, the Government began to recognise the lack of options for people to deal with their debt and the need for a co-ordinated approach. In February 2010, it set up an Expert Group on Mortgage Arrears and Personal Debt, comprising principally government representatives but also consumer advocates and banking representatives. It was headed by accountant Hugh Cooney and included Paul Joyce of FLAC in its ranks. The 'Cooney Group' issued an interim report in July 2010 and a final report, containing a number of recommendations, in November 2010 (bit.ly/cooneyrep2010).
- **Change of government:** The current coalition took office in March 2011. In its Programme for Government (bit.ly/PfG2011), the new executive explicitly recognised debtors' distress and promised to investigate solutions in relation to mortgage debt, undertaking to reform the personal insolvency legislation. The same promise – reform of personal insolvency regime - was promised to the so called 'Troika' as a condition for continued financial support.
- **Keane Group:** In July 2011, at the behest of a ministerial sub-group (the Economic Management Council), accountant and former Cooney group member Declan Keane was tasked with heading up an 'Interdepartmental Working Group on Mortgage Arrears' to consider further actions. Its terms of reference covered 15 specific items, including keeping people in their home and to minimise the cost to the state. It focused solely on mortgage debt and not personal debt generally. The group consisted only of representatives from various government departments, many of whom had already been in the Cooney group, together with delegates from the Central Bank, AIB and EBS. There was no consumer representation whatsoever.
- **Keane recommendations:** The 'Keane Report' on Mortgage Arrears issued in September 2011 (bit.ly/keanerep2011). It suggested a number of steps including out-of-court debt settlement, reformed bankruptcy legislation, mortgage to rent, mortgage interest supplement reform, introduction of trade down and split mortgages and an independent mortgage advice function.
- **Nine principles to tackle personal debt:** In October 2011, a group of concerned organisations and individuals united to issue a set of principles which would be used to underlie the state's action plan on personal debt (bit.ly/9ondebt). The group, including FLAC, Threshold, Focus Ireland, Society of St Vincent de Paul, New Beginning, Northside Community Law Centre, Ballymun Community Law Centre and various independent experts presented these suggestions to the Joint Oireachtas Committee on Finance.
- **Draft scheme of personal insolvency:** In January 2012 the government published a very detailed scheme of the planned bill which was to be released later that spring following a consultation period (bit.ly/draftdebtbill). FLAC presented its views on the scheme to the Joint Oireachtas Committee on Justice Defence and Equality in mid-February 2012 (bit.ly/FLACPR_joc_debtsub) and made its full submission to the Department of Justice and Equality on the proposals in April 2012. (bit.ly/FLACsub_draftPIscheme). The Committee also submitted its report to the Department on its hearings on 6 March (bit.ly/MDEokw)
- **FLAC personal insolvency conference:** On 19 April 2012 FLAC held a full day consultation on *Legislating for personal insolvency in Ireland: International developments and domestic issues*. Here Irish and international experts suggested that Ireland should learn from the experience of other jurisdictions in finalising the forthcoming legislation. It examined rationale for debt settlement legislation from a legal and economic perspective. Speakers tackled relevant issues such as 'moral hazard', debt write-off and insolvency. Ultimately the conference concluded that the scheme had a number of weaknesses which could ultimately undermine the

effectiveness of the legislation (all materials available on the conference microsite <http://flacdebtconference2012.wordpress.com/>).

2. The figures behind the facts: Key indicators of the personal debt crisis

A. Central Bank data on mortgage arrears

Since September 2009, the Central Bank has been releasing data on the extent of residential mortgage arrears. This is exclusively obtained from information from the banks and it only concerns the principal private residence of a household. It does not include arrears on local authority housing loans. The Central Bank proposes to collect information on other mortgage debt, such as buy-to-let mortgages but nothing has been released to date. Deputy Governor of the Central Bank Matthew Elderfield recently announced that as part of the Bank's ongoing research on the mortgage market, it will conduct a Household Income Survey to get a more accurate picture of the financial position of a representative sample of mortgaged households - which would indicate that an accurate picture does not currently exist. There are still no corresponding figures on arrears with unsecured personal debts.

The most recent statistics show that 10.2 percent of all residential mortgage accounts are in arrears of 3 months or more as of March 2012 (bit.ly/2012CBfigsQ1). This figure has increased steadily since September 2009. However, an analysis of the eleven sets of Central Bank figures available provides some interesting data:

- **Number in arrears:** At the end of September 2009 (Q.1), **26,271** accounts were in the 90 plus days arrears category. Two and a half years later (March 2012, Q.11) there are **77,630** such accounts. That is an increase of over **50,000** households, averaging well over **1700** new cases per month.
- **Amount of arrears:** The average amount owed in arrears per household has increased from €13,490 in September 2009 to €16,704 in March 2012, an increase of €3214.
- **Repossessions:** Some 2408 new cases to repossess family dwellings were brought from July 2009 to end of March 2012. Of these, 1205 Possession Orders were granted during this period but only 411 houses were actually repossessed on foot of a court order.
- **Voluntary surrender:** On the other hand during the same period, 932 houses were voluntarily surrendered or abandoned, well over twice the number repossessed. The number of family homes returned to lenders has increased from 331 to 961 during this time.

It should be noted that the Courts Service also provides data on possession orders issued and made (bit.ly/NJbwqq).

B. FLAC information line and advice centres data on debt enquiries

FLAC collects data on queries to its central telephone information line and to its network of legal advice centres around Ireland. This data has shown a marked increase in queries on debt since the start of the recession - going from 417 queries in total in 2008 to 2695 queries in 2011, an increase of almost 650% over the four years. In terms of overall information and advice, in 2011 debt queries constituted 12% of calls to our information & referral line and just over 9% of queries in our advice centres. Further, an analysis of debt-related queries in our centres in 2011 shows that almost 40% were around mortgage arrears, 24% on debt collection procedures and around 22% on personal loans. It should be noted that FLAC also handled some 277 complex legal queries from MABS for second-tier advice in 2011 (<http://bit.ly/annrep2011>). Finally, a snapshot survey of 50 callers to FLAC centres with mortgage problems in Spring 2012 revealed that of the 50, some 33 callers had other personal debts, and 29 of these 33 were in arrears with those other personal debts.

Queries to FLAC reveal considerable cross-over of debt with other areas of enquiry, such as family law and employment law, which indicates that debt is having an impact on family life in a legal context as well as a personal or social setting.

The issues FLAC identified over the recent months around personal debt therefore can be summarised as

- **Urgent need for solutions:** While the current government has acknowledged how important it is to fix the debt problem, FLAC is deeply concerned that it is taking so long to come up with viable solutions. The Irish state's failure to take definitive action on debt over the past four years has allowed a dreadful mess to establish itself, which must be cleaned up if we are to move on as a society and as an economy.
- **Holistic view:** Debt must not be taken in isolation - it is very much entwined with other issues - for example, many callers to FLAC centres and information line have family, employment or health problems caused by or contributing to their personal debt crisis. Thus FLAC has argued that government policy on personal debt must be holistic, taking into account a person's entire debt situation. and offering a suite of remedies.
- **Independent system:** FLAC has made the case for the establishment of a separate out-of-court debt settlement system to independently adjudicate on debt issues.
- **Preserve the family home:** Government policy must focus on keeping people in their homes as far as is possible if we are to avoid a tsunami of homelessness and attendant issues.
- **No soft options:** Genuine concerns that 'undeserving' debtors will abuse the system should be allayed through a robust system of checks and balances, as in other countries.
- **Rebalance power inequality:** Ultimately, the state must re-balance the unfair distribution of power between banks and consumers in a fairer way and remember that it **cannot leave matters of public policy in the hands of a for-profit financial services industry.**

In conclusion, FLAC's data shows that firstly, debt is a growing legal problem in Ireland which impacts on other areas of life; and secondly, that debt is complex, with people likely to be experiencing simultaneous problems with various different types of debt. This shows an urgent need for action to stop the proliferation of debt problems and also for a holistic approach offering a suite of solutions to over-indebted people.

C. Other data sources on personal debt and poverty levels

The state-funded but independent **Money Advice and Budgeting Service** (<http://www.mabs.ie>) assists people to put their financial situation in order through advice, information and direct assistance in negotiating with creditors. It has local offices nationwide and a national telephone helpline. In 2011, MABS had more than 26,000 clients on its books and handled more than 5,600 calls over its telephone helpline. Most (44.3%) live in mortgaged accommodation, 20.4% in private rented accommodation and 17.2% in local authority housing. The number of people it helps is not growing hugely year on year (up 3% in 2011 over 2010) but MABS advisors have commented that demand is very great and there is a backlog at some locations.

The **Society of St Vincent de Paul** is a voluntary countrywide charity that offers short-term practical assistance to people in need with donated clothing, furniture and in some cases money for bills and food vouchers. In May 2012 it reported that calls for help had jumped 83% nationwide since 2009 (<http://bit.ly/OD5cae>). Its President stated that same month that "the range of issues and complexity of problems, including large debts that our volunteers face has increased significantly due to the economic downturn." (<http://bit.ly/L49AxO>)

3. FLAC resources on personal debt

NB: All resources available at <http://bit.ly/flac1debt>

Conference Microsite on Legislating for personal insolvency in Ireland: International developments and domestic issues (April 2012): <http://flacdebtconference2012.wordpress.com/>

Reports:

- FLAC report on debt enforcement in the Irish legal system, *To No One's Credit*, (July 2009) also an [Executive Summary](#): bit.ly/flacdebtrep09

- FLAC landmark report on treatment of credit and debt in Irish law [An End Based on Means?](#). This report was well received by politicians, financial experts and money advisors (May 2003): bit.ly/endmeansrep03

Submissions:

- FLAC's final [submission on the draft scheme of personal insolvency law](#) (Mar 2012): bit.ly/FLACsub_draftPIscheme
- FLAC [presentation on the draft scheme](#) of personal insolvency law to the Joint Oireachtas Committee on Justice, Equality and Defence (15 Feb 2012): bit.ly/FLACPR_joc_debtsub

Papers:

- FLAC's [overview of debt settlement schemes from around Europe](#), based on the work of Professor Jason Kilborn of John Marshall School of Law, Chicago (January 2012): bit.ly/debtschemes2012
- Joint paper on [9 key principles on personal debt](#) (October 2011): bit.ly/9ondebt doc
- In September 2011 FLAC did an [analysis of the latest mortgage arrears figures from the Central Bank](#) which showed worrying levels of increase in arrears: bit.ly/sep11analysis
- FLAC Senior Policy Advisor Paul Joyce paper to the Law Reform Commission's Annual Conference on '[The Future of Debt Enforcement in Ireland](#)' (December 2010). bit.ly/PJpaper2010
- FLAC presentation to Joint Oireachtas Committee on Social and Family Affairs on [levels & trends in personal debt in Irish society](#) (April 2009): bit.ly/flacpresapr09

FLACsheets & information pieces

- [FLACsheet on the Code of Conduct on Mortgage Arrears](#) (January 2011): bit.ly/FLACguideCCMA
- FLAC [Checklist for Actions on Losing Your Job](#) (updated April 2011): bit.ly/unemp_checklist
- A [briefing document on legislation to change the Enforcement of Courts Orders Acts 1926-1940](#): bit.ly/enflawbriefing
- FLAC proposals on [short-term measures to tackle personal debt](#) (March 2010): bit.ly/debtmeasures2010