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Explanatory Memorandum](#)

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**AN BILLE UM FHORFHEIDHMIÚ ORDUITHE CÚIRTE  
(LEASÚ) 2009  
ENFORCEMENT OF COURT ORDERS (AMENDMENT)  
BILL 2009**

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*Mar a tionscnaíodh  
As initiated*

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ARRANGEMENT OF SECTIONS

Section

1. Definition.
  2. Amendment of Enforcement of Court Orders Act 1940.
  3. Short title and collective citation.
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ACTS REFERRED TO

Criminal Justice (Legal Aid) Act 1962	1962, No. 12
Enforcement of Court Orders Act 1940	1940, No. 23
Enforcement of Court Orders Acts 1926 and 1940	



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**BILL**

*entitled*

AN ACT TO AMEND THE ENFORCEMENT OF COURT  
ORDERS ACT 1940.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

10 **1.**—In this Act “Act of 1940” means Enforcement of Court Orders Act 1940. Definition.

**2.**—(1) The following section is substituted for section 6 of the Act of 1940: Amendment of Enforcement of Court Orders Act 1940.

15 “Failure to comply with instalment order.”

20 **6.**—(1) Where a debtor is liable, by virtue of an instalment order, to pay a debt and costs either in one payment or by instalments and the debtor fails to make the payment or fails to pay any one or more of the instalments due while that order is in force at the time or times appointed by it, the creditor may, at any time while it is in force or within 12 months after it has ceased to be in force, apply to a District Court clerk for the District Court area where the debtor resides for a summons directing the debtor to appear before the District Court.

25 (2) A summons referred to in subsection (1) shall—

(a) be issued by the District Court clerk concerned,

30 (b) contain details of the consequences, under this section, of a failure to comply with an instalment order and in particular the possibility of imprisonment,

(c) state that the debtor may be arrested if he or she fails to appear before the District Court as directed, and

(d) be served on the debtor by personal service. 5

(3) If a debtor fails, without reasonable excuse, to appear before the court in answer to the summons, on the application of the creditor, the judge of the District Court, if satisfied that the debtor was served in accordance with subsection (2), 10 may—

(a) issue a warrant for the arrest of the debtor, or

(b) if the judge thinks it appropriate in all the circumstances, fix a new date for the hearing at which the debtor will be required to attend and direct that he or she be notified of that date. 15

(4) A debtor arrested under subsection (3)(a) shall be brought as soon as practicable before the District Court. 20

(5) Where a debtor is arrested and brought before the District Court under subsection (3)(a), the judge shall fix a new date for the hearing of the summons and direct that the creditor be informed by the District Court clerk by notice in writing of the date so fixed, and shall explain to the debtor in ordinary language— 25

(a) that he or she—

(i) is entitled to apply to the court for a certificate of legal aid under section 6A, and 30

(ii) must attend before the court at the date next fixed for the hearing of the summons, 35

and

(b) the consequences, under this section, which may follow a failure—

(i) to comply with an instalment order and in particular the possibility of imprisonment, or 40

(ii) to attend before the court as required under paragraph (a)(ii).

(6) At the hearing of the summons, where both the creditor and the debtor are present in court, before hearing their evidence, the judge shall explain to the debtor in ordinary language— 45

(a) that he or she is entitled to apply to the court for a certificate of legal aid under section 6A, and

(b) the consequences, under this section, which may follow a failure to comply with an instalment order, and in particular the possibility of imprisonment.

(7) On hearing the creditor and the debtor and such evidence, if any, as they may respectively adduce, a judge may, if he or she is satisfied that the debtor has failed to comply with the instalment order—

(a) treat the proceedings on the summons as an application under section 5 for a variation of the instalment order, in which case section 5 applies as if the proceedings were such an application,

(b) if he or she considers it appropriate, request the creditor and the debtor to seek resolution by mediation, within such period as the judge may specify and, if not resolved by that method and within the period so specified, the creditor may apply to the District Court clerk concerned to re-enter the proceedings,

(c) if he or she considers it appropriate, and subject to subsection (8), make an order fixing a term of imprisonment for any period not exceeding 3 months (which order shall specify the amount of the outstanding debt and costs, including the costs of that order), and postpone the execution of that order until such time and on such conditions, if any, as to the payment of the outstanding debt and costs as he or she thinks just, or

(d) if he or she considers it appropriate, and subject to subsection (8), order the arrest and imprisonment of the debtor for any period not exceeding 3 months (which order shall specify the amount of the outstanding debt and costs, including the costs of that order), and the debtor shall be arrested and imprisoned accordingly.

(8) A judge shall not make an order under subsection (7)(c) or (d) unless he or she is satisfied, beyond reasonable doubt, on the evidence presented, that the creditor has established that—

(a) the failure to pay the sum in respect of which the debtor has made default is not due to his or her mere inability to

pay but is due to his or her wilful refusal or culpable neglect, and

(b) the debtor has no goods which could be taken in execution under any process of the court by which the judgment, order or decree for the debt was given. 5

(9) Where an order fixing and postponing a term of imprisonment has been made under subsection (7)(c) with a condition as to payment of the debt and costs by the debtor, he or she may, if his or her ability to comply with the terms of the order has changed, apply to the District Court clerk concerned to re-enter the matter and the District Court judge, on notice to the creditor, shall deal with the matter as if it was an application under section 5 for a variation of an instalment order. 10 15

(10) Where a debtor is imprisoned on foot of an order made under subsection (7)(c) or (d), he or she— 20

(a) may, if his or her ability to re-pay the outstanding debt and costs as specified in that order has changed, apply to the District Court clerk concerned to re-enter the matter and the District Court judge, on notice to the creditor, shall deal with the matter as if it was a rehearing of the summons referred to in subsection (1), and 25

(b) is entitled to be released immediately upon payment by him or her or on his or her behalf to the District Court clerk concerned or to the Governor of the Prison for the District Court clerk, of the sum of money consisting of the amount of all instalments of the debt and costs which have accrued before, and are unpaid at the date of such order. 30 35

(11) All moneys paid under this section to the District Court clerk (whether directly or through the Governor of the Prison) by or on behalf of a debtor shall be paid by the clerk to the creditor on request. 40

(12) If a debtor fails to comply with subsection (5)(a)(ii), without reasonable excuse, the District Court judge may deal with the matter as if it were a contempt of that court. 45

Entitlement to legal aid.

6A.—(1) If it appears to a judge of the District Court in proceedings on a summons under section 6 that the means of a debtor are insufficient to enable him or her to obtain legal aid, the judge shall, on application being made by the debtor in that behalf, grant to the debtor— 50

(a) a certificate for free legal aid (in this section referred to as a “debtor’s legal aid certificate”),

(b) where the debtor appeals an order for his or her imprisonment made under section (7)(c) or (d) and applies to the judge for legal aid in connection with the appeal, a certificate for free legal aid in respect of the appeal (in this section referred to as a “debtor’s legal aid (appeal) certificate”), or

(c) where the judge refers a question of law arising in the proceedings to the High Court by way of case stated or states a case in relation to the proceedings for the opinion of the High Court and the debtor applies to the judge for legal aid in connection with that reference or case stated, a certificate for free legal aid in respect of the reference or case stated (in this section referred to as a “debtor’s legal aid (case stated) certificate”).

(2) (a) Where a certificate has been granted under subsection (1) the debtor concerned shall be entitled to legal aid and to have legal representation assigned to him or her for that purpose.

(b) Where a debtor, in respect of whom an order for imprisonment is made, is refused a debtor’s legal aid (appeal) certificate, he or she may apply for the certificate to the court to which an appeal from imprisonment lies either—

(i) by letter addressed to the registrar of that court setting out the facts of the case and the grounds of the application, or

(ii) to the court itself.

(3) The Criminal Justice (Legal Aid) Act 1962 and regulations made under section 10 of that Act shall, where appropriate and with such modifications as may be necessary, apply to a certificate granted under subsection (1) and to such legal aid.

(4) The Minister may make regulations as are necessary for the purpose of this section to prescribe all or any of the following:

(a) the form of debtor’s legal aid certificates,

(b) the rate of payment of any fee, costs or other expenses payable,

(c) the manner in which legal representatives may be assigned pursuant to such certificates, or

(d) anything that by this Act is required or permitted to be prescribed.”. 5

(2) Section 8 of the Act of 1940 is amended—

(a) in subsection (1) by substituting “treat the application as an application for a summons under section 6, in which case section 6 applies as if the application was made under it” for “unless the defaulter shows, to the satisfaction of such Justice, that the failure to pay was due neither to his wilful refusal nor to his culpable neglect, sentence the defaulter to imprisonment for any term not exceeding three months”, 10

(b) in subsection (2)(d) by substituting “shall treat the failure to discharge the amount as a failure to appear before the court in answer to a summons issued under section 6(2), in which case section 6 applies accordingly” for “may, unless the defaulter shows to the satisfaction of such Justice that the failure to discharge the said amount was due neither to his wilful refusal nor to his culpable neglect, sentence the defaulter to imprisonment for any term not exceeding three months”, and 15 20

(c) in subsections (3) and (5) by substituting “section 6 for failing to pay the sum or sums due under an order referred to in subsection (1)” for “this section”. 25

Short title and collective citation.

**3.—(1)** This Act may be cited as the Enforcement of Court Orders (Amendment) Act 2009.

(2) The Enforcement of Court Orders Acts 1926 and 1940 and this Act may be cited together as the Enforcement of Court Orders Acts 1926 to 2009. 30





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**EXPLANATORY AND FINANCIAL MEMORANDUM**

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*Background*

The need for this Bill arises from the issues raised in High Court judgment of 18 June 2009 in the case of *Caroline McCann v Judge of Monaghan District Court, the Commissioner of An Garda Síochána, the Chief Executive of the Irish Prison Service, Minister for Justice, Equality and Law Reform, Ireland and the Attorney General*. The High Court found that section 6 of the Enforcement of Court Orders Act 1940 is incompatible with the Constitution. This section, together with section 8 of the same Act, is part of the framework used for debt enforcement in civil disputes.

*Purpose of the Bill*

The amendments proposed in the Bill will replace section 6 and amend section 8 of the 1940 Act. The effect will be to ensure that certain safeguards will apply to the provisions under which a Court may hear an application or grant an imprisonment order against a debtor who has failed to comply with an instalment order. There is a provision that debtors against whom an imprisonment order may be made will be entitled to apply for legal aid.

*Amendment of Enforcement of Court Orders Act 1940*

Section 2(1) substitutes an amended section for section 6 of the 1940 Act which replaced section 18 of the Enforcement of Court Orders Act 1926.

***Section 6***

Subsection (1) sets out the circumstances in which a creditor may apply for a summons under section 6, that is, where a debtor has failed to comply with an instalment order made by a Court under section 17 of the 1926 Act.

Subsection (2) specifies the details that must be contained in a summons.

Subsection (3) provides that, where a debtor fails to appear on foot of a summons, a judge may issue a bench warrant or adjourn the hearing.

Subsection (4) provides that a debtor arrested under (3) above shall be brought before a Court as soon as possible.

Subsection (5) provides that where a debtor is arrested and brought before a Court under the bench warrant issued under subsection (3), that a date shall then be fixed for a hearing and specifies that the judge shall make clear to the debtor his or her entitlement to apply for legal aid, the consequences, including imprisonment, of failing to comply with the instalment order and that he or she must attend for the hearing on the date specified.

Subsection (6) deals with the judge's explanation in circumstances where the debtor attends on foot of a summons, that is, the entitlement to apply for legal aid and the consequences, including imprisonment, of failing to comply with the instalment order.

Subsection (7) sets out the options open to the court if it is satisfied that the debtor has not complied with an instalment order.

Subsection (8) sets out the standard and onus of proof and the criteria that must be applied by the judge before making an order for imprisonment.

Subsection (9) provides that a debtor, who is the subject of a postponed imprisonment order and whose circumstances change, may apply to re-enter the matter.

Subsection (10) makes the same provision as subsection (9) for a debtor who is imprisoned and also provides that he or she may be released immediately on payment of the debt plus costs.

Subsection (11) provides that a District Court clerk or Governor receiving a payment under subsection (10) should pay that money over to the creditor.

Subsection (12) provides that a debtor who fails to attend the Court hearing may be regarded as being in contempt of court.

Section 6A makes provision for an entitlement to apply to the Court for a debtor's legal aid certificate and sets out the circumstances in which it can be granted.

Section 2(2) applies the provisions of the amended section 6 above to section 8 of the 1940 Act which deals with applications for enforcement proceedings for default of payments due periodically, for example, maintenance orders.

#### *Financial Implications*

The provisions of the Bill which extend to debtors the entitlement to apply for legal aid will give rise to some additional expenditure for the Exchequer. The cost will depend on the number of debtors who come before the court and their individual circumstances. Entitlement is limited to debtors at risk of imprisonment under section 6 whose means, in the view of the judge, are insufficient to enable him or her to pay for their own representation. Regulations to set the relevant fee will be made by the Minister for Justice, Equality and Law Reform with the consent of the Minister for Finance.

*An Roinn Dlí agus Cirt, Comhionannais agus Athchóirithe Dlí,  
Meitheamh, 2009.*

Wt. —. 654. 7/09. Cahill. (X54658). Gr. 30-15.