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An Exploration of the Potential Negative Effects of using Community Service Orders as an Alternative to Imprisonment for Fine Defaulters

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Abstract

The article discusses the changes that were made by the Fines (Payment and Recovery) Act 2014 (which commenced on January 11, 2016). It critically examines certain provisions contained in the Act, in particular the provision allowing for community service orders to be used as an alternative to imprisonment for non-payment of a fine. This is done in order to identify and explore the potential negative effects which might arise from the operation of this new provision.

Introduction

Of the 12,489 offenders sentenced to imprisonment in Ireland in 2013, 8,121 were imprisoned for failing to pay a fine.² In an attempt to reduce the number of fine defaulters that were being sentenced to imprisonment in Ireland each year, policy makers passed the Fines (Payment and Recovery) Act 2014.³ Despite having passed through the Houses of the Oireachtas in 2014, the Act only came into force in January 2016. This article will begin by briefly setting out and discussing the contents of this Act. It will welcome many of the changes that were made to the law dealing with the setting and payment of fines. The main focus of this article, however, will be on examining the changes the Act makes to how offenders are dealt with once they have been found to be in default. It will, in particular, critically examine Part 5 Section 19 of the Act which gives judges the power to impose a Community Service Order (CSO) as an alternative to a prison sentence for non-payment of a fine. It will be argued that while this provision, when looked at in isolation, may appear to be capable of diverting a substantial portion of fine defaulters away from costly and ineffective prison sentences, once placed within the existing Irish criminal justice system, a very different picture starts to

emerge. It will be shown that, when the provision is required to interact and comply with other existing laws and legislation, its ability to reduce the use of imprisonment for fine defaulters becomes uncertain. It also gives rise to two further concerns. The first being that in trying to divert fine defaulters from prison it could potentially result in the most vulnerable of fine defaulters serving far longer periods in prison than they would have prior to the implementation of the Act. The second being that it could have a negative impact on the use of the CSO in the wider criminal justice system.

The Fines (Payment and Recovery) Act 2014

The Fines (Payment and Recovery) Act 2014 (hereafter referred to as the Fines Act) made a number of amendments to the laws which govern the setting of fines, the payment and recovery of fines as well as how persons are dealt with once they have been found to be in default. Firstly, in relation to the setting of fines, the Fines Act repeated and reaffirmed provisions contained in the Fines Act 2010 which provides that judges must take a person's financial circumstances and their ability to pay into account when deciding upon the level of fine to be imposed. The purpose of this is to ensure, in so far as is practicable, that, where a court imposes a fine on a person, the effect of the fine on that person or his or her dependants is not significantly abated or made more severe by reason of his or her financial circumstances.⁴ This is a very important provision which should work to ensure that judges do not impose fines which are beyond individual's means and therefore their ability to pay. Secondly, in relation to the payment of fines, the Fines Act gives individuals the option to pay fines by instalment.⁵ Previously when a fine was imposed on a person, a due date was set by the court and the person was required to pay the fine in full in one single instalment by the date specified in the court order. The requirement to pay the fine in one instalment proved to be problematic in many instances, especially when the fine imposed was substantial. Allowing fines to be paid by instalment removes a major barrier that existed for many individuals when seeking to pay a fine. The option to pay by instalment is however, only available to fines over €100 and requires the payment of an additional administration fee of up to 10%. It is, nevertheless, an extremely positive development and it will play a significant role in reducing the number of people who find themselves unable to pay a fine which has

been imposed by a court. Thirdly, where a fined person fails to pay a fine in full by the due date, the Fines Act, provides judges with the option to impose either an Attachment Order, a Recovery Order or a CSO.⁶ In accordance with Section 7(5) the court must first give consideration to the making of an Attachment Order prior to deciding whether or not to impose a Recovery Order or a CSO. An Attachment Order can be used by the court in circumstances where the fined person is employed under a contract of employment or in receipt of an occupational pension. It cannot be used where the person is in receipt of social welfare. The order directs the person's employer to deduct from the fined person's earnings the sums specified in the order, and pay the sums so deducted, as contributions toward the payment of the fine, in the manner and within the period specified in the order.⁷ If the court, having taking into account the person's financial circumstances, is of the view that an Attachment Order would not be appropriate it may then consider imposing a Recovery Order or a CSO. A Recovery Order is an order of the court for the appointment of a receiver to recover from the fined person all or part of the fine owed (as well as the fees and expenses of the receiver). The receiver may seize and sell property belonging to the fined person in order to recover the monies owed. It can only be imposed however, where the part of the fine that remains unpaid exceeds €500 and where the court, having regard to the person's financial circumstances, deems it appropriate.⁸ The major benefits of Attachment and Recovery Orders are that they create additional steps between persons defaulting and being sentenced to imprisonment as well as giving judges an additional method of seeking to recover the monies owed. A CSO then, is an order of the court requiring a person to perform unpaid work in the community and is to be used as an alternative to sentencing the person to imprisonment when the fined person has failed to pay the fine in full by the due date and the court is of the view that neither an Attachment Order nor a Recovery Order would be appropriate or where a person has failed to comply with one of these orders. A maximum of 240 hours community service can be imposed on a person in circumstances where the original fine was imposed on indictment while the maximum for failing to pay a fine imposed summarily is 100 hours. Finally, where the person is not suitable for an Attachment Order, Recovery Order or a CSO or has refused to consent to a CSO or failed to comply with one imposed upon them and the court is left with no option but impose a custodial sentence, the Fines Act reduces the length of the default periods of imprisonment which can be imposed.⁹

As can be seen, the Act introduces numerous changes at various different stages in the process. These changes seek to ensure, where possible, that the level of fine imposed is not beyond the fined person's capacity to pay; that structures are in place to make it easier for the person to pay the fine; where the fined person has not paid in full by the due date that the court has a range of options available to it to try to recover the monies owed and where all attempts to recover the fine have failed that the court can sentence a person to a CSO instead of having to sentence them to imprisonment. It is advocated by proponents of the Act that all of these changes combined will significantly reduce the number of fine defaulters that are sentenced to imprisonment in Ireland each year.¹⁰

There is a lot in this Act which is commendable and which is very much welcomed. It is a positive piece of legislation which has introduced a number of important and much needed reforms to laws governing the payment and recovery of fines in Ireland. With that said the Act is not without some flaws and parts of it do give rise to some concerns. The administrative charge which has to be added to all fines when being paid by instalment (up to 10%) could end up being excessive in some cases and it could be argued the requirement that the fine be at least €100 before it can be paid by instalment is unnecessary.¹¹ One could further point to the lack of guidance contained in the Act for judges when deciding on a person's ability to pay a fine and what is needed for them to have a 'reasonable standard of living' and argue that this will lead to inconsistencies in decisions between courts. While these are all, in and of themselves, worthy of further investigation, the remainder of this article will focus exclusively on Part 5 of the Act and in particular on the provision contained in section 19 which gives judges the power to impose a CSO as an alternative to imprisonment for non-payment of a fine. The purpose of this is to explore the likely impact it will have on diverting fine defaulters away from sentences of imprisonment as well as to identify the potential negative consequences which may arise from the operation of the provision.

Using CSOs as an alternative to imprisonment for non-payment of a fine

As set out above, Part 5 section 19 of the Fines Act gives judges the power to sentence a person to a CSO when the person has defaulted on a fine and where the court is of the view that an Attachment Order would not be appropriate. This particular provision has received a

lot of media attention and it has been heralded by proponents of the Act as a provision that will substantially reduce the use of imprisonment for fine defaulters.¹² When looked at in isolation it appears almost certain that the provision will achieve this goal. It gives judges the option to sentence fine defaulters to a CSO where previously they would have had no option but to impose a custodial sentence. However, once the provision moves from being words on paper to an operational provision within the existing Irish criminal justice system a different picture starts to emerge.

Doubts about the ability of Section 19 of the Fines Act 2014 to divert fine defaulters away from sentences of imprisonment

Prior to the implementation of the Fines Act 2014 when imposing a fine a judge would not only state the level of the fine that was to be imposed and the date by which it had to be paid but would also state what the sentence of imprisonment would be if the person failed to pay the fine by the due date. This would range from 5 days up to 90 days imprisonment,¹³ depending on the level of the fine imposed. In reality though, where a person was imprisoned for failing to pay a fine they would not serve anywhere near the actual sentence that was handed down by the court. The reason for this was that the Prison Service did not want valuable and much needed prison spaces taken up with fine defaulters. Persons sent to prison for non-payment of a fine would therefore be released having served only a small fraction of the sentence imposed upon them. In some cases, this would be a few days but in most cases fine defaulters would be released within 24 hours.¹⁴

Part 5 of the Fines Act 2014, since being implemented in January 2016, has made two significant changes to the law in this area. Firstly, it reduces the maximum periods of imprisonment which could be imposed on individuals for non-payment of a fine¹⁵ and secondly, it gives judges the power to sentence a fine defaulter to a CSO as an alternative to sentencing them to imprisonment. As stated above, supporters of the Act believe that by giving judges this additional option of imposing a CSO that it will divert a substantial portion of fine defaulters away from imprisonment.¹⁶ It will now be shown why, in reality, this may not necessarily be the case.

Under the Criminal Justice (Community Service) (Amendment) Act 2011, the legislation which governs the use of the CSO in Ireland, 240 hours community service is, in a broad sense,

benchmarked against 12 months imprisonment.¹⁷ This same benchmark is used in the Fines Act when dealing with non-payment of a fine imposed on indictment. Judges can, under the Act, impose a prison sentence of up to 12 months or as an alternative a CSO of up to 240 hours. However, when dealing with a person who has defaulted on a fine imposed summarily in the District Court, where the vast majority of fines are imposed, the Fines Act uses a different benchmark.¹⁸ In these cases the Act allows to impose a prison sentence not exceeding 30 days or as an alternative a CSO of up to 100 hours. So straight away it can be seen that the CSO, when used under the Fines Act for non-payment of a fine in the district court, is significantly more punitive. 100 hours community service is now being benchmarked against 30 days imprisonment.

It should be made clear at this point that, under existing legislation, a court can only impose a CSO in circumstances where a person has given their consent to the imposition of the sanction. If a person refuses to consent to performing community service, then the court cannot impose a CSO. With CSOs becoming more punitive under the Fines Act a question arises as to what impact the increased punitiveness will have on offenders when deciding whether or not to consent to a CSO. At this stage, with the Act having only been implemented in January 2016, it remains unclear. One could put forward a strong argument that when a person is faced with 30 days imprisonment, 100 hours community service will still be viewed as a reasonable alternative and therefore it will not significantly increase the portion of offenders who refuse to consent to performing community service. However, as highlighted above, where a person is sentenced to imprisonment for non-payment of a fine, in reality they serve only a small fraction of the actual sentence handed down by the court and in most cases are released within 24 hours. This is not a well-kept secret that is known by only a select few high ranking criminal justice officials. This is a well-known fact that regularly receives national media attention. A recent example of this was the well-publicised case involving two TDs, Deputy Mick Wallace and Deputy Claire Daly.¹⁹ Both were convicted of breaching airport regulations for climbing a fence at Shannon Airport and attempting to inspect a US Army plane for weapons. They were fined €2,000 each with 30 days imprisonment to be imposed if they failed to pay within 3 months. Both refused to pay the fine as a matter of principle. After the due date set by the court had passed, they were arrested and brought to prison. Deputy Wallace walked in the front door of Limerick Prison just before 2pm and was out again in time

to be interviewed on the evening news, while Deputy Daly spent no more than 2 hours in custody.²⁰ The reality of fine defaulters spending little or no time in prison has been acknowledged by the Government. The Minister for Justice, Alan Shatter (as he then was) when speaking in the Dáil about the Fines Bill 2013, accepted that it is 'common knowledge that imprisonment, in any real sense, for the non-payment of fines is now a rarity and only the unlucky spend even a night in prison'.²¹ But as well as it being well publicised to the general public it also the case that many fine defaulters appearing before the courts will have already gone through the process of being imprisoned and released for failing to pay a fine and will be well accustomed with the system in place. O'Donnell et al found that 85% of those imprisoned for failing to pay a court ordered fine were re-imprisoned within 4 years.²² While the study does not state what they were re-imprisoned for it is safe to assume that, at least for some, it was for failing to pay another fine (more individuals are sentenced to imprisonment for non-payment of a fine than any other offence).²³

The proper question therefore, is not will fine defaulters view 100 hours community service as a reasonable alternative to 30 days imprisonment but rather will they view 100 hours community service (or any amount of hours community service for that matter) as a reasonable alternative to a prison sentence of less than 24 hours. If for a substantial portion the answer is no and they refuse to consent to the imposition of a CSO, then the ability of this provision to achieve its aim of diverting a substantial portion of fine defaulters away from sentences of imprisonment, is significantly reduced. Furthermore, if this were to occur, and a system emerged where offenders were regularly refusing to perform community service and instead choosing to go to prison knowing that they will be released within 24 hours, it would cause significant damage to criminal justice system and to the authority of the courts.

The obvious solution to this would be for the government to ensure that when a person is sentenced to prison for failing to pay a fine that they would serve that actual sentence handed down by the court or at least a significant portion of it. This would incentivise people to consent to the imposition of a CSO. If this approach is taken though, and it looks likely that it will to some extent, then it too will give rise to some serious concerns. The most worrying being that it could lead to a situation whereby it will be the most vulnerable of individuals who will be at the greatest risk of serving longer prison sentences.

The most vulnerable fine defaulters could end up serving longer prison sentences

Ensuring that fine defaulters serve longer periods in prison than the current average of less than 24 hours will likely result in the majority of fine defaulters consenting to the imposition of a CSO. However, there will inevitably be some individuals who will still refuse to consent, some of whom will have legitimate reasons for refusing to do so (an illness, disability or some other personal circumstance).²⁴ If fine defaulters are going to be required to serve much longer periods of time in prison where they refuse to consent to a CSO, than it is likely going to be these fine defaulters (those with illnesses, disabilities etc.) that will be most negatively impacted. It will likely be these individuals who will end up serving sentences far greater than the ones they would have served prior to the implementation of the Fines Act.

To avoid this happening it is vital that all individuals are placed in an equal position at the point at which they are offered a CSO as an alternative to imprisonment. For this to happen there would need to be suitable community service projects available all across the country for all individuals regardless of their characteristics, abilities or circumstances. For the Probation Service to find such projects is not an impossible feat but it is an extremely difficult one. Whether or not it will be achieved remains to be seen.

The potential negative impact of Section 19 of the Fines Act on the use of the CSO in the wider criminal justice system

As well as there being some doubt with regard to the capability of Part 5 of the Fines Act to divert fine defaulters away from sentences of imprisonment, there are also some concerns about the potential negative impact it may have on the use of the CSO in the wider criminal justice system. As mentioned above, the Fines Act is now benchmarking 100 hours community service against 30 days imprisonment. If this equation is brought into the wider criminal justice system then, 240 hours, the maximum number of hours that can be imposed on an offender under current community service legislation, would equate to a prison sentence of less than two and a half months. If judges are, on a regular basis, valuing CSOs in this way (there were 9,883 offenders sentenced to imprisonment for non-payment of a fine in 2015)²⁵ then can we reasonably expect judges to view even the maximum 240 hours as an adequate alternative to a prison sentence, of say, 12 or 15 months when sentencing offenders for other

offences (a burglary or assault for example)? Yet this is exactly what the legislation is asking of judges.²⁶ The concern therefore, is that the CSO will become devalued in the minds of judges, due to them regularly having to value the CSO in accordance with the Fines Act, and as a result this will impact how CSOs will be used by judges when sentencing offenders for other offences in the wider criminal justice system. It is submitted that the CSO will become more punitive and will primarily be used on a lower level of offender than is currently the case, with judges becoming less inclined to impose a CSO as an alternative to a prison sentence where the sentence of imprisonment is approaching 12 month or beyond.

The effect of the CSO being pulled in two opposite directions

The policy approach taken by law makers in Ireland over the past few years has been to strongly promote the CSO as an alternative to imprisonment, firstly, by introducing the Criminal Justice (Community Service) (Amendment) Act 2011 and more recently by introducing the Fines Act 2014. Both pieces of legislation were introduced to divert offenders away from custodial sentences by increasing the use of the CSO. The problem, however, is that they are pulling the CSO in two opposite directions. The 2011 Amendment Act seeks to increase the use of the CSO for offenders who are facing prison sentences of 12 months or less as well as for offenders facing prison sentences of more than 12 months.²⁷ These are offenders who have committed serious offences. The Fines Act then seeks to increase the use of the very same sanction but for the very lowest level of offenders – fine defaulters. Together these Acts are causing the CSO to become stretched. Law makers are attempting to use the same sanction to divert a wide range of vastly different types of offenders from imprisonment. As well as the aforementioned danger of the CSO becoming more punitive and less likely to be used on the higher level offenders, the stretching of the CSO in this way may also lead to further confusion and uncertainty as to how the CSO should be used, which in turn may cause judges to lose confidence in the sanction. Ultimately, while both Acts were introduced, individually, to reduce the use of imprisonment and increase the use of the CSO, combined they could end up having the opposite effect.

Conclusion

Over the last decade the number of people being sentenced to imprisonment for failing to pay a fine has continuously risen. Few would dispute that this is a major problem. In an attempt to address this policy makers developed and introduced the Fines Act 2014. It received widespread support, across the political spectrum, from its inception right through to its implementation, and for good reason; it makes a number of positive changes to an area of law that was in dire need of reform and overall should go some way towards addressing the continuous rise in the number of fine defaulters being imprisoned each year.²⁸

It should be made absolutely clear that this article is not a criticism of the entire Fines Act and it most certainly is not a criticism of what it is seeking to achieve. The article does however seek to highlight that an important part of the Act, Section 19, the provision which gives judges the power to impose a CSO as an alternative to imprisonment for failing to pay a fine, may not be as straightforward as it first appears. Not only is there doubts about its ability to divert offenders away from imprisonment at the level touted by proponents of the Act but there are real concerns about the potential impact it may have on vulnerable offenders as well as the potential negative effect it could have on the use of the CSO in the wider criminal justice system. So while the abstract idea of using CSOs as an alternative to imprisonment for fine defaulters may be a good one, what this article shows is that once placed within the existing Irish criminal justice system the provision becomes much more complex and its outcome far more uncertain than has been portrayed to date.

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² Irish Prison Service Annual Report 2013 (Dublin: Irish Prison Service, 2014); Irish Prison Service Annual Report 2014 (Dublin: Irish Prison Service, 2015) p.19. By 2014 the number of fine defaulters sentenced to imprisonment had increased to 8,979.

³ Dáil Debates, Second Stage, September 25, 2013, Vol.814, No.3 at 101

⁴ Fines (Payment and Recovery) Act 2014, s.5.

⁵ Fines (Payment and Recovery) Act 2014, s.6.

⁶ Fines (Payment and Recovery) Act 2014, ss.8 -18.

⁷ Fines (Payment and Recovery) Act 2014, s.14.

⁸ Fines (Payment and Recovery) Act 2014, s.8.

⁹ Fines (Payment and Recovery) Act 2014, s.20. Default periods of imprisonment for non-payment of a fine imposed summarily: not greater than €500 = 5 days, greater than €500 but not greater than €1500 = 10 days, greater than €1500 but not greater than €3000 = 20 days, greater than €3000 = 30 days.

¹⁰ Dáil Debates, Second Stage, September 25, 2013, Vol.813, No.3 at 109.

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- ¹¹ Press release issued by the Irish Penal Reform Trust, April 10, 2014. Available at <<http://www.iprt.ie/contents/2616>> [accessed on January 30, 2016]
- ¹² Seanad Debate, Second Stage, February 26, 2014, Vol.232, No.2 at 81.
- ¹³ The default periods of imprisonment for non-payment of a fine in the district court were as follows: Less than €64 = 5 days, between €64 and €318 = 15 days, between €318 and €635 = 45 days, over €635 = 90 days
- ¹⁴ Dáil Debates, Written Answer No. 546, January 15, 2014. In response to a Dáil question the Minister for Justice stated that in 2014 the average sentence served by persons imprisoned for non-payment of a fine was less than 1 day.
- ¹⁵ Fines (Payment and Recovery) Act 2014, S.20. fn.8
- ¹⁶ Dáil Debates, Second Stage, September 25, 2013, Vol.814, No.3 at 109,116; Dáil Debates, Second Stage, September 26, 2013, Vol.814, No.4 at 833,836,837,847,849.
- ¹⁷ S.3 of the Criminal Justice (Community Service) (Amendment Act) 2011 provides that judges must consider imposing a CSO of between 40 and 240 hours in all cases where they would, but for the act, have imposed a prison sentence of 12 months or less. S.3 (b) of the Act also gives judges the power to impose a CSO (maximum of 240 hours) as an alternative to prison sentences of more than 12 months.
- ¹⁸ (2014) 41 (6) Related Journal, p.1. Available at <http://www.citizensinformationboard.ie/downloads/relate/relate_2014_06.pdf> [Accessed on January 30, 2016]
- ¹⁹ "Mick Wallace arrested and being taken to Limerick Prison", Irish Independent, December 9, 2015. Available at <<http://www.independent.ie/irish-news/mick-wallace-arrested-and-being-taken-to-limerick-prison-34273358.html>> [Accessed on January 30, 2016]; "Wallace and Daly spend brief spell in Limerick Prison, Irish Times", Irish Times, December 19, 2015. Available at <<http://www.irishtimes.com/news/politics/wallace-and-daly-spend-brief-spell-in-limerick-prison-1.2460033>> [Accessed on January 30, 2016]; "TD Mick Wallace has been arrested", Irish Examiner, December 9, 2015. Available at <<http://www.irishexaminer.com/breakingnews/ireland/td-mick-wallace-has-been-arrested-710622.html>> [Accessed on January 30, 2016]
- ²⁰ "Daly and Wallace granted temporary release from Limerick Prison", RTE, December 10, 2015. Available at <<http://www.rte.ie/news/2015/1209/752369-mick-wallace-arrest/>> [Accessed on January 30,2016]
- ²¹ Dáil Debates, Second Stage, September 25, 2013, Vol. 814, No.3 at 102.
- ²² O'Donnell, Baumer and Hughes, "Recidivism in the Republic of Ireland" (2008) 8(2) Criminol. Crim. Just, pp.136,137.
- ²³ Irish Prison Service Annual Report 2014 (Dublin: Irish Prison Service, 2015) p.19.
- ²⁴ Redmond, Imprisonment for Fine Default and Civil Debt: Report to the Department of Justice, Equality and Law Reform (Dublin: Stationary Office, 2002) p.53. In this report it was stated that a relatively high portion of fine defaulters are unemployed or not in the labour force because of a disability.
- ²⁵ Irish Prison Service Annual Report 2015, p.23
- ²⁶ Criminal Justice (Community Service) (Amendment) Act 2011, S.3
- ²⁷ fn.24
- ²⁸ Dáil Debates, Second Stage, September 25, 2013, Vol. 814, No. 3 at 101-118; Dáil Debates, Second Stage, September 26, 2013, Vol. 814, No. 4 at 830-860,