AN END
BASED ON MEANS?

A report on how the legal system in the Republic of Ireland treats uncontested consumer debt cases with an examination of alternatives and proposals for reform.

Paul Joyce

Free Legal Advice Centres

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FREE LEGAL ADVICE CENTRES - 2003

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This report is dedicated to money advisors everywhere who work on an everyday basis with people who are indebted and over-indebted.

Paul Joyce, Free Legal Advice Centres – May, 2003.

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FOREWORD

Credit is now an integral part of the daily lives of the vast majority of the population and for many, these commitments range across a variety of agreements from housing loans, credit cards and car finance arrangements to credit union, credit sale, hire purchase and moneylending loans, many financed by limited incomes vulnerable to sudden change. Money advisors working in the frontline with over-indebted people are experiencing an increase in the number of clients presenting with multiple indebtedness, in particular to financial institutions[1].

In the event of a client's inability to continue scheduled repayments, money advisors are reliant on the common sense of creditors to accept alternative proposals. However, there is nothing to prevent a creditor from taking legal action if they so choose, even when it becomes clear that the borrower in question is hopelessly indebted with a multitude of other creditors. When the borrower is dragged into the legal system, they are faced with a surfeit of obstacles – excessively formal documents, a lack of opportunity to participate in the absence of a strict legal defence, very limited access to legal advice or representation, and outdated and inappropriate legislation such as the Enforcement Of Court Orders Acts 1926 – 1940 - to mention but a few.

The Central Bank, in its annual report of 2000, provided an overview of risks to financial stability in Ireland. In this section of their report, they indicated that private sector credit growth has been a source of concern to the Bank for some time and that it had increased from 50% of GDP to 100% of GDP between 1994 and 2000. It speculated that *"such a rapid build up in credit would be a cause of concern for the stability of the whole system if borrowers were to find themselves unable to service these higher levels of debt"*[2]

This report, in the course of examining attachment of earnings systems and debt settlement legislation in relation to non payment of civil debt in other jurisdictions, echoes these concerns from an anti-poverty perspective. It poses fundamental questions about the suitability of the current legal system in Ireland to cope with increased consumer indebtedness and debt enforcement, which would become more pronounced in the event of an economic downturn. Of critical importance is that it also offers possible solutions as an agenda for future discussions.

1 Anne Eustace and Ann Clarke, National Evaluation of the Money Advice and Budgeting Service (Dublin: Eustace Patterson Ltd, 2000) Page 27. According to this report, MABS had an active caseload of 7,800 clients as of June 1999 and had up to that point alone dealt with over 28,000 clients since its inception in 1992. Although originally established to assist with indebtedness as a result of moneylending, the report notes that 84% of clients were in debt to mainstream financial institutions at that time, and further that, 76% of the total debt owed by clients involved these institutions.

2 Central Bank of Ireland – Annual Report, 2000 – 27th April, 2001, Page 106

We have been members of the European Community for 30 years now and in that time economic growth and increased prosperity for many have led to a massive increase in the extension of consumer credit in Ireland. During this time, the majority of our fellow members have introduced debt settlement (or personal insolvency) legislation, whereby the clearly over-indebted consumer can reach an affordable scheme of repayment or part payment with their creditors, within a realistic timeframe. However, in Ireland, while our level of default on personal debt has mushroomed, our legal system has stood still. Many sensible changes to the existing outmoded system could be made immediately that would improve matters for all involved. Ultimately, it is also our view that a debt settlement alternative is needed, that takes into account the complex factors that can bring about over-indebtedness and balances the interests of debtor and creditor.

Thus, Free Legal Advice Centres believes that it is time for a thorough review of debt enforcement procedure to be undertaken by the Department of Justice, Equality and Law Reform in tandem with other interested parties. Suggestions to end committal to prison for non payment of civil debt or fines through the introduction of attachment of earnings legislation are worthy but the proposals made by Government and other political parties thus far fail to address the complexity of the issues involved. It is hoped that this report fills that information gap, in particular from the perspective of the indebted consumer and that its findings will stimulate a comprehensive debate on these issues leading to much needed changes .

Siobhan Phelan, B.L
Chairperson, Free Legal Advice Centres - May, 2003

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SECTION 1

AIMS AND OBJECTIVES OF THE RESEARCH

1.1 The Research Questions

In response to a Government proposal to introduce attachment of earnings (AOE) for non-payment of civil debt or fines, and in the context of the unsatisfactory resolution of many cases of uncontested civil debt, coupled with a significant growth in consumer credit in recent years, this study aims to:

- Briefly outline the circumstances that cause and exacerbate over-indebtedness.
- Briefly describe and evaluate the rules in relation to debt enforcement operating in the Irish legal system at present, in order to make recommendations to improve that system.
- Reflect the views of a cross-section of key informants in relation to debt and the legal system and concerning the potential introduction of attachment of earnings legislation.
- Describe and evaluate recent proposals to introduce attachment of earnings, in particular the Private Member's Bill on the subject proposed by one of the opposition parties (Fine Gael) and the Dail debate on the subject that followed the publication of this Bill.
- Describe attachment of earnings procedures currently in existence in the Irish legal system, namely attachment of earnings for non-payment of maintenance to spouses and children, as regards their potential application to non-payment of civil debt.
- Describe attachment of earnings models in operation in other jurisdictions, namely the UK, Europe and the USA, with a focus on how the following vital issues are considered:
    - protected earnings (or minimum income)
    - multiple attachment
    - the relationship between maintenance and civil debt attachment
    - protection of the debtors employment
- Examine debt settlement (or personal insolvency) schemes in operation in other jurisdictions with a view to recommending the possible introduction of such an alternative in Ireland in cases of uncontested over-indebtedness.
- Recommend, should attachment of earnings legislation ultimately be introduced in the Republic of Ireland, a model that will protect the interests of the indebted person and his/her dependants, in particular those living on low incomes and which will simultaneously stand a realistic chance of working effectively.
- Make other recommendations, both short term and long term, for reform of the legal system in the Republic of Ireland in relation to debt enforcement, in particular from the perspective of the indebted consumer.

1.2 Methodology

Questionnaires

Given that the primary focus of this report at the outset was to examine models of attachment of earnings in other jurisdictions with a view to suggesting a model for Ireland, a basic questionnaire was circulated to Money Advice and Debt Counselling agencies throughout Europe regarding their systems for the attachment of earnings. Many of these contacts were accessed through the author's membership of the European Consumer Debt Network (CDN), an informal group of money advice experts in Member States of the European Union and the European Free Trade Area.

Equally, given that money advisors employed in the Money Advice and Budgeting Service[3] (MABS) nationally are in the front line of dealing with the problems encountered by debtors who might face attachment of earnings orders, a short questionnaire was circulated to a selection of money advisors in order to elicit their views on attachment of earnings and the effectiveness of the current legal system in relation to debt enforcement.

Similarly, the views of some mainstream creditors to the question of attachment of earnings were sought through their umbrella organisations, namely the Irish Bankers Federation (IBF) and the Irish Finance Houses Association (IFHA). These bodies represent respectively, the associated banks licensed by the Central Bank and the finance houses that are involved principally in the provision of hire purchase finance.

Research Materials

On an international basis there appears to be very little research carried out into the effects of attachment of earnings on indebted people. In the course of the questionnaires directed to money advice/debt counselling agencies, details were sought of any research in this area of which the particular correspondent was aware. Only a Swiss study[4] and the Collection Watch questionnaire[5] emerged from this quest. Given that attachment of earnings has yet to be introduced in relation to civil debt or fines in the Republic of Ireland, there is no research on this aspect of AOE in existence. However, in relation to AOE for non-payment of maintenance, a significant study carried out for the Combat Poverty Agency[6] enables some predictions to be made as to how judgement debtors might respond to attachment of earnings in the civil debt or fines area.

Literature Review

As far as we are aware, there is no source legal text book on debt and the legal system in the Republic of Ireland although Woods' comprehensive work on District Court Practice and Procedure describes the relevant procedural rules[7]. In addition, some specific publications and training materials exist in this area. Two of these, Coolock Community Law Centre's handbook on debt management[8] and Casey and Nolan's Debt Collection and the Enforcement of Judgements[9] (undertaken for the Law Society's Education Committee) were useful sources of material. Equally, the submission made by the West/North West Region Money Advisors to the Department of Justice on the subject of Attachment of Earnings and the Legal System in relation to debt, is reviewed in detail.[10]

In the UK context, a variety of detail on the English, Welsh, Scottish and Northern Ireland situations was sourced with the assistance of a number of money advice organisations, in order to describe the position in the U.K. These documents included the Determination of Means Guidelines used by County Court officials in England and Wales, the Attachment of Earnings Act 1972 in England and Wales and sections on reform of attachment of earnings procedures in the report of the Lord Chancellors office[11]. In addition, the Debtors (Scotland) Act 1987, together with the explanatory notes on the Scottish legal system and the Institute of Professional Legal Studies Enforcement of Judgements Working Notes in relation to Northern Ireland were useful source material. The Debt Advice Handbook published by the Child Poverty Action Group provides a good overview of debt and the legal system in England and Wales[12].

Finally, in relation to the United States, much of the material used was sourced via the internet and through Lexis, an American database of case law and legal information on the USA and other jurisdictions throughout the world.

3 For origin and details on MABS, See Section 4, Page 29.
4 Zaborowski.C and Zweifel.P,. *Getting out of Debt -Attachment of Wage In whose interest?* (Zurich: Socioeconomic Institute, University of Zurich, April 1998)
5 Laws.N, Mansfield.M., *Debt Collection Practices Across Europe* (Newcastle:Consumer DebtNet and Money Advice Trust, February1999)
6 Ward.P., *Financial Consequences of Marital Breakdown*, (Dublin:Combat Poverty Agency, 1990)
7 James V.Woods., *District Court Practice and Procedure in Civil, Licensing and Family Law Proceedings* 12th Edition (Limerick: J.V Woods, 1997)
8 *A Handbook on Debt Management* (Dublin: Coolock Community Law Centre, 1995)
9 Casey.T, Nowlan. F., *Continuing Legal Education, Debt Collection and the Enforcement of Judgments* (Dublin; Law Society Education Committee, 1998)
10 See further Section 4 – Page 35
11 Lord Chancellor's Department Debt Enforcement Review –Consultation Paper 3 (London: Lord Chancellor's Department, October, 1999).
12 Wolfe.M et al *Debt Advice Handbook* (London: Child Poverty Action Group, 1998)

SECTION 2

INTRODUCTION AND BACKGROUND TO THIS STUDY

2.1 Summary

The principal purpose of this study initially was to examine attachment of earnings models in relation to civil debt in other jurisdictions with a view to making recommendations for inclusion in such legislation should it be introduced here. In brief, attachment of earnings orders (AEO's) involve the deduction by an employer at source of a portion of an employee's earnings as directed by a court order. The amount deducted is then forwarded either directly to the creditor or through the offices of the court, who then distribute it.

AEO's are only currently available in Ireland as an enforcement method where a person has defaulted on the payment of maintenance to a spouse and/or a child/children. Clearly, its introduction for non-payment of civil debt or fines is a major step with considerable potential effects for the Irish legal system, debtors and creditors alike.

In particular, this study has sought to focus on the position of the debtor and how the risk of increased poverty traps for the debtor and his/her dependants could be minimised, should attachment of earnings be introduced as an alternative to imprisonment when a creditor is attempting to enforce an Instalment Order. Thus, the analysis of attachment in other jurisdictions focuses on such core issues as protected earnings and the consideration of dependants in arriving at protected earnings, the question of multiple attachments and the priority between attachments, and the protection of the debtor's employment whilst the attachment is taking place.

Gradually, the focus of the work has expanded to consider other pressing issues in the area of debt and the legal system. A brief analysis of the current legal system in relation to debt enforcement in Ireland is provided[13] and it is clear both from this analysis and from the hands on experience of money advisors and practitioners that, quite apart from the introduction of attachment of earnings, other practical changes and a fundamental updating of the system of debt enforcement in Ireland needs to be considered. Thus, recommendations for immediate improvements in the treatment of the debtor in the process are made, but equally it is to be hoped that these suggested changes may also be of benefit to creditors.

Finally, the desirability of introducing debt settlement legislation as an adjunct to attachment of earnings is explored, in particular where the debtor's indebtedness is of the chronic variety already described earlier in this section and where it is unlikely that the debtor will, within a reasonable time frame, be capable of repaying outstanding debts in their entirety.

2.2 Over-indebtedness – Definitions, Causes and Effects

"The term over-indebtedness is used to describe an imbalance between income and expenditure. This occurs when expenditure exceeds income and the shortfall cannot be made up. Figures alone reveal only a fraction of the true picture of over-indebtedness. The causes of debt are as many and varied as the stories that lie behind the many case studies that have been widely documented on the subject. If we were to distil much of what has been written about debt, we would get a catalogue of reasons for over-indebtedness."[14]

The authors go on to reduce these reasons into 4 broad and often intertwining categories. These are:

- **A detrimental change in circumstances** involving one of the so called unforeseen triggers of debt such as sickness, unemployment, or family separation.

13 See Section 3, Page 19
14 McCaul.M and Stamp.S *Money Advice Manual* (Dublin: Comhairle, January 2002)

- **Inaccessibility of financial services** especially for those on low incomes who ultimately end up paying proportionally more for much needed credit such as moneylending loans.

- **Inadequate income** due to a reliance on Social Welfare payments as a sole source of income and under claiming of other available payments, or caused by low pay such as minimum wage rates in an economy with strong inflationary pressures for goods and services.

- **Creditor practice and the legal system** involving irresponsible marketing and provision of credit and the lack of an early warning response to default and the adversarial and often forbidding nature of the legal system in relation to debt enforcement.

It is important to distinguish **'indebtedness'** from **'over-indebtedness'**. There cannot be too many people in the State who are not in debt in some sense, in that they are committed to the repayment of monies that they have already borrowed and used, whether it be to purchase a dwelling or a car or to go on a holiday or to simply meet current domestic needs. It is only when these borrowings cannot be serviced from current income within a reasonable time frame that the person becomes 'over-indebted'.

Where a person has multiple borrowings from a number of different sources (a scenario that the creditor view might tend to describe as irresponsible borrowing) the situation can become hopeless relatively quickly, with arrears and default interest accumulating. Unless the indebted person's circumstances improve within a short time, there is little chance of a resolution of the problem that will involve full repayment. This situation is variously described as multiple or **'chronic over-indebtedness'** and it is in this type of extreme case that a 'debt settlement' involving part payment and part write off of the debt over a reasonable time frame is the preferred solution in many European jurisdictions.[15]

The detrimental effects of over-indebtedness on the debtor and his/her dependants are many and have been documented in other jurisdictions although little published work is available on these problems in this country[16]. These effects can vary from psychological difficulties such as anxiety, stress, shame, denial, guilt, loneliness and family conflict that may in turn manifest themselves in physical symptoms such as sleeplessness and headaches and ultimately in physical illness or addiction problems[17]. Not alone does this cause avoidable suffering for the debtor and his/her dependants but it is arguable that the long term costs to the State – healthcare and crime, for example - are incalculable. Thus, it is argued that the State has or should have a strong vested interest in how problems of over-indebtedness are resolved in our legal system and by our society in general.

2.3 Attachment of earnings proposals – A brief history

Proposals to introduce attachment of earnings legislation in relation to non-payment of fines or civil debt were first announced by the last Government in its legislative programme of October 1997[18]. The impetus for proposing attachment of earnings legislation was the acceptance that committal in such circumstances is an anachronism[19]. The State bears the cost of the prison stay and the adverse consequences for the debtor as well as his/her dependants are clear. In the case of fines levied on behalf of the State, the term of imprisonment purges the debt and this is ironic to say the least. The State invests resources in prosecuting the offence and imposing the fine. When the convicted person fails or is unable to pay, further resources are committed to arresting and imprisoning him or her. Finally, the high cost of the prison stay, short though it may be, must be met and upon release, the actual fine itself that caused the whole process to be undergone in the first place, is waived. In the case of a civil debt, creditors to whom the debt is owed derive nothing from the debtor being sent to prison. The prison sentence does not purge the debt although, if anything, it makes it less likely that the debt will ultimately be paid.

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15 See Section 7 – Page 58
16 See for example surveys carried out by the Birmingham Settlement in the U.K referred to in the Money Advice Manual (Comhairle) Page 4.
17 Money Advice Manual, Comhairle, Page 4
18 Item 64 – under the Department of Justice, Equality and Law Reform
19 Although currently provided for by Section 18 of the Enforcement of Court Orders Acts 1926-1940.

The thrust of the suggested legislation in the civil debt area, therefore, was the replacement of the committal order procedure with the power of a court to enforce payment of a judgment debt by attaching the income of an employed debtor at source, thereby removing his/her choice about repayment.

In November, 1997, Jim O`Keeffe, T.D (F.G) set down the following parliamentary question for written reply in relation to this issue[20] :

> *"To ask the Minister for Justice, Equality and Law Reform the number of people who are committed to prison* ***for non-payment of debts*** *for each of the years from 1993 to 1996 and his views on other sanctions such as the imposition of community service as an alternative to the imprisonment of debtors".*

The Minister responded:

> *"The number of persons committed to prison for non-payment of debts in the years from 1993 to 1996 was as follows:*
>
> 1993 - 234
> 1994 - 140
> 1995 - 220
> 1996 - 203

The Minister continued:

> *The Deputy will be aware that where a person is committed to prison because of failure to pay a debt, that person is in fact committed for failure, through wilful default or culpable neglect, to obey an order of the court. Before the court would make such an order, it would have to go through an extensive procedure before making an Instalment Order and finally a committal order sending the person to prison. This is a mechanism for enforcing the courts Instalment Order. It is estimated that debtors comprise less than 0.5% of the prison population on any one day.*
>
> *My Department is examining the question of employing options* ***other than imprisonment in*** *the case of fine defaulters and debtors. It would, of course, be necessary to ensure that any alternative to custody which might be introduced would secure compliance with court orders relating to debt".*

Unfortunately, the statistics quoted by the Minister from 1993 to 1996 are not further broken down into the different categories of debt that the imprisonment might relate to nor into the types of creditor who were pursuing the debt, nor do they show how many orders were made in default of any response on the part of the debtor as opposed to hearings where the debtor attended but committal was, nonetheless, ordered. However, it is very likely that the majority of committals fall into the former category and that the judge took as 'wilful refusal or culpable neglect' the debtor's failure to appear.

These figures are likely to include imprisonment for non-payment of maintenance debt as well as civil debt. They do not, however, include fines for which the statistics are much higher.[21]

In passing, it might be noted that this lack of detail reflects a general absence of detailed statistical information in the area of debt and the legal system in Ireland. This may be attributed in the main to paper file systems across a large number of court offices throughout the country but also to the lack of an established recording system designed to yield information from those systems. It is to be hoped that in the future the recently established Courts Service can remedy this deficiency.

20 Parliamentary Question, No.365 – For written answer on Wednesday, 12th November, 1997.

21 In 1996, for example, 1610 people were imprisoned for non-payment of fines. This constituted 15.5% of all committals in that year – from Question No 156 to the Minister for Justice, Equality and Law Reform, Written Answer, March 1st, 2000

Note the Minister's statement that the committal order procedure is a mechanism for enforcing the court's Instalment Order. The available proposals from the Department indicated that it was this committal order procedure that the Government intended to replace with attachment of earnings as an alternative method of enforcing the Instalment Order.

Announcements about the publication of the legislation were subsequently made in the course of 1998. The then Minister for Justice, Equality and Law Reform, John O'Donoghue TD, announced on 5 May 1998 following the opening of the second wing of Castlerea Prison that he was drawing up such a Bill, which would lead to fines and non-payment of debt being deducted from earnings and/or social welfare. He further specified that it was not desirable that banks and other financial institutions could refer to the criminal justice system to collect debts and that he would be making provisions in the Bill that this be done in a different fashion, although the deductions from earnings would be operated on a means-tested basis.

A Private Member's Bill was then published on this subject by one of the opposition political parties. This Bill was introduced by the then Fine Gael Spokesperson on Justice, Equality and Law Reform, Jim Higgins TD on 21 May 1998 and was entitled *The Enforcement of Court Orders Bill*. It was said to be designed "*to reduce the pressure on an already overcrowded prison system by providing the courts with an option to make an attachment of earnings order on debt defaulters*"[22].

This Bill was debated in the Dail, put to a vote and ultimately defeated on 24 February 1999. During the course of the debate, the Minister indicated the then Government's thinking on the issue.

> *"The Government legislative programme contains a commitment in relation to an AEO Bill. To this end, a considerable amount of work has been carried out in my Department including research in relation to committals for non-payment of fines and debts and an examination of the law in some other jurisdictions. Because of the complexity of the issues involved, work is not yet at the stage where we are able to finalise proposals which would get around the types of difficulties which arise and which are evident from the (Private Members) Bill"*[23].

In particular, it would appear that any administration would have a difficulty with the fines issue. At present, the District Court can make an Instalment Order as a method of enforcement after judgement has been obtained in relation to the non-payment of a civil debt, whereby set periodical amounts are ordered to be paid to the creditor. However, no such power exists in relation to non-payment of fines. Attachment of earnings would be used to back up the Instalment Order procedure in the case of civil debt but if no instalment system exists for the payment of fines, it is neither logical nor fair to attach earnings to ensure payment. It would appear from the Dail Debate that an instalment system for the payment of fines is likely to be introduced through the Courts Service and this seems a prerequisite for any attachment legislation in the area of fines.

A brief analysis of the provisions of the Private Member's Bill and the Dail debate that followed will be provided in Section 5 of this report. However, ultimately, the former Government's promise to introduce a Bill on the subject never materialised. It is understood that the Public Accounts Committee of the Oireachtas is currently looking at the efficiency of the fines collection system, following the publication of a 'value for money' report on the subject by the Comptroller and Auditor Generals Office.[24] As such, it may be that the non-payment of fines issue will, therefore, be the subject of a more comprehensive examination prior to the introduction of any legislation by the current or a future administration.

Departmental Research Report

In this regard, research commissioned by the Department of Justice, Equality and Law Reform in 2000 on the non-payment of fines or civil debt was published in May, 2002[25]. The report's principal objective

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22 Fine Gael press statement, 21, May 1998
23 Dail Debates, Official Report, P.13, 24/2/9
24 *Report on Value for Money (No 37), Collection of Fines* (Dublin: Comptroller and Auditor General, December, 2002)
25 *Imprisonment for Fine Default and Civil Debt* Redmond.D (Dublin: Nexus Research Co-operative, May 2002)

was to interview persons committed to prison in order to relate the experience from the offender's perspective. 24 people were interviewed, but from the point of view of this study, only two were imprisoned in relation to non-payment of civil debt and both cases were unusual. The first involved a disputed non-payment of maintenance and the second concerned a 78 year old man who had refused to return a deposit on a holiday home and was ultimately imprisoned as a result of his inability on medical grounds to get to Dublin for the committal hearing, despite the Court's awareness of his medical condition. Indeed, apart from these two interviews and some brief references to civil debt procedure and conference papers/submissions, there is little on the civil debt side in this report.

In relation to the fines issue, the interviews confirm the perceived and well documented shortcomings of the current system. Some respondents (of those who were present at the hearing) cited the speed with which the hearings were conducted and the apparent disinterest of the judge in listening to their case. The vast majority were not aware of the possibility of an appeal. Some of the fines related to Road Traffic Act offences of which the respondent was allegedly not even aware. Some of the respondents were homeless at the time and in many cases an inadequacy of income was often the principal reason for the failure to pay. The absurdity of not having an instalment payment system in relation to, in some cases, quite heavy fines was also reiterated.

Ultimately, the author concludes (Redmond: 2002: 5.14) that *"enquiries in the court process about offender's means and capacity to repay would appear to be non-existent or at best cursory"* and that *"legislative proposals for attachment of earnings of fine defaulters may be of little use for those who end up in prison. In the first place it is unlikely that many of these offenders will be in the type of permanent employment that has an administrative capacity to allow attachment to be implemented. Secondly, attachment of social welfare entitlements and benefits is problematic given that persons dependent on these may be living on or close to the poverty line"*

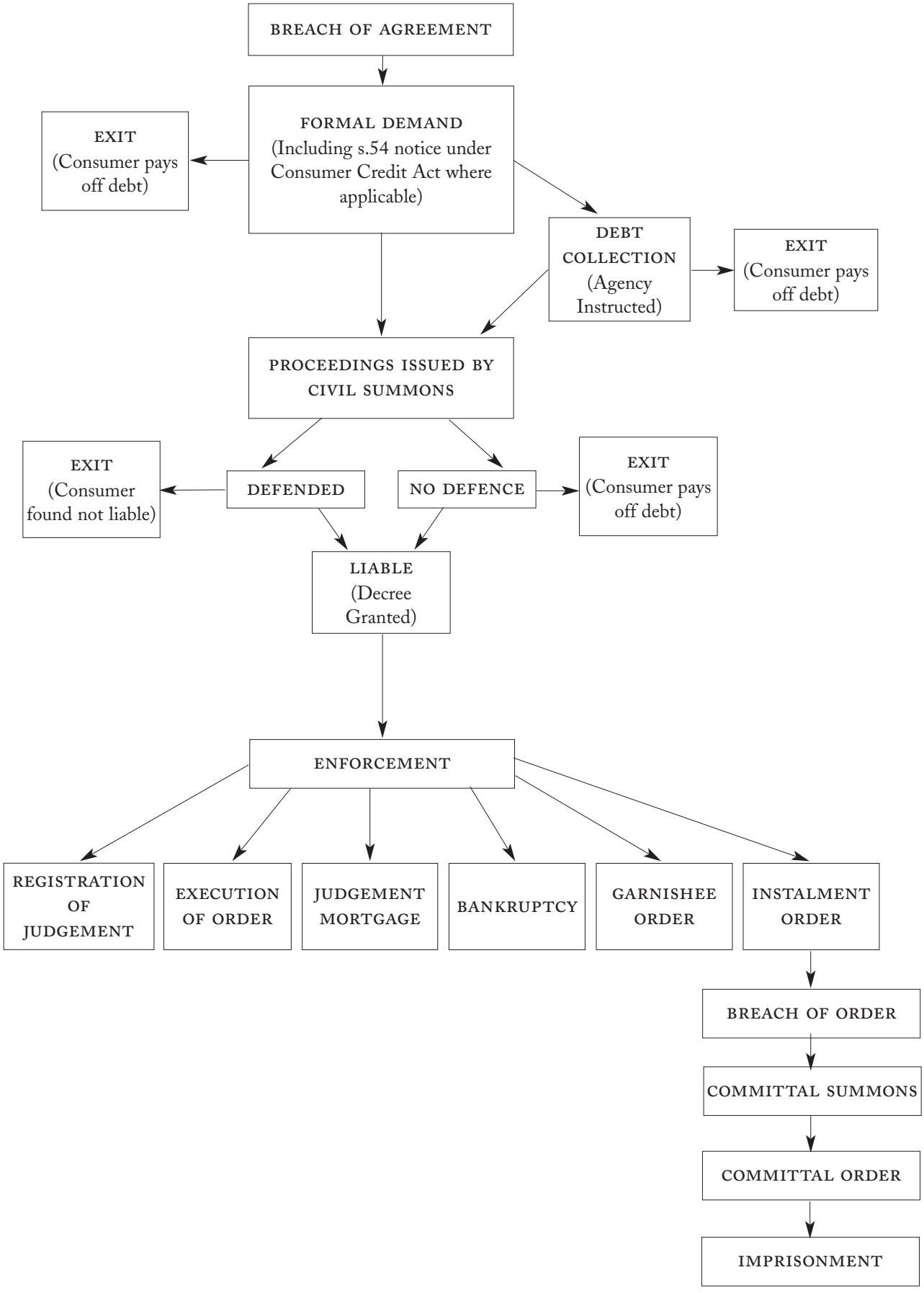
The report does not make recommendations in relation to how these problems might be addressed although it clearly concludes that these are issues that must be remedied in the future. This may well be because this was not part of the research brief. As such, it does not go beyond confirming what many believe to be the absurdity of the current fines system, although in pointing out the glaring lack of statistical data in these areas, it serves to simultaneously provide a statistical snapshot. It also performs a valuable role in giving a voice to those who are casualties of that system.

Finally, both research enquiries and the material in this study indicate that non-payment of civil debt had become a less vital issue from the point of view of the former administration, despite the Minister's commitment in the debate on the Private Member's Bill. Further, that legislation, had it been introduced during the lifetime of the last Government, would only have attempted to address the fines issue anyhow. This report, on the other hand, is primarily concerned with the plight of civil debtors although many of the recommendations it will make in relation to attachment of earnings would apply equally to fines situations.

SECTION 3

THE ENFORCEMENT OF DEBT IN THE IRISH LEGAL SYSTEM

SUMMARY OF DEBT ENFORCEMENT IN IRELAND (District Court Procedure)



3.1 Introduction

There is no specific legal definition of the word "debt". However, it is generally understood to involve a sum of money owed by one person to another that can be calculated by simple arithmetic. If the debt has been incurred as a result of a valid agreement or contract, it may be capable of being legally enforced through a court if the person to whom the debt is owed (the creditor) so chooses. For example, a personal loan may be taken out by a consumer with a financial institution for the purchase of an item such as a motor car. This will involve a contractual obligation to repay to the credit institution the amount borrowed plus interest by way of a number of instalments over a set period of time.

Failure to pay on the agreed basis set out in the agreement will usually result in warning letters being sent from the creditor. Some creditors may then put the matter in the hands of a debt collection agency. If this method of collection proves fruitless, a creditor may decide that instituting legal proceedings is the only method of recovering the money loaned and at this point, following a final warning letter, legal proceedings may issue, subject to the creditor's obligation in relation to agreements covered by Section 54 of the Consumer Credit Act, 1995 to serve a default notice on the consumer.

Voluntary arrangements to repay or reschedule debts are often agreed as an alternative to legal action being taken. In particular, the Money Advice and Budgeting Service (MABS[26]) provides a network of local services whereby professional money advisors can assist an indebted person with a view to negotiating a repayment programme with their creditor(s) based on an agreed statement of income and expenditure. This financial statement enables the money advisor to assist in securing the essential needs of their client, whilst prioritising existing debts and making offers to repay amounts on an affordable and equitable basis.

Many people in debt are not yet aware of the existence of these services and in any case, creditors are not strictly obliged to negotiate with money advisors or to inform their indebted clients where money advice can be obtained (though in practice many will and do). Inability to pay due to a change in circumstances is not a legal defence to a claim for unpaid debt. Some creditors may feel that they hold information indicating that the indebted person has an ability to pay but is simply refusing to do so. Some may only have regard to the outstanding amount due to them and have no regard to the overall over-indebtedness of the person. This can be characterised as a **"vertical"** as opposed to a **"horizontal"** view of over-indebtedness. If any given creditor is solely concerned with the amount loaned by them to a debtor and unaware of or unconcerned with other debts, they are unlikely to be sympathetic to phased offers to repay reduced amounts.

It is for this reason that it is sometimes suggested that a register of credit agreements be created. This might achieve two things; the prevention of arguably irresponsible loans being offered in the first place where it is apparent that the consumer in question is already overcommitted and the provision of a verifiable source of information on a consumer's position before legal action is contemplated. The potential drawback is that it might restrict access to credit for those most in need of it.

Finally, it is worth questioning (from both the debtor **and** creditor's point of view) what is achieved by dragging an already impoverished and under pressure debtor through an intimidating and costly legal process. For this reason it is frequently suggested that an out-of-court debt settlement alternative should be available in cases of **uncontested** multiple over-indebtedness. A later section of the report[27] will examine this issue in greater detail, in particular, how other jurisdictions deal with it. For the moment, it should be noted that a creditor cannot be prevented from taking legal action against an indebted person if they so choose. There follows a brief description of the current practice in relation to debt enforcement in the Irish legal system.

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26 MABS is now a nationwide service made up of a network of independent companies currently funded centrally by the Department of Social & Family Affairs.(For further details See Section 4, Page 29)

27 See Section 7 – Page 58

3.2 Debt Procedure – Obtaining judgement

Stage 1_Service of documents

Should no acceptable arrangement be reached for the repayment of arrears and outstanding instalments on a loan (or other due sum), the creditor may then commence legal action against the debtor. Depending on the amount claimed, the proceedings will be issued in:

- **The District Court** – where the amount claimed is under € 6,349 (or £5,000). The legal document used to bring the action is called a **Civil Summons**. The majority of consumer debt proceedings are brought here and with the proposed changes in the financial jurisdiction of the courts, this is likely to be increasingly the case[28].

- **The Circuit Court** – where the amount claimed is under € 38,092 (or £30,000). The legal proceedings are brought by way of a **Civil Bill.** In cases where the creditor is seeking the recovery of land, such as in mortgage default, the document is called an Equity Civil Bill.

- **The High Court** – where the amount claimed is over € 38,092 (£30,000). In this case the legal document is called a **Summary Summons** (or in cases for the recovery of land, a Special Summons).

These documents, Civil Summons, Civil Bill and Summary Summons respectively, will contain details of the contract between the parties, the fact of the default of the debtor, the amount owed (including interest) and the legal costs that have accrued up to then. Depending on the document concerned, they must be served on the debtor personally or by registered post. The standard District Court summons claiming a debt (or liquidated sum) offers the defendant the following options:

1) A defendant may pay the claim and costs within 10 days.

2) Alternatively a defendant can admit the claim and request time for payment. This involves calling to the creditor's solicitor within 10 days and signing a consent form. In the case of agreements not covered by the Consumer Credit Act 1995, the debtor can consent to judgement involving payments by instalment. Otherwise a general consent to judgement can be signed. Both these consents can be enforced by filing the appropriate affidavits (sworn statements) in the relevant District Court office[29]

3) Where the defendant wishes to challenge the claim either by questioning the amount claimed by the creditor or the existence of the debt in the first place, a defence (preceded by an appearance in the case of the Circuit and High Courts) must ultimately be entered. It is commonly understood that little purpose is served by entering a defence where the debt is not disputed as this may result in a formal legal hearing for which arguments must be prepared and witnesses produced. This will increase the creditor's legal costs and, therefore, ultimately the amount to be repaid by the debtor to the creditor. Some practitioners have speculated that if a creditor refuses a reasonable offer of a phased instalment repayment of the total debt and proceeds with legal action, that the debtor could defend on the basis that the creditor's refusal was unreasonable. Much would depend on the attitude of the judge to the debtor's predicament.

   It is also worth bearing in mind that where a hearing does take place and even if judgement is given in favour of the creditor, the court may grant a stay of execution on payment 'upon such conditions as shall appear to the court to be reasonable' where it is satisfied that reasonable grounds exist to do so[30]. This stay of execution can include the making of an instalment decree

28 At the time of writing the Courts and Courts Officers Act, 2002 has been passed but awaits the relevant Ministerial Commencement Order. It will raise the courts financial jurisdiction respectively to: under €20,000 in the case of the District Court; under €100,000 in the case of the Circuit Court and over €100,000 in the case of the High Court. The hold up in implementing the legislation is thought to relate to the provision of staff to deal with the likely increase in caseload in the District and Circuit Courts.

29 District Court Rules Schedule C, Order 45, Rule 2(1) (c) Nos 45.7and 45.8

30 Enforcement of Court Orders Act, 1926 – Section 21

whereby the debt is ordered to be paid in instalments. The stay of execution option is **not** available where no defence is entered by the debtor as the court does not have the benefit of hearing from the debtor as to why a stay should be granted.

4) Finally, the defendant may not respond (a frequent occurrence in consumer debt cases) in which case the creditor's solicitor is likely to proceed to the next stage, namely enforcement.

Stage 2 _Undefended Claims (District Court Procedure)

If there is no defence filed, there will be no hearing and judgment for the amount claimed will be given in the debtor's absence when the solicitor for the creditor files the correct papers in the relevant court office[31]. Although this is explained in the text of the court documents, it is somewhat lost in the body of the text and is explained in formal language. The experience of some money advisors seems to confirm that many people in the pressurised circumstances of over-indebtedness do not open registered letters and even if they do, panic at the prospect of court hearings and documents they find difficult to understand[32]. This is exacerbated where there is little or no access to legal advice or information and literacy problems may also play a significant part. In the legal year August 1998 to July 1999, **29,513** District Court civil cases were dealt with by way of Summary (i.e. undefended) Judgement[33]. Unfortunately, statistics are not available to show how many of these were consumer debt cases.

An immediate criticism that can be made in relation to our current debt enforcement system is that an explanatory booklet is not included with the civil summons or bill, which explains the consequences of the legal proceedings in question and is written in plain and intelligible language. Neither are contact numbers of Money Advice and Budgeting Services, or other helpful organisations in the particular court area, provided so that the debtor can at least contact someone for assistance. In addition, it is not clearly explained that as well as getting a judgement for the amount claimed, the creditor may also obtain an order for legal costs or that interest may also be claimed, either under the terms of the contract if applicable, or at the discretion of the judge under the Courts Act, 1981. None of this information is immediately apparent from these legal documents. Frequently, the covering letter accompanying the summons from the creditor's solicitor will suggest that the debtor contact his/her solicitor for advice. With civil legal aid and advice subject to a waiting list, and so rarely available in debt cases because the debtor may fail the merits test, it is unlikely that the debtor will be able to afford this[34].

3.3 Debt Procedure – Enforcing Judgement

Assuming that no defence has been entered to the creditor's claim, or a defence has been entered and a hearing has determined that the money claimed is owed, the creditor effectively has possession of a court order requiring the debtor to pay the amount claimed. Assuming again that the debtor is not in a position to pay the entire amount in one payment, the creditor's choice at this stage is to take enforcement proceedings. A number of options are available to the creditor at this point. The primary focus here will be on the **Instalment Order** procedure, as it is likely that if attachment of earnings legislation were to be introduced, it would act as a back-up to an Instalment Order as an alternative to the current ultimate sanction, committal to prison.

In brief, the other options open to the creditor under current legal procedures are as follows:

(i) Registration of Judgement.

A judgement may be registered in the Central Office of the High Court whether it is obtained in the District, Circuit or High Court. The purpose of registering the judgement is to convince the debtor to

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31 An assortment of prescribed forms of affidavit of debt are available for this purpose, depending on whether the agreement is regulated by the Consumer Credit Act, 1995 or not and if it is, what kind of consumer credit agreement it is.

32 See Section 4, Page 32 – Money Advisors questionnaire

33 From figures kindly provided by the Courts Service

34 Civil Legal Aid provided by the State Legal Aid Board is subject to a Means test and a Merits test (except in Family Law cases). Uncontested debt cases will often fail the merits test as there is no strict legal defence. According to the Legal Aid Board Annual Report, 2000, legal aid was provided in 3 cases in the District Court, 1 case in the Circuit Court and 4 cases in the High Court. Advice in the area of Hire Purchase/Debt was given in 93 cases in 2000.These figures cover the entire country.

clear their debt, as reference agencies that hold information utilised by creditors for the purpose of determining the creditworthiness of loan applicants inspect the register on a periodic basis and hold or publish the information gleaned from it[35]. Therefore, while not strictly speaking a method of enforcement, registration is intended to encourage the debtor to satisfy the judgement in order to have their credit rating restored, as well as serving as a general warning to future creditors from whom the debtor may subsequently look for credit. In the same way that a judgement can be registered, so equally can the fact of satisfaction of the judgement, so that any subsequent search of the register will show that the debt has been paid.

(ii) Execution Orders through the Sheriff/County Registrar.

The Sheriff's basic duty in this area is to seize assets in an attempt to satisfy the sum set out in the court order. In relation to judgements obtained in the District Court, the court order serves in itself as an Execution Order without any alterations being required. The Circuit Court and High Court judgements require the addition of an Execution Order and what is called an order for Fieri Facias (or FiFa) respectively in order for the Sheriff to act.

Seizure of goods is an unpleasant business and in many instances is the least preferred enforcement action on the part of creditors given the level of intrusion into the private life of the debtor involved. There are also practical difficulties. The Sheriff can seize any asset but can only retain and sell assets that belong to the debtor. Goods, therefore, that are owned in part by someone else or goods that are rented or are the subject of a hire purchase agreement should not be sold. Equally, essential household necessities such as clothing and bedding cannot be seized. In addition, the re-sale value of second-hand goods is now quite limited and the Sheriff is also entitled to take a commission on what is seized and sold. This commission amounts to 5% on the first € 4,444 realised and 2.5% on the balance[36].

(iii) Judgement Mortgages.

The judgement mortgage procedure is governed by the Judgement Mortgage (Ireland) Act, 1858[37]. It is intended to act as a form of guarantee of future payment and as such is rarely an enforcement measure that has immediate impact. It involves the creditor registering a judgement for a cash sum against the property (land or buildings) of the debtor in the Land Registry or Registry of Deeds as appropriate. In the event of the debtor attempting to sell the property, the creditor who registered judgement (the judgement mortgagee) must be paid from the proceeds of the sale, although the s/he ranks after an original mortgage lender (the prior mortgagee), who may hold the title deeds of the property as security for a housing loan. Given the high number of properties that can change hands within the 12 year period, registration can be an attractive option from the creditor's viewpoint. Technically, the creditor can also seek an order that the judgement is validly charged on the land (A Well Charging Order) and can then look for an order for sale although this is a long drawn out and potentially costly process with no guarantee of success.

In addition, the fact that the Well Charging Order is granted does not mean that an order for sale necessarily follows. See, for example, the decision in **First National Building Society v Ring**[38] where the High Court refused to sanction the sale of a family home held in the joint names of the spouses when a judgement mortgage had been registered against the property as a result of a debt incurred by the husband alone. The court felt that, as the wife was an innocent party and the disruption to her and her children would be enormous if the property was sold, that alternative means of solving the problem should be explored.

A debtor will generally be allowed a stay of execution (or number of stays) of at least 3 months before a sale of the property will be ordered. The court must also be satisfied that it has details of all other encumbrances on the property (i.e. other debts against it) and this may involve time consuming and costly advertising to unearth other creditors in order to determine priorities.

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35 Such as Dun and Bradstreet (publishers of Stubbs Gazette)
36 Sheriffs' Fees and Expenses Order, 1998, Statutory Instrument 314/1998
37 13&14 Vic. c. 29
38 (1992) 1 I.R 375 High Court

Although there is differing legal opinion on the subject and the area is somewhat of a legal minefield, a prevalent view is that a judgement mortgage can only be enforced within 12 years of the date of registration and cannot be registered a second time. This does not mean that the judgement debt is wiped out. Technically, the debt is still owed but this method of enforcement is no longer available once the 12 year period elapses.

A notable anomaly in the procedure relating to the registration of judgement mortgages is that only the registered owner of the property is notified of the fact of registration. The Family Home Protection Act, 1976 is designed to protect the interests of the non-owning spouse (usually the wife) in the property. Any conveyance, including a loan raised by the deposit of the title deeds by the other spouse, requires the non-owning spouse's written consent. However, if the owning spouse runs up a debt not secured on the property, is sued and a judgement is thereby registered against the property, the non-owning spouse is not informed. This could lead to a situation where a wife, who might potentially have a considerable beneficial (as opposed to legal) interest in the property, is not aware that her interest is being eroded. The 1976 Act[39] allows the non-owning spouse to apply to a court for a declaration that the family home is being put at risk by the conduct of her husband and to make any appropriate order to protect her right of residence in it. However, she can only do this if she is aware of such conduct. If it was obligatory for the Land Registry or Registry of Deeds to notify the non-owning spouse of the fact of any judgement mortgage, it is suggested that it would be easier for her to protect her interest and right of residence.

(iv) Bankruptcy

The Bankruptcy Act, 1988 provides that a creditor can issue a Bankruptcy Summons against a debtor who owes at least € 1,905 to that creditor and is unable or has refused to pay[40]. If the debtor fails to pay the debt within 14 days of service of the summons s/he commits an act of bankruptcy[41] and a petition can be served on that person within 3 months.[42] In addition, the debtor can also seek the protection of the High Court and opt to make themselves bankrupt where they owe at least € 1905[43].

From the point of view of consumer debt, the bankruptcy legislation is very rarely used. Furthermore, it is rarely used even in commercial situations. The most common use of the Bankruptcy Act tends to involve a sole trader or partnership where there are several quite large outstanding debts but some assets and/or property that might be used to satisfy a portion of the debts through a deed of arrangement or a composition with creditors. When a person is declared bankrupt their property vests in the Official Assignee, who becomes responsible for assembling the bankrupt's property with a view to satisfying, partially at least, the outstanding debts. The declaration of bankruptcy has a disastrous effect on an individual's credit rating and should only be chosen by the debtor as an absolute last option. From a creditor's point of view, it is an expensive procedure and unlikely to be of much benefit where the bankrupt has few or no assets. Many European countries do have specific bankruptcy or personal insolvency legislation designed to relieve over-indebted consumers and this issue will be explored in more detail in a later section of this report.[44]

(v) Garnishee Order

This form of enforcement is not commonly used in consumer debt situations. However, in brief, it involves an application being made by a judgement creditor to have a sum of money owed to the judgement debtor by a third party, paid directly to the judgement creditor in satisfaction or part satisfaction of the judgement. For example, if a creditor becomes aware that an award of damages has been made to a debtor in a personal injuries claim, s/he might seek to have the judgement satisfied out of the proceeds.

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39 Section 5
40 Section 8 – Bankruptcy Act
41 Section 7(1) g
42 Section 11(1) c
43 Section 11 (3)
44 See Section 7 - Page 58

(vi) Instalment Order / Committal Order Procedure

It is with this method of debt enforcement that we are most concerned. In brief, Instalment Orders can be made under the Enforcement of Court Orders Acts 1926 / 1940, by the District Court only (regardless of which court granted the judgement in the first place) to enforce a judgement or decree for a liquidated sum[45]. The debtor is ordered to pay a set amount by way of instalment on a weekly or monthly basis until the judgement is paid off in its entirety, subject to the proviso that the order can only last for 12 years from the date of the judgement[46]. In the legal year, August 1998 to July 1999 a total of **10,153** Instalment Orders were applied for so it is a highly significant part of the debt enforcement process[47].

In theory, the means of the debtor in terms of their income and expenditure should be examined by the relevant District Court with a view to fixing the instalment at a level that the debtor can afford to pay *vis-à-vis* their income and outgoings. The creditor's solicitor is required, for this purpose, to issue an examination order and a copy of this order will be served on the debtor with a court hearing date[48].

The order will request the debtor to outline his/her financial circumstances to the court at least a week in advance of the hearing and to then appear in court on the date specified. However, there is no guarantee that the judgement debtor will respond to the examination order and there is no strict legal obligation to do so. The fact that this appearance will be in open court does not help and there is a strong case for providing that these matters should be dealt with in an alternative forum. In addition, it will often be some time since the original order (which is often undefended) and the details of the judgement were served and the debtor may not realise the serious consequences of not responding to the examination request. Even if they do, there may be other debts mounting and/or other legal proceedings in train and this may cause the debtor to panic and ignore the examination order in the vain hope that the problem will go away. This view from an experienced money advisor illustrates the debtor's potential difficulty in this situation:

> *"I am extremely concerned about the examination of means by the courts. A debtor is given a date for the hearing but may not be prepared, may panic at the last minute or miss the court date for any number of reasons. Most of all, the person will probably have no legal representation and be too frightened to go alone. The result is that the court picks a figure out of the air without any knowledge of the person's means. I have been dealing with the fall-out from this scenario for nearly four years and am still horrified when it happens[49]."*

The assertion is sometimes put that failure to respond on the debtor's part is showing contempt for the process. However, this is a major value judgement which, in the view of this report, misunderstands the trauma of consumer debt in the majority of cases. It is simply illogical that a judge should fix an instalment payment without having the debtor's detailed financial circumstances before him/her. Without this vital information, how can a realistic assessment of a person's ability to repay take place? Frequently, a debtor in this position has other debts, as well as the normal outgoings to provide food, shelter and clothing. These details are crucial to any assessment and this is clearly recognised in other jurisdictions. In the UK, the financial statement is taken as the basis for assessing instalment repayments[50]. In Northern Ireland, the Enforcement of Judgements Office (EJO) has the right to request a debtor or other relevant parties to provide evidence of means[51]. If the debtor chooses not to attend, a conditional order to issue a warrant of arrest can be made. If s/he further refuses to attend, an actual warrant follows automatically. Effectively, this is a compulsory examination order, although research enquiries found that the purpose of the compulsory nature of the order is not to imprison the debtor, but to make sure that they appear before the Office so that a realistic assessment of their position can be made.

46 Section 17- Enforcement of Courts Act, 1926
47 Section 4, Enforcement of Courts Act, 1940 as amended by Section 3, Courts (No 2) Act, 1986
48 From figures provided by the Courts Service
49 Section 15 – Enforcement of Court Orders Act, 1926
50 Response to survey on Attachment of Earnings sent to a cross section of money advisors – See further Section 4
51 See further Section 8 of this report – Page 69
52 See further Page 82

It is **essential** that the debtor's financial circumstances are before the court or other adjudicating body before any order is made. This could be achieved by a clear and prominent A4 enclosure with the examination order that explains in simple terms the purpose of the order and the possible consequences of failing to deal with it. Ultimately, attendance may need to be enforced by the possibility of a warrant. Equally, it is not uncommon for a second or third Instalment Order to be made in respect of the same individual who has not responded to the first Examination Order and who cannot even afford the first instalment, let alone any further ones. This absurdity could be removed by the availability of a database for judges, court officials and creditors that would provide accurate information on existing orders and legal proceedings in train in relation to that individual. Finally, the need for a comprehensive agreed statement of means would be just as important in setting attachment of earnings rates as Instalment Orders.

The role of MABS in relation to the statement of means

The role that the MABS can play in this area should not be under-estimated. It is standard practice for a money advisor to draw up a statement of means (or financial statement) on behalf of an indebted client to be used as a basis to negotiate affordable repayments and this should be admissible before courts or other adjudicative bodies dealing with debt matters, subject to the creditor's right to question what they consider to be unsatisfactory elements of it. A logical progression of this would be the extension of McKenzie Friend[52] privileges for money advisors (already allowed in practice in some District Court areas and which appears to be sanctioned in Irish courts as a result of some recent case law[53]) and/or the possibility of money advisors being allowed to give evidence as to a debtor's financial and other circumstances with the court's consent, where s/he has no legal representation.

This is all the more necessary as civil legal aid is rarely available in debt cases, in particular if the debt is admitted and there is no legal defence to the creditor's claim. This means that a debtor applying for legal aid will often fail the Legal Aid Board's merits test. It goes without saying that debtors are rarely in a position to hire their own legal representation and are often overwhelmed by the powerlessness of being alone in a public forum, if indeed they appear at all. Currently, some District Court judges and officials recognise the work and the role of MABS advisors and will seek their view on a particular case, but this is by no means uniform throughout the country. Finally, it should be noted that MABS is only part of the solution in that it is not possible with current resources for it to assist every debtor.

Consequences of Failure to Attend Examination

If the debtor does not lodge a statement of means in the appropriate District Court Office and does not appear in response to the examination order, this will not prevent a judge issuing an Instalment Order. Some judges in this situation will request details from the creditor's legal representatives of their view of the debtor's ability to pay and what sort of sum they feel would be appropriate. By default, this is usually a one-sided view and any information that the creditor's solicitor does hold in relation to the debtor is likely to relate to information around that debt in isolation. It is unlikely, therefore, that this information will take into account other debts or credit commitments on the debtor's behalf and it may also be based upon information that is not factually correct. For example, there may have been a drop in income or an increase in commitments since the loan application form was completed. Equally a loan may have been obtained by inflating an income figure on the loan application.

Once the Instalment Order is made by the judge, it will be lodged in the District Court Office for signing and ultimately one copy must be served on the debtor by the creditor's solicitor. The first instalment is generally due one week later and it is failure to pay at this point that leaves the creditor with the option to have a Committal Summons issued.[54] This summons must be prepared by the creditor's solicitor and a committal hearing date arranged and a copy of this document must be served on the debtor. It is sometimes argued that the main purpose of the creditor taking this action is to galvanise the debtor into paying the instalment in the gap between the service of the summons and the

52 A McKenzie friend is a person who can act as an assistant to a person representing themselves in court but who does not have a right to address the court on the person's behalf - from McKenzie v McKenzie (1971)

53 See Supreme Court Order in the case of Quinn v the Governor of the Bank of Ireland and others (October 13th, 1995) and Daly v District Judge Oliver McGuinness - Judicial Review, High Ct - Macken, J (Feb 11th, 1999).

54 Section 6 (a) – Enforcement of Court Orders Act, 1940.

hearing. Given that the Instalment Order is often unrealistic and does not take into account the debtor's possible multiplicity of debts, this is often a forlorn expectation.

Equally, it is also not often understood by many people subject to these orders that they can apply at any time to have the order varied downwards. The Instalment Order itself does contain this information but in a very small note at the bottom of the page. Again this information should be made much more accessible to the debtor so that any unfavourable change in their circumstances can be taken into account by the system.

At the Committal Summons hearing, the creditor's solicitor must appear and must bring a witness for the creditor to show evidence of default. The debtor then gets a chance to explain why the order has not been complied with. If the judge is satisfied that ***"failure to pay was due neither to his wilful refusal nor to his culpable neglect"***[55] the Instalment Order can be varied to reflect a more realistic view of the debtor's income. However, in the absence of a satisfactory explanation or the failure of the debtor to appear at all, imprisonment for up to 90 days may be ordered, though in practice much shorter custodial sentences are imposed. However, it is questionable how a judge can infer that there was wilful refusal or culpable neglect on the debtor's part in the absence of any explanation from the debtor. It would appear that not turning up is taken in many cases as being sufficient evidence[56].

When the judge makes the order, the creditor's solicitor must prepare it and the committal warrant for signature. The appropriate District Court office will either send the warrant directly to the Gardai or give it to the creditor's solicitor to lodge with the Gardai. It is then up to the Gardai to decide when to execute it and this practice will vary. In some cases it will be enforced quickly but more often, warnings will be provided to the debtor that the warrant will be executed if immediate payment is not made to the District Court clerk. The full amount plus legal costs must be paid to avoid imprisonment at this point. Clearly, if the debtor has been unable to pay the instalment, s/he will be unable to make the entire payment unless s/he has been trying to avoid liability. There is no flexibility in this situation. Even if the creditor's solicitor is sympathetic to the debtor's plight, they would risk being in contempt of court by accepting part payment.

However, it is still possible at this late stage for the debtor to appeal the committal to the Circuit Court even when the warrant has been issued to the Gardai. This appeal will act as a stay on the Committal Order[57]. This information is not widely known and is not made available to the debtor on the order for arrest and imprisonment. Very frequently, debtors in this situation do not have access to legal advice and so are unlikely to become aware of this possibility otherwise.

As observed in the introduction to this report, many parties to the debate on debt and the legal system agree that imprisonment for non-payment of civil debt is unacceptable. As far back as 1969, the Payne Report in the U.K. recommended the abolition of such imprisonment and this recommendation was implemented in 1970[58]. Apart from moral considerations, such imprisonment does not make economic sense. Not only does the debt remain to be paid when the debtor is released from prison (assuming no-one has paid it in the interim), but the cost to the State far outweighs any possible benefit that might result. Nor can it be under-estimated, and this is a crucial point in the whole debate in relation to debt enforcement, the extent to which completely innocent parties usually suffer.

The costs to society of over-indebtedness are hard to quantify and as far as we are aware, no research has been carried out in this country in this area[59]. However, it is fair to assume that chronic debt and imprisonment for non-payment of civil debt involves considerable long term negative consequences for

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55 S.6 (c) - Enforcement of Court Orders Act, 1940

56 It is sometimes speculated that imprisonment for non-payment of debt is a breach of the European Convention on Human Rights and Fundamental Freedoms. Indeed, Article 1 of the Fourth Protocol to the Convention provides in general that '*No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation*'. Explanatory reports on this protocol state that it was conceived to prohibit '*as contrary to the concept of human liberty and dignity, any deprivation of liberty for the sole reason that the individual had not the material means to fulfil his contractual obligations*'. This article does not apply if a debtor acts fraudulently of maliciously or if a person deliberately refuses to fulfil an obligation.

57 Order 53 (1) and (2), District Court Rules

58 Report of the Committee on Enforcement of Judgment Debts, 1969, HMSO, Cmnd. 3909

59 See, however, *Over-indebtedness affects Health – What are the costs to Society?* Ahlstrom.R Dr – Paper presented to 3rd CDN European Conference, Dublin September 1998 – See also Money Matters, Debt Net Newsletter 3/98

the partners, children and relatives of the debtor or imprisoned person and this may impact upon the State in terms of healthcare and other intangibles like crime rates. Of course, the argument put forward on behalf of creditors is that there must be some method of enforcing a court judgement relating to debt. It is also true that there are some debtors who are in a position to meet their obligations under a Court Decree or Instalment Order but who choose not to do so. However, this would become apparent, in many cases, if it was obligatory to have details of the debtor's circumstances before the court before an order could be made.

In the event that there has been no response from the debtor so far, it is essential that s/he is afforded an opportunity to respond to the Committal Summons. Again, this could be achieved in many cases by a simple A4 enclosure in plain English which makes it absolutely clear that the debtor's liberty may be at risk if they do not appear at the Committal hearing. If necessary, the matter should be adjourned and the debtor brought before the court compulsorily in order to prevent unnecessary, costly and damaging imprisonment.

In the long term, taking debt enforcement out of the courts and substituting it with some form of alternative resolution may be the best option. However, in the meantime it is imperative that every possible opportunity be taken to explain and provide advice to the debtor in relation to the legal proceedings they are about to become involved in, and that each stage of these proceedings provide adequate safeguards to ensure that their interests and liberty are protected, whilst balancing these with the rights and interests of the creditor.

SECTION 4

AN OVERVIEW OF THE ROLE OF THE MONEY ADVICE AND BUDGETING SERVICE AND A CROSS-SECTION OF VIEWS FROM KEY INFORMANTS ON ATTACHMENT OF EARNINGS

4.1 Introduction

Given the concerns that this study has with regard to the position of the over-indebted consumer, this section concentrates primarily on describing and evaluating the current infrastructure of money advice provision in Ireland and on canvassing the views of money advisors who work directly with the over-indebted, on the legal system for debt recovery. In addition, the opinion of some representatives of the credit industry has been sought on these issues, namely the Irish Bankers Federation (IBF) and the Irish Finance Houses Association (IFHA).

4.2 Money Advice & Budgeting Service (MABS) – An Overview

4.2.1 Background

MABS was initially set up in 1992 as five pilot projects in response to the Combat Poverty Report on Moneylending and Low Income Families which highlighted, amongst other things, the lack of advice and support for families caught in high-cost moneylending agreements[60]. Although MABS was initially set up to combat illegal moneylending, the service quickly expanded country-wide and now deals with a wide variety of consumer, as well as moneylending debt.

MABS is the only specifically designated money advice service in existence in the Republic of Ireland. Each of the services (now numbering over 50) is an independent company limited by guarantee with a management committee (normally composed of members drawn from the voluntary, community and statutory sectors) who oversee the work of its staff. The funding for the service comes exclusively from the Department of Social and Family Affairs who retain overall responsibility for the management of the programme. MABS has a National Co-ordinator, who is seconded from the Department and the service is also organised on a regional basis with overall Regional Co-ordinators. A National Advisory Committee (N.A.C) composed of various stakeholders such as departmental officials (from the Department of Social and Family Affairs) money advisors, representatives of management committees and representatives of community, voluntary and statutory agencies advise the Minister on policy in relation to the operation of the service. MABS also has a specific Training and Community Education Service located in Comhairle which itself is also funded entirely by the Department of Social and Family Affairs. The Training Service provides training in relevant areas to both MABS staff and members of management committees as well as having a responsibility in relation to the provision of community education.

A comprehensive national evaluation of MABS took place in the course of 1999 and a detailed critique and analysis of the service in terms of its achievements, efficiency, realisation of objectives and strategic planning was subsequently published.[61] Amongst the many questions examined in that report was the future structure of MABS. Following on from this report, the former Minister for Social, Community and Family Affairs, Dermot Ahern, T.D announced his intention to establish MABS on a statutory basis at the MABS Annual Conference in 2000 in the following terms:

> *"I want to stress that this is about giving formal recognition in legislation to the MABS as it is working and as it has worked so well over the past years and not about changing the key features and advantages of the service as currently structured. In other words, I see the value of giving*

60 Daly. M with the assistance of Walsh .J *Moneylending and Low Income Families* (Dublin: Combat Poverty Agency, 1988)
61 Eustace.A and Clarke.A, MABS Evaluation Report for Phase Two – August 2000

MABS a statutory basis as enhancing and supporting the autonomous nature, the voluntary management and the sense of community 'ownership' of independent local MABS services"[62]

Following cabinet approval, a draft Bill was prepared during the course of 2002 but had not been presented to either House at the time of the last general election. It is unclear at present what plans are in preparation for placing MABS on a statutory basis.

4.2.2 MABS Aims and Objectives and Mission Statement

MABS has a set of national aims and objectives as follows:

Objective One To provide an independent, free and confidential MABS to the target group to facilitate them to cope with their immediate debt problems and become financially independent in the long run.

Objective Two To facilitate the target group to develop the knowledge and skills to avoid getting into debt or to deal effectively with debt situations that arise.

Objective Three To identify sources of credit which can best meet the needs of the target group and facilitate them to access these sources.

Objective Four To work in partnership with other support agencies to provide an integrated system of supports that can be accessed by the target group as appropriate to their needs.

Objective Five To facilitate the target group to be involved in the planning and implementation of MABS to ensure that it is responding effectively to their needs.

Objective Six To ensure that the target group have equal access to MABS regardless of geographical location.

Objective Seven To highlight changes in policy and practice that need to be implemented at local and/or national level in order to eliminate poverty and over-indebtedness[63].

In addition, MABS' mission statement, in terms of its casework can be summarised as follows:[64]

The prevention of

- homelessness,
- fuel disconnection,
- the loss of essential goods or services,
- the loss of liberty,

Whilst

- Establishing or maintaining an acceptable or minimum standard of living.
- Facilitating the client to clear up their debts at an affordable rate, within a reasonable period (e.g. 3-5 years).
- Ensuring access to justice and that a client's rights are upheld.
- Encouraging self-reliance.

4.2.3 The future role of MABS

It has been speculated that putting MABS on a statutory basis would at least help to secure its future existence and decrease its vulnerability to the winds of political change, but, in any case, it is unlikely

62 Conference Report, MABS National Conference 2000, Tralee – Page 11
63 Money Advice Manual – Section 1 , Page 8, Comhairle, January 2002.
64 Money Advice Manual - Section 2 , Page 7, Comhairle, January 2002.

that any future administration would consider diluting the role of MABS, given the vital role it has played in negotiating on behalf of indebted people and given the increasing incidence of credit and over-indebtedness in Irish society. Put simply, money advice is here to stay and the process of establishing MABS on a statutory basis now provides a golden opportunity to review its role and development. The National Evaluation of the Money Advice and Budgeting Service has concluded:

> *"MABS as an intervention has grown and developed significantly in the past five years. This growth has not been matched with development of the strategic planning or support functions nationally and this has contributed to piecemeal development locally. The results of the evaluation point to these issues as key development needs for the continued future success of the service*[65]

The evaluation thus put forward 3 options in relation to the revised future structure of MABS that might be summarised as follows:

- Retain the existing structures while strengthening the national co-ordination role in terms of issues such as community education, research, training, technical support and strategic planning.
- Streamline the current structures by placing an increased emphasis on regional support mechanisms and appropriate additional resources being provided to the services, overseen and funded by a central unit including national co-ordination located in Community and Voluntary Services in D.S.C.F.A. with the training and development role to remain in Comhairle.
- Set up a new and *separate* national support unit for MABS to replace the national co-ordination function and to deal with all aspects of support to the services. This unit would be located centrally in Community and Voluntary Services in D.S.C.F.A.

Although these proposals form a very useful basis for discussion, it is suggested that none of the three options are entirely satisfactory. A combination of numbers two and three – regional support systems with a supporting central unit - may provide the best strategy.

It is the view of this report that MABS has come of age and that, whilst acknowledging their considerable achievements up to now, it may be time for its parent, the former Department of Social, Community and Family Affairs (now Social and Family Affairs) to let go. Objective Number 7 of the National Aims and Objectives for the MABS[66] is *'to highlight changes in policy and practice which need to be implemented at local and/or national level in order to eliminate poverty and over-indebtedness'*. It is arguable that little concrete progress has been made on this objective since the inception of MABS, principally as a result of a lack of resources devoted to policy issues. It is also suggested that this is due to an understandable reluctance on a government department's behalf to engage and grapple with the social, economic and legal factors that give rise to poverty and over-indebtedness.

At this stage of its development, it is suggested that MABS needs a focus and independence to distinguish it from the direct control of a government department if it is to maximise its potential as the only specific rights based money advice service and principal point of repair for indebted people in the State. Indeed, to redress the creditor/debtor imbalance at policy level, it is crucial that MABS becomes a cohesive national organisation able to espouse the cause of the indebted in the same way, for example that the Irish Banks Federation (I.B.F) advocates the creditor perspective.

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65 Eustace.A and Clarke.A MABS Evaluation Report for PhaseTwo, August 2000 – Page 73.

66 See Page 30

In order to attempt to achieve this, it is suggested that a Money Advice Central Unit or Board be created, funded by the State in the form of the Department of Social and Family Affairs (or other relevant government department). This unit would be directly accountable to that department in terms of its budget, but would be independent in terms of its policy development, research, training, technical support and other relevant issues. Funding for the direct provision of MABS services themselves could be devolved to an administrative section of this unit that could undertake to co-ordinate and streamline staffing issues. The central unit could, in turn, set up and resource regional support mechanisms from its budget. These supports could act as a conduit for the development of policy initiatives, through statistical reportage and feedback on areas of concern on the ground.

It is not suggested that the voluntary management committee structure of the MABS service be fundamentally altered as this system provides a valuable community focus to each MABS service and community involvement is important to the success of money advice services. However, research enquiries indicate that management committees need both greater support to enable them to carry out their work and greater supervision in how they exercise their functions and the recommendations of the MABS evaluation confirm this[67]. It is argued that a dedicated unit specifically charged with this role could achieve a much greater degree of uniformity and certainty than heretofore. A short summary of these recommendations in relation to the future role of MABS is also included in Section 11[68].

4.3 - Questionnaire to money advisors on attachment of earnings

Money advisors are in the front line of consumer over-indebtedness and deal on a daily basis with clients who have all kinds of financial difficulties and many associated problems. These are likely to be the people upon whom any potential attachment of earnings legislation will impact. Accordingly, a short questionnaire was circulated to a cross section of money advisors to get their views on attachment of earnings in general. There follows a list of the questions that were asked of them and a selection of the respondents' comments in relation to them. It is **not** being suggested that this represents any policy viewpoint on the part of MABS. Rather, it is intended here to give some kind of indication of the types of issues that a sample of money advisors would be concerned with in the event of AOE legislation being introduced.

Q.1 How would you expect this Bill to impact directly upon the work of money advisors and their clients?

- In response to this question, one advisor commented, *"AOE will obviously affect a person's ability to provide basic necessities for themselves and their families unless basic income is protected. In a situation where the court makes an order which interferes with other agreed payments - this would cause problems. AOE is just another factor which affects a citizen's ability to deal with debt".*

- Another respondent was more explicit - *"I think it would be disastrous. While imprisonment for debt would no longer happen, this Bill would merely add to the existing body of law in relation to the recovery of debt which everyone recognises is in need of total reform. It is too simplistic and crude. A debt settlement code (which could also be legislated for) that takes the recovery of debt out of the hands of judges and solicitors is badly needed instead. If punitive attachment orders are made against low to middle-income earners, it will give rise to increased distress and hardship. It will, in many cases, remove all incentive to continue work".*

- Another commented that the legislation would "*impact very seriously were it to apply to those dependent on social welfare and would impact unfairly if no distinction is made between debtors guilty of wilful neglect and unaffordable default".*

67 Eustace.A and Clarke.A, MABS Evaluation Report for Phase Two, August 2000– Page 87

68 See Section 11, Page 126

- Finally, under this heading, another advisor commented that *"If multiple attachments are introduced, many of our clients would be below subsistence level".*

Q.2 Have your views on this subject been canvassed by the Department of Justice and if not, do you expect them to be?

The majority view here appeared to be that if money advisors were not to be consulted directly, at the very least the National Advisory Committee advising the Minister for Social and Family Affairs should be. It should also be noted that, subsequent to this questionnaire being returned, the West/North-West region of the MABS sent a comprehensive submission to the Department of Justice, Equality and Law Reform on AEO and other debt related issues[69]. All respondents commented that the views of money advisors and MABS in general should be crucial in framing any legislation dealing specifically with the over-indebted. However, there was no great surprise that this had not yet occurred.

One advisor commented, *"All press releases and the Private Member's Bill published to date on this issue by the Minister and the Opposition Spokesperson have only shown interest in prison spaces and the cost to the tax payer thereof. Neither has shown any interest in the subject from the debtor's point of view. On this basis, I don't foresee any consultation".*

This comment echoes the observations made in a subsequent section of this report on the disturbing lack of depth revealed in the publication of the Private Member's Bill and the debate in the Dail that followed it[70].

Q.3 If AOE is to be introduced, what safeguards would you like to see included in the legislation that would protect your clients?

There was a fairly strong convergence of views from the advisors who responded to this question. Many commented that if AOE is to be introduced, the debtor should be given an opportunity to seek independent financial advice in relation to presenting a statement of means and that MABS might be the appropriate service to carry out this assessment. Equally, the respondents were unanimous that a minimum level of protected income should be established, although how this would be arrived at was not explored.

One advisor responded by posing a number of questions as follows:

- *"What happens when a couple are earning and only one has incurred a debt?*
- *Will the second partner be expected to support the family while the court attaches the other's income?*
- *How will income retention be dealt with in this and other circumstances?*
- *Will protection of earnings be a subject for discussion before or after legislation has been introduced?*
- *Will there be strict guidelines or will the level of attachment be left to the judge?*
- *Will anyone involved in decision making consider the fact that it costs money to go to work and we must be aware of possible employment disincentives?*
- *Would we expect people to continue working if they could be at home with their families for the same money?*
- *Will the quality of life of the debtor and his/her family be considered"?*

69 Submission to Dept of Justice, Equality & Law Reform - Response to the Proposed Attachment of Earnings Bill and Appraisal of the Legal System for Debt Recovery - 16/12/99.

70 See Section 5, Page 41

Equally, the majority of respondents commented that multiple attachments should not be permitted.

One advisor felt that *"only one order should be made against a debtor (unlike the present situation with Instalment Orders where multiple orders can exist). For this reason, where multiple debts exist it would be vital that all are dealt with".*

Finally, the respondents felt that AOE legislation in isolation, without a comprehensive review of current debt enforcement law and without adequate safeguards for the debtor, would make the situation worse. Many felt that the future in this area of law lay with an out-of-court debt settlement code along the lines of the models developed in Scandinavian and other European countries. Further detail on the principles of debt settlement is provided in a later section of this report.

One advisor commented, *"It would be very wrong to add to a system which is inequitable and punitive. AOE in isolation would be a mistake. A complete change in the debt enforcement laws is required and should incorporate an out-of-court debt settlement programme.*

The existing system is designed to deal with people who refuse to pay. Unfortunately, everyone is treated equally harshly. This includes those who through fear, ignorance of the legal system, ill health, etc, are unable to deal with their situation. Although there is a certain amount of protection for debtors, how many are aware of this? Who advises them that these options are available or where to go for help? Ask anyone on the street what a variation order is or about the legal process involved and I would be surprised if many would know. The vast majority of people are embarrassed when they miss their first payment. As time goes on they feel more and more ashamed, threatened and frustrated by their failure to deal with their arrears. Many have a fundamental difficulty in communicating their difficulties at any stage and are hopelessly lost when attempting to defend themselves in a public arena where they are treated like criminals. Everyone I have encountered has been intimidated by both the legal system and the legal terminology. At the very least, a simple explanatory leaflet should accompany legal documents. This should outline exactly what is required of the debtor and set out the options and consequences they may face. Will any of this change with the introduction of AOE?"

Q.4 Have you any other observations to make on this subject?

Issues that were raised by respondents under this heading included irresponsible lending on the part of the creditor. One respondent commented, *"How will the courts ensure that the creditor seeking the order acted in a responsible manner"?*

Another suggested that *"the responsibility of the creditor be reflected in the legislation".* Similarly, the issue of legal representation for the debtor was raised. One advisor suggested that, *"Because of the seriousness of the proposed legislation and the potential consequence, debtors should be guaranteed legal representation".*

Finally, one advisor under this heading commented as follows: *"Overall I feel that attachment in relation to credit/debt would be a seriously retrograde step. As things stand, the legal system in relation to debt recovery is hugely stacked in favour of creditors. The debtor is, for the most part, powerless and voiceless. In the absence of a total overhaul of the legal system in relation to debt and no serious debate on an extra-legal debt settlement programme, the proposed legislation would merely add to the already formidable and frightening arsenal available to creditors. One other worrying aspect of the proposed legislation concerns the potentially disastrous consequences for employees who are not in secure permanent employment. The employer will now be privy to information relating to their debts which could seriously militate against their future job prospects".*

4.4 Submission of the West/North West MABS Region to the Department of Justice on debt and the legal system.

This submission provides a critique of the current legal system in relation to debt recovery as well as an analysis of the possible effects of AOE legislation on indebted consumers. In effect, this submission reiterates many of the points already made by the different respondents in the questionnaire already detailed in this section of the report. Similarly, many of the deficiencies in the current legal system for debt recovery pointed out in the submission are also echoed in Section 2 of this report[71].

On the specific issue of attachment, the executive summary of the submission states as follows:

> *"We are not opposed to attachment of earnings in principle. However, we have grave concerns about a system of direct deduction from income being introduced within a legal system which is inherently flawed when it comes to protecting vulnerable people. Judging by the level of debate so far, there is no indication that there is an understanding of the problems faced by people in debt who want to pay but have difficulty in doing so. There are still a number of issues requiring debate. We are opposed to attachment of means tested benefits on the grounds of preventing poverty".*

Section 4 of the submission then went on to consider the Dail debate and press releases on attachment of earnings. The following is a synopsis of the points made by the submission:

- It was noted that the debate so far had focused on prison overcrowding and the possible savings that might be made by introducing attachment of earnings for non-payment of civil debt or fines. However, the submission pointed out that there are many other costs to the taxpayer that might result from AOE legislation, such as the increased use of court resources, Garda time and pressure on the health services.

- It was argued that civil debt and non-payment of fines should be considered in separate categories as the former results from civil proceedings and the latter from a fine imposed as a penalty for a criminal offence.

- The possible application of attachment orders to social welfare payments is opposed. The submission supported the Minister for Justice's observation in the debate on the Private Member's Bill that social welfare payments made to an individual often include sums in respect of dependants and that these should not be part of any payment subject to an attachment order.

- A number of questions in relation to the shape that any potential Bill might have taken are posed as follows:

Are the courts the appropriate forum to recover monies owed to a creditor given the high costs involved to the taxpayer?

Will the situation of those willing but unable to pay be differentiated from those who refuse to pay?

Will protection be provided in the event of possible discriminatory action that could be taken by employers against their employees subject to attachment?

How will the courts ensure a standardised practice in assessing ability to pay and what consideration will be given to maintenance, rent or mortgage payments in calculating protected income?

71 See further Page 19

What opportunity will a debtor have to participate fully in the process in terms of accessible information as to what is happening, the possibility of legal representation and the opportunity to place a full and honest picture of their circumstances before the court?

Finally, it also asks whether the responsibility of the creditor in offering the loan in the first place will be examined and what system of appeal will be put in place?

The submission's ultimate recommendation is an out-of-court debt settlement option, but pending its creation, the submission offers some interim solutions. In connection with AOE specifically, the submission recommends as follows:

1. Attachments should not be made to social welfare benefits;
2. The legislation should not proceed without consultation of debtor representatives;
3. An adequate standard of living should be provided for the debtor
4. An order should not be granted without an examination of means;
5. A third party should undertake means examinations.

Conclusion

It is difficult to argue with any of these recommendations either from the perspective of natural justice or from the more pragmatic viewpoint of what would be workable. It is also self-evident that the concerns of money advisors should be extremely relevant in framing appropriate legislation. It is notable that the observations made in the West/North-West submission show an awareness of the practical difficulties involved in establishing a workable AOE model for non-payment of civil debt or fines. Whilst undoubtedly money advisors are coming from a pro-consumer perspective as one would expect them to do, their concerns and hands on experience of the difficulties faced by debtors is in stark contrast to the rather one dimensional level of the Dail debate on the Private Member's Bill.

Some crucial points have been made by the money advisors concerned, not least of which is that attachment of earnings legislation on its own will provide no solutions to debt enforcement problems. Immediate changes need to be made to the Enforcement of Court Orders Acts 1926-1940 to make the system more accessible for the debtor pending the introduction of a debt settlement option for chronically over-indebted consumers for whom the legal system is entirely inappropriate. If AOE is to be introduced, the central issues raised by the money advisors - **protected income, multiple attachments, statements of means, irresponsible lending, employment protection, legal representation, accessibility and an appeals system** - need to be addressed in any potential legislation.

4.5 Views from the Irish Bankers Federation and Irish Finance Houses Association

Irish Bankers Federation

The IBF is the representative body for the financial services industry in Ireland, representing over 60 member institutions in all, including banks licensed by the Central Bank and banks/subsidiaries operating in the International Financial Services Centre. As such it is the representative voice for many of the creditors who might be likely to seek attachments were legislation to be introduced. The IBF and the Irish Mortgage Council (IMC) have recently agreed a Pilot Debt Settlement Programme[72] with the Money Advice and Budgeting Service (MABS) (assisted by FLAC), one of the aims of which is to encourage some Government action on the chronic debt issue.

The IBF have had concerns about the effectiveness of the system of debt enforcement for some time and submitted a position paper on these issues to the Department of Justice in October, 1997 following the deliberations of a special bank industry working group set up in 1996.

72 For further details – See Section 7, Page 66

It proposed "*a special quasi-judicial system for the processing of debt cases*" in order to "*facilitate an agreed voluntary settlement between debtor and creditor*".[73] Attachment of Earnings Orders and the imposition of Community Service were then proposed as possible sanctions to ensure adherence to voluntary agreements. Finally, the IBF effectively disowned the idea of imprisonment for non-payment of debt. Whilst claiming that the banks were only involved in 7% of the total number of committals to prison for non-payment of debts, the IBF were "*mindful, however,* ***that even one such committal is one too many****, we as an industry have taken the initiative to examine alternatives to debt enforcement. We look forward to discussing our Position Paper with the Department of Justice and with all other parties in due course*".

Research enquiries have revealed that the IBF's desire for further discussions was not accommodated by the Department but their willingness to explore alternatives has led to developments with MABS in the form of the Debt Settlement Pilot. It is to be hoped that this will provide the impetus for legislators to examine the alternatives themselves.

Irish Finance Houses Association

The IFHA is the umbrella body representing those banks and finance companies in Ireland who are principally involved (in consumer credit terms) in the provision of instalment credit, in particular Hire Purchase and Consumer Hire agreements. These agreements generally have the acquisition of goods by the hirer as their objective and the most prevalent of these is that of car finance, an area of consumer credit that has dramatically increased in recent years. The offices of the IFHA also house the Irish Credit Bureau which is involved in providing information to creditors on the credit rating of potential borrowers, in particular in relation to how current and past agreements have been conducted by applicants, with a view to making a decision on such loan applications.

Response to Questionnaire

For the purpose of this report, a short questionnaire was submitted to the IBF and the IFHA and the following are the questions and the responses they elicited respectively:

Question 1 - *Have the Associated Banks/Finance Houses a policy position on the attachment of earnings procedure and, if so, could you summarise it?*

IBF - The Irish Bankers Federation, the representative body for the Irish financial services sector, would welcome consideration being given – by the Department of Justice and relevant creditor and debtor representatives - to the introduction of an Attachment of Earnings Order and the imposition of community service as effective alternatives to debtor imprisonment.
IFHA – No formal policy position has been taken in the absence of a clear description of the suggested attachment procedures and administration.

Question 2 - *Do you feel that imprisonment as a sanction for non-payment of civil debt should still lie at the back of the attachment of earnings procedure?*

IBF - IBF member institutions advise that the threat of imprisonment can prove a very effective deterrent against ongoing irresponsible behaviour on the part of some debtors. However, the same institutions are anxious to work with others in identifying equally effective alternatives.
IFHA – No.

Question 3 - *Under what circumstances could you visualise creditors using attachment of earnings orders?*

73 *Proposals address issue of Debt Enforcement* – IBF Press release, October 6th, 1997

IBF - The IBF believes that member institutions would use an Attachment of Earnings order where satisfied about the prospects of its delivering an acceptable programme of debt repayment.
IFHA – Anecdotal evidence suggests that current attachment of earnings procedures in England and Wales do not operate satisfactorily from a creditor perspective.

Question 4 - *Under what circumstances would you envisage creditors feeling it was not worthwhile to utilise it?*

IBF – Where member institutions could not be satisfied along the lines stated in response to Q.3
IFHA – Where attendant procedures were time consuming, costly or cumbersome.

Question 5 - *Do you think the responsibility for the loan should be examined before a court decides whether to make an order or not?*

IBF – In the normal course of events, the creditor examines each loan application using established, prudent criteria. This process helps to identify, in the first instance, the appropriateness or otherwise of a loan application. On approval of a facility, and in accordance with the terms of the Consumer Credit Act, the borrower is provided with substantial, relevant information and can avail of an important cooling-off period before final acceptance of the credit facility. In these circumstances, the IBF view is that subsequent examination by a court should not prove necessary or relevant.
IFHA – No.

Question 6 – *Have you any other observations to make on this or related issues?*

IBF – A copy of an IBF news release of 6th October is attached here
IFHA – No.

Conclusion

There is not a lot of information to go on here and to a certain extent the responses are fairly stock ones and much to be expected in the circumstances. Of some note is the response by the IBF to Question 2 that some member institutions find the threat of imprisonment to be an effective deterrent although they are happy to explore alternatives. It would be interesting to research how many judgement debtors faced with committal borrowed from family members or high cost credit sources such as moneylenders (legal or otherwise) in order to stave off imprisonment as opposed to miraculously finding the money as may seem to be implied by some member institutions in the IBF response.

The response by IBF to Q.5 on irresponsible lending is, again, routine. However, one wonders to what extent 'prudent lending criteria' are used when clients are presenting to MABS with, in some cases, multiple credit agreements that they are unable to service even with reasonable incomes. Equally, the high ratios of mortgage provision in relation to income and housing cost during the property boom are hardly evidence of prudence when, in many cases, clients are borrowing from other institutions in relation to car finance and credit cards[74]. It is now not uncommon for clients to present to MABS with a plethora of credit agreements, including a number of credit cards debts simultaneously. Such has been the concern on the part of the Central Bank at the growth in private sector credit that it has warned mortgage lenders to apply stress tests to customers to ensure that mortgage instalments could be repaid in the event of an increase in interest rates.[75] It is understood that by and large, the Central Bank is happy with the response of institutions to this call.

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74 See, for example, Irish Times, Business This Week, Feb 2002, McCaffrey.U – ' Most lenders are now prepared to offer 92% mortgages to home buyers, with some approving 100% loans for investors who wish to cross-securitise the loan with existing property.'

75 See Current Account, No.6 – Journal of the National Money Advice Training Service

The IFHA response to Q.3 suggests that anecdotal evidence is available to the effect that AOE does not operate satisfactorily from a creditor's point of view in England and Wales. It is true that some creditors in the U.K, in the course of the Lord Chancellors Debt Enforcement Review, expressed some dissatisfaction with existing AOE procedures but it is safe to assume that they were hardly likely to express satisfaction in the context of such a review. Furthermore, the review itself states that **63,000** applications for Attachment of Earnings orders were made in England and Wales in 1997, arguably a significant figure[76].

Overall, it is none too surprising that the creditor approach on Attachment of Earnings is a cautious one and that the view has been expressed by both representative bodies here that AOE would be used where it could deliver '*an acceptable programme of debt repayment'* (IBF) or '*where the attendant procedures were not time consuming, costly or cumbersome'* (IFHA). Creditors will already have expended money on legal fees in the course of obtaining judgement and may be fearful of not recovering those fees, let alone spending more on AOE applications. It is, perhaps, for this reason that debt settlement is of interest to IBF members. At least, there is the prospect of obtaining some limited repayment even in drastic cases, without additional expenditure.

Finally, it is also to be hoped that a realistic approach by the credit industry would be likely to prevail in relation to the question of protected income. AOE can only hope to succeed where the debtor is not unduly penalised by a prohibitive attachment whilst continuing to work.

76 Enforcement Review – Consultation Paper 3 – Attachment of Earnings, Charging and Garnishee Orders, Page 4

SECTION 5

AN ANALYSIS OF THE PRIVATE MEMBERS BILL AND DAIL DEBATES ON THE ENFORCEMENT OF COURT ORDERS

5.1 Introduction

The Private Member's Bill (PMB) was officially entitled *The Enforcement of Court Orders Bill* and was introduced to update the existing Enforcement of Court Orders Acts of 1926 - 1940[77]. It was ultimately debated at second stage in the Dail on 24 February 1999, put to a vote and defeated. As with many Private Member's Bills, it can be speculated that the principal motivation was to put pressure on the then Government to introduce its own promised legislation as announced in its legislative programme.

The accompanying press statement described the Bill as being "*designed to reduce the pressure on an already overcrowded prison system by providing the courts with an option to make an attachment of earnings order on debt defaulters*" [78].

It went on to claim that "*significant savings to the tax payer will result from the enactment of this Bill. It would successfully tackle the revolving door prison system which has brought our legal system into disrepute and it would save on valuable Garda work hours for other operations*" and it added that "*in 1994, the last year for which there are official figures available, 2,443 individuals were committed to prison for failure to pay fines, civil debts, contempt of court and sureties. Fine Gael estimates that over two million (punts) could be saved annually by the enactment of this Bill*".

Finally, the Bill offered a number of alternatives to prison for debt defaulters. These were:

a) *Community Service Orders.*
b) *Attachment of Earnings Orders*
c) *Attachment of Welfare Orders*
d) *Money Payment Supervision Orders.*

The Government responded by issuing its own press statement[79]. Then Minister for Justice, John O'Donoghue (T.D), rejected "*the suggestion that is being put about that overcrowding in the State prisons is being caused by the jailing of fine defaulters and/or civil debtors*".

He added that suggestions of this nature were "*totally disingenuous*" and " *that the truth of the matter is that at any given time on any given day approximately 1% of the total prison population housed in the State's 14 prisons, places of detention and open centres consists of fine defaulters.*"

The Minister announced that he would be bringing forward his own proposals as soon as possible to adequately reform the system of jailing fine defaulters, civil debtors and so forth. However, he added that he *"would not for a moment suggest that these proposals would significantly impact on the problem of overcrowding in jails*".

This exchange of press releases helps to illustrate how the preliminary debate in relation to the PMB focused to a large extent on differing versions of the pressure on the prison system and not on the mechanics of the various forms of attachment being proposed. The impact that attachment is likely to have on the economic circumstances of low to middle income consumers is of more pressing concern to those working with the over-indebted than the functioning of the criminal justice system, important though that may be. However, in the various press releases on the PMB and in the debate that followed, precise practical details of how attachment of earnings would function within the legal system were sketchy to say the least.

77 Proposed by Jim Higgins,T.D, then Fine Gael spokesperson on Justice, Thursday, 21 May, 1998.
78 Issued by Fine Gael National Press Office, Leinster House in the name of Deputy Higgins, May 21st, 1998
79 Issued by the Department of Justice, Equality and Law Reform – 21 May, 1998.

In the apparent clamour to free up prison spaces, the potential complexity of operating an attachment of earnings system appears to have been ignored. It is hoped that the detail in this report will demonstrate these complexities and equally the detrimental impact that they can have on consumers without the appropriate safeguards being introduced to accompany them.

5 .2 Description of the Enforcement of Court Orders Bill 1998

Although the Bill does have some noteworthy features which are described in due course, the overriding impression is that it fails to grapple with some of the more thorny issues involved in operating an equitable Attachment of Earnings system. It is also apparent that some of the sections in this Bill are heavily derivative of the Family Law (Maintenance of Spouses and Children) Act, 1976, the legislation that introduced AOE for non-payment of maintenance.

The following is a brief examination of some of the more salient provisions in the Bill. These are referred to in the past tense as the Bill was ultimately defeated.

Section 4

This section allowed an application to be made to the District, Circuit or High Court, either to secure payments under a Court Order or in default of payment of a penalty (i.e. a fine). It then specified that an order would not be made without the consent of the civil debtor unless the court was satisfied that the debtor or fine defaulter had**, without reasonable excuse,** defaulted in the making of any payment under the relevant antecedent order or financial penalty. No guidance was provided as to what would have constituted a reasonable excuse. For example, would inability to pay due to an unfavourable change of circumstances have qualified as a reasonable excuse?

This section went on to require that the court specify the normal deduction rate (NDR), the periodical payment the court thinks it reasonable to set in order to satisfy the amount of the court order or fine. In addition, a Protected Earnings Rate (PER) was to be set by the court. Should the normal deduction rate have left the debtor with an income less than the PER, it was to be amended downwards. The PER was to be set "*having regard to the resources and needs of the civil debtor or fine defaulter*". Basically, this is the same imprecise formula that is applied in relation to AEOs for non-payment of maintenance.

Sections 5-7

Sections 5 - 7 were technical in nature and related to matters such as the kind of notifications to be provided to the debtor's employer, the obligation of employers to disclose information on employee's earnings if requested and the obligation to provide a receipt to the employee whose earnings were being attached. These sections also provided that the civil debtor or fine defaulter had to notify the court in writing on every occasion that they left their employment.

Section 8-13

These sections of the Bill dealt with what constitutes earnings, how persons in the service of the State would be treated and how orders could be varied or discharged. Section 12(1) specified that once an AEO had been made, any other enforcement proceedings that the creditor was in the process of taking would lapse. However, subsection (2) also stated that any AEO in existence would cease if any other enforcement action had been granted by a court. This may have been to cover a situation where the AEO had been ignored or the employee had left their employment and the creditor decided to enforce the judgement by another method. Nonetheless, the lack of clarity in this section is symptomatic of the lack of clarity of the Bill in general.

Section 14-18

Section 14 of the Bill dealt with the controversial proposal that the Minister for Social, Community & Family Affairs would, by regulation, have the power to introduce attachment of **social welfare** orders. This would involve a court applying (presumably at the behest of a creditor) to the Minister to deduct sums from a person's social welfare payments. Before making the application, the court was to be charged with enquiring as to the defaulter's means. Quite what was intended here is uncertain given that means tested Social Welfare (S.W) payments are set by the State at minimum subsistence levels, but it may have been implied in this section that any given S.W recipient might be in receipt of other income over and above their S.W payment that was not being declared.

Section 15 of the Bill dealt with the issue of community service. It suggested that the Criminal Justice (Community Service) Act 1983 be amended to allow for the imposition of community service orders where a person has defaulted on payment of a penalty imposed by the District Court (i.e. a fine) or where a person has defaulted on payment of a civil debt.

Section 16 sought to introduce a right for the person who had been fined to apply for further time to pay.

Section 17 sought to introduce the possibility of instalments to pay off a fine. However, this would have been at the court's discretion only. Where this option was considered inappropriate (for example, where the failure of the defaulter to make payment was considered to have been wilful), a community service order could have been sought instead.

Section 18 provided that where a person had been allowed time to pay off a fine, the court could order that a probation and welfare officer supervise such person in paying off the fine. In effect, this appears to be the **"money payment supervision order"** referred to in the Fine Gael press release. This option already exists in the UK and is sometimes utilised there by Fine Enforcement Officers.

5.3 Analysis of the substantive content of the Bill

Having provided a brief description of the Private Member's Bill, it is now proposed to evaluate it:

(1) Under a number of AOE headings that have been included
and
(2) In relation to significant AOE features that have been omitted.

5.3.1 AOE Matters Included

Minimum Income.

The provisions on minimum income were inadequate. Section 4 repeated the formulae set out in the maintenance attachment legislation as regards the normal deduction rate (NDR) and the protected earnings rate (PER). It specified that the PER should be set having regard to the resources and needs of the civil debtor or fine defaulter. No guidance was provided as to how this might be calculated and there was no provision in the Bill for regulations to be introduced on foot of the Bill that might provide some guidance or rules in this area.

This phrase 'having regard to the resources and needs of the civil debtor' is open to contrasting interpretations. It seems likely that two persons with similar earnings may be treated differently, depending on how this clause is interpreted and the perspective of the judge involved. This is an insufficient and imprecise basis upon which to set something as vital to the debtor's interests as minimum income.

Relevant Court

The Bill provided that an application for an AEO could be made in either the District, Circuit or High Court depending on where original judgement was obtained. If such applications are to be made in the courts, one court only should be chosen. Under current debt enforcement legislation, an application for an Instalment Order is always made through the District Court, regardless of where judgement was obtained[80].

Attachment of Social Welfare

The proposal in Part III of the Bill to potentially introduce attachment of social welfare payments is inequitable and would be likely to lead to further social exclusion of an already excluded minority. It is the view of many in Ireland that social welfare payments alone leave families with an inadequate income to meet their basic needs[81]. The survey in this report of attachment models in European jurisdictions reveals that many European countries do not permit attachment of social security[82]. Those that do tend to be countries with relatively high rates of social security, for example, the Netherlands which sets protected earnings at 90% of applicable social security payments.

If such a measure had been introduced or were to be introduced at some time in the future, it is interesting to speculate which creditors might seek such an order. On the civil debt side, the credit sale companies associated with the utilities extend credit to social welfare recipients and might be tempted to pursue this avenue. Equally, a consumer who took out a loan with a credit institution whilst employed but who subsequently lost their job and defaulted, might be targeted. On the fines side, it is likely that failure to pay a fine imposed by a court will often be caused by the defendant's inadequate income. In this situation, attachment might be viewed as an option by the State to enforce payment of instalments whenever they are introduced.

Community Service Orders

Although the notion of community service for non payment of debt is preferable to imprisonment, it must still be viewed as a criminal sanction in what is a matter of civil law between two private parties. Furthermore, the Bill did not state whether the community service order to be imposed purged the fine or debt. If it did not, the debtor or fine defaulter is still indebted having performed their community service. If it did, the creditor would not have received anything.

Probation and Welfare Service

A role was envisaged in the Bill for the Probation and Welfare Service in recommending community service orders and supervising payment of fines by instalments. However, this is a service already under considerable pressure and neither the Bill nor the press release accompanying it suggested any increase in resources.

5.3.2 AOE Matters Omitted

Multiple or Consolidated Attachment

The question of how to deal with multiple attachments, such a difficult AOE issue, is not considered in the Bill. Clearly, an indebted person may have more than one creditor who, having obtained a judgement may choose to seek an attachment. Attachments might be sought in respect of different types of debt including debts to the State and non payment of maintenance as well as civil debt. If more than one attachment is permitted at any one time, it will result in a smaller minimum income for the debtor and his/her dependants. If this is not allowed, it will prolong the repayment period as other creditors line up to take the place of the creditor whose attachment has been satisfied.

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80 Enforcement of Court Orders Acts 1926-1940, Sections 15-17.

81 *Monitoring Poverty Trends,* Economic and Social Research Institute (Dublin: Combat Poverty Agency and the Department of Social, Community and Family Affairs, 1999).

82 See Section 9 – Page 89

Equally, a consolidated attachment whereby creditors with judgements are paid *pro-rata* might be introduced. However, this could also elongate the repayment period to potentially intolerable lengths for the debtor and render the whole procedure meaningless if the debtor becomes unemployed. For this reason it is again argued that attachment as a debt enforcement tool on its own will not work. Complementary measures are needed to cope with cases of multiple indebtedness[83].

Priority between Attachments

A related question also not evidently considered is what relationship should exist between a maintenance attachment and a civil debt or fine attachment. There is no indication in the Bill as to what priority will exist between these attachments. As this report will demonstrate, many jurisdictions allow an attachment for the support of a spouse or child to overtake existing attachments for non-payment of civil debt to a creditor or a fine to the State[84]. Similarly, in many of the jurisdictions where protected earnings rates are set down by regulation, the level of retained income will differ depending on whether the attachment is for non-payment of civil debt or maintenance debt.

Information on existing judgements

It is clear from the Dail Debate on the Private Member's Bill that a new information technology system is to be introduced as part of the functions of the Courts Service. This would seem an opportune time to review the availability of accessible information on the financial and legal position of persons in debt in order to prevent additional and possibly futile legal proceedings being issued by creditors.

A later section of this report will consider the benefits of an office such as the Enforcement of Judgements Office in Northern Ireland whereby creditors, judges and court officials alike can become aware of the financial position of the debtor and any other outstanding orders or legal proceedings currently being taken against them[85]. However, it is notable that the Bill does not take account of the extra burden that attachment applications would place on the courts and on court officials, nor does it call for increased resources to be put at the disposal of the Courts Service to streamline debt enforcement proceedings.

Employment Protection

There were no employment protection measures in place in the Bill. The evidence gathered for this report, both in relation to maintenance attachment of earnings in Ireland and attachment for non-payment of civil debt in other jurisdictions, tends to indicate that the making of an AEO may well jeopardise an employee's advancement prospects or, indeed, threaten the very continuation of their employment. While there is no doubt that AEO's may impose an administrative burden on an employer, this should not entitle an employer to draw conclusions about the trustworthiness of an employee that might result in discriminatory treatment. Legislative protection should be put in place in this respect.

Suspended Attachments

On a related issue, the Bill does not provide for suspended AEO's. A suspension of the order after the creditor has made a successful application will at least give the debtor the option to make the payments voluntarily against the threat of an attachment in the background. The clear advantage of including this measure is that the debtor's employer does not become aware of the debt(s) with the negative implications that this might have for their employment and employment prospects.

Irresponsible Lending

In most consumer debt cases, the creditor obtains a court judgement that the amount is owed, in default of a defence. This means that the debtor does not get an opportunity to put forward their side of the story, unless they are prepared to run the risk of additional legal costs being added to the amount owed. It is therefore common that the behaviour of the creditor is not focused upon in debt cases, from the

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83 See Section 7 on Debt Settlement Legislation and Section 8 on Administration Orders and Consolidation Orders for example

84 See Sections 8, 9 and 10 on Attachment of Earnings in other jurisdictions

85 See further Section 8 on attachment in the U.K and Northern Ireland.

service of legal proceedings through to the granting of the decree, except insofar as court officials will seek to verify that the amount claimed is mathematically correct. The Private Member's Bill takes the same approach. At no time up to and including the granting of the AEO is the conduct of the creditor considered to be a relevant factor in determining the extent of the attachment.

It has been apparent for some time to many working on behalf of people who are indebted that there are many whose liability stretches across a number of credit agreements simultaneously and whose ability to service these agreements is tenuous. Indeed, the remarkable growth in the provision of consumer credit in Ireland can be attributed in no small part to the relaxation or, in a minority of cases, absence of assessment criteria before a decision is made to extend credit to a given consumer[86].

Credit reference agencies such as the Irish Credit Bureau Ltd hold information on the current credit standing of individual members of the public and how they may have dealt with previous loans they have been involved in, both in terms of the timing of repayments and the overall settling of the agreement. In addition, many credit institutions have their own formal and informal methods of evaluating the credit rating of an individual, known as credit scoring. By and large, however, this is a largely secretive process to which the consumer does not have access, subject to limited rights under the Data Protection Act, 1988 in relation to automated information and the Consumer Credit Act in relation to manual records. Equally, it is not as yet a process that courts have had the opportunity to examine in any detail for its consistency and accuracy prior to making fundamental decisions affecting the welfare of indebted persons and their dependants.

The Private Member's Bill, similarly, does not consider this side of the equation. At a time when interest rates have been comparatively low and credit institutions have felt the need to lend increased amounts of money in order to sustain and in many cases increase their levels of profit, money has been advanced to consumers whose ability to repay based on their current income and credit commitments, is extremely questionable. This, of course, is not a one sided equation and many creditors routinely lament the irresponsible borrowing practices of some consumers and, in some cases, the falsified information that leads to the loan being granted. However, this begs the question as to what lengths these creditors went to verify this information in the first place.

It is also appreciated that there is a delicate balance to be struck in a credit driven society between under and over supply of credit, and that all credit extension carries an inherent risk. Nonetheless, there is something fundamentally disturbing about anecdotal examples such as a person on a low income being supplied with a credit card and then having their credit limit unilaterally increased without consultation. Should that person then avail of the increased credit and subsequently prove unable to meet their obligations, the current system fixes them with the entire legal responsibility. This is not an argument for the abdication of responsibility on the part of the consumer but for a **shared responsibility**.

Nor should it be forgotten here that there is an imbalance of power in the relationship between the credit institution and the consumer. Credit institutions are operating at high profit levels and have the provision to write off bad debt for taxation purposes. The inconvenience caused by the failure of a consumer to repay money borrowed is in the main, financial and administrative. On the other hand, this report has already made the point that the potential consequences of indebtedness and legal proceedings for the consumer and their dependants in general far outweigh the damage caused to the credit institution.

It is, therefore, suggested that the legislature should examine the possibility of writing off a portion of a loan where it can be established that the creditor has failed to adequately check the applicant's credit standing or has clearly acted irresponsibly in offering the loan following a credit check. In the specific case of AEO legislation, a court should be obliged, in particular where the judgement has been obtained

86 For some relevant statistics, see Section 7, Page 59-60.

without a defence having been offered by the debtor, to examine the circumstances surrounding the loan before deciding the level or indeed the appropriateness of an AEO.

5.3.2 Advantages of the Bill

Although the deficiencies and omissions in the Bill have been considered in some detail, it did at least attempt to remedy some obvious injustices. Any measure which provides for an end in principle to imprisonment for non-payment of civil debt or fines is praiseworthy in itself. In addition, the proposal to provide for payment of fines by instalment is necessary and indeed, the Minister for Justice appears to have conceded in the course of the debate that AEO's should not be introduced for non-payment of fines until an instalment system exists. Lastly, the right to apply for time to pay a fine is also potentially useful where the individual may have the means to pay but cannot for some reason make immediate payment.

5.4 Debate on the Private Member's Bill

5.4.1 Introduction

It is not intended to delve in any great detail into this debate as it concentrated primarily on the fines issue as opposed to non-payment of civil debt. The point has already been made that it was disappointing in terms of its lack of analysis of the mechanics of attachment of earnings. In summary, the majority of opposition TD's contributions amounted to a condemnation of the current position where non-payment of civil debt or fines can lead to committal to prison. Deputy after Deputy from the opposition side of the House provided both anecdotal evidence of the unnecessary misery to the debtor and unnecessary expense to the State caused by this procedure. On the other hand, many TD's from the government parties questioned whether the removal of the imprisonment option would lead to an increased level of fine defaulting.

5.4.2 The view of the then Minister for Justice

The then Minister responded on behalf of the Government to the Fine Gael presentation of the Bill to the House[87], praising the Bill in principle but taking issue with its approach. He stated that:

> *"We are concerned that what the Bill proposes could undermine the existing system for the payment of fines, could prove vastly and disproportionately expensive to administer, could place impossible administrative burdens on both the courts and the Gardai and, despite claims to the contrary, would make no significant improvement with regard to existing pressure on prison accommodation"*[88].

The Minister then went on to assure the Dail that the type of issues dealt with by the Bill would be addressed by the Government in their own legislation in due course. However, no detail was provided as to how this would be achieved and as already noted such a Bill has not materialised. For example, the Minister criticised the Bill on the basis that it would place a further burden on both the court system and the Probation and Welfare Service. However, it is arguable that this comment is more than a little disingenuous as it is difficult to envisage a situation where such legislation would not place such an extra burden.

In relation to the Probation and Welfare Service, the Bill suggested that its function would have been to advise on the possibility of a community service order being made in lieu of a committal order. Equally it would have had to supervise the extra time being given to a person found guilty of a minor criminal

87 By Deputies Higgins, Coveney and Ring respectively, Dail Debates Official Report, 24/2 /99, Pages 1 -9
88 Dail Debates Official Report, 24/2 /99 - Page 10

offence to pay their fine. There was no suggestion in the Minister's contributions as to what other service might conceivably carry out these functions but neither is there any suggestion that these provisions in themselves should not have been included.

The Minister identified the central difficulty of the Bill as being the provisions on fines. He stated that "*people pay fines at present on the understanding that failure to do so would lead to imprisonment*" and "*it may be the case that people who are prepared to pay fines under present arrangements would be happy to take their chances instead with the alternatives in relation to non-payment which the Bill provides. Were this to happen, the current fines system could be grievously undermined*".[89]

It is hard to understand the logic of this argument. If the principal purpose of attachment of earnings legislation is to put an end to imprisonment for non-payment of fines for all the reasons already outlined in this report, how can imprisonment simultaneously lie at the back of the procedure? If it already costs the State a considerable amount to process these committals with the additional cost that the prison sentence purges the fine, how can this method of enforcement come remotely close to the potential efficiency of fines by instalment and AEO (when feasible) where deductions are reasonable and guarantee the debtor a reasonable protected income? Finally, did the former administration not commit itself in both its legislative programme and its announcement of May 5th, 1998 to a Bill that would lead to fines and non-payment of debt being deducted from earnings?

Further on in his response, the Minister did acknowledge that non-payment of debt gives rise to different considerations because Instalment Orders already existed in such cases. He further confirmed that the option to attach earnings where there is a failure to comply with Instalment Orders was an issue being addressed by his Department. He outlined the improvements he felt needed to be made to the administration of the court system by the enactment of the Courts Service Act and the establishment of a Courts Service Transition Board. He acknowledged that for many years the process of decision making in the criminal justice system was hampered by the lack of adequate information systems to underpin decision making. He went on to explain that a newly created ***Information Systems Development Programme*** for the courts would improve this situation. Finally, the Minister closed by explaining that although the Government had grave doubts about the practicality of much of what was proposed in the Bill, he recognised that it gave rise to issues which needed to be addressed.

5.5.3 Contribution from T.D's

Contributions from the Government parties thereafter varied significantly. However, it was a disappointing feature of the debate that TD's contributions tended to divide along party lines in support of or against the Bill. Some cast doubt on the benefit of ending committal for non-payment of fines in particular. Michael Collins, T.D (F.F) stated that "*it appears the only purpose the Bill will serve is to add bureaucratic layers to the justice system and give the impression that imprisonment will never be an option to be considered in the case of fine defaulters*". Echoing the stance of his Minister he went on to add that these proposals "*could have adverse implications for the payment of fines. People pay fines at present on the understanding that failure to do so could lead to imprisonment. They might now take the view that they might be prepared to take their chances with the alternatives provided for in the Bill for such non-payment.*"[90]

John Perry TD (FG) suggested that a far more appropriate way of enforcing judgements against those of inadequate means would be to have "*work orders*" made by the courts, under which the debtor would work for the creditor to pay off his or her debt. He added that the courts could also make orders whereby the debtor could be employed on community work schemes and the value of the work be assessed and the State would then pay the creditor for the work done. What the debtor and his/her dependants were supposed to live on in the interim was not addressed.

89 Dail Debates, Official Report, 24/2/99, Page 13
90 Dail Debates, Official Report, 24/2/99, Page 26

Almost without exception, the contributions of TD's failed to mention the welfare of the over-indebted person at any stage. There was little examination of the consequences on the debtor of attachment of earnings and at no stage did Deputies seem to be aware of or concerned with the mechanics and complexities of attachment. The question of how to calculate and at what level to set the Protected Earnings Rate (P.E.R) was rarely mentioned and very few cast any doubt over the suitability of a District Court Judge to make this decision or questioned upon what information it should be made.

There were exceptions. Sean Ardagh TD (FF) stated that the items which concerned him most in the Bill were the issues of employment and poverty. He stated that "*people on the poverty line will often buy videos and washing machines on hire purchase, putting them in a position where they have a debt they cannot afford to repay. In such circumstances, the attitude should be* ***contractor beware*** *rather than buyer beware"*[91].

This comment appears to indicate a willingness to look at the question of irresponsible lending. In relation to S.4(2), Deputy Ardagh remarked that the order was to be directed at the employer and asked whether it was possible that employment would be jeopardised by the provisions of this Bill? He noted that compliance with an AEO would involve a huge amount of bureaucracy, that may deter an employer from employing people and that an AEO might be good reason for many employers to consider the continuation of a person's employment. He then asked who would decide on the PER and that a court might not be the right body to make such a decision. Finally, he said the Bill deserved more thought and it would be good to have it as a basis for further discussion.

5.5.4 Conclusion

If the debate on the Private Member's Bill is anything to go by, there is a considerable lack of awareness amongst the Deputies involved of the potential complexity of Attachment of Earnings legislation and the social and legal implications of over-indebtedness in general. To be fair, this may be attributable to some degree to the tone set by the press release accompanying the Private Member's Bill with its references to reducing the pressure on an overcrowded prison system and savings for the taxpayer. Nevertheless, it is disturbing that so few T.D's grasped the opportunity to widen the debate into a broader discussion on the widespread extension of credit and the occurrence of debt and how the Irish legal system is placed to cope with it. At no stage in the debate was the current system analysed for its shortcomings except on the prison issue and there appears to be no reference whatsoever to attachment models in other jurisdictions in order to provide a backdrop for a more enlightened discussion.

91 Dail Debates, Official Report, 25/2 /99 – Page 3

SECTION 6

EXISTING ATTACHMENT OF EARNINGS PROCEDURES IN THE IRISH LEGAL SYSTEM

6.1 Introduction

Attachment of earnings is currently available in Ireland *only* to enforce maintenance orders made by a court for the financial support of spouses and/or children (known in other jurisdictions as alimony / child support).

The Department of Social and Family Affairs has operated a Household Budgeting Scheme for a number of years, in conjunction with An Post, whereby social welfare recipients can *voluntarily* have deductions made from their payments in order to assist with paying regular bills such as local authority rent, tenant purchase or mortgage payments, or utility payments such as electricity, gas or telephone. It is proposed to briefly examine both of these procedures.

Lastly, the Housing (Miscellaneous Provisions) Act, 1997 allows for the potential deduction at source of a portion of a local authority tenant's social welfare payment if they have fallen into arrears with their rent, but this provision has not been invoked to date.

The principal emphasis in this section will be on AOE in relation to maintenance orders. The basic procedures will be outlined and some views as to their effectiveness highlighted, with a view to gauging how attachment might work in the civil debt area were it to be introduced. By identifying and analysing deficiencies in these procedures, it is also hoped to learn for future reference which features should be avoided if an effective and equitable AOE system is to be introduced for non-payment of civil debt or, indeed, fines.

6.2 A summary of the law in relation to Maintenance and Attachment of Earnings

6.2.1 Maintenance Applications

The Family Law (Maintenance of Spouses and Children) Act 1976, (as amended[92]) provides that a court has the power, where a spouse has failed to provide proper financial maintenance for his/her spouse and any dependant children, to order the making of periodical payments on the application of that other spouse, for such a period and of such amount as the court considers proper. Factors taken into account in deciding the appropriate payment include the income, earning capacity, property and other financial resources of the spouses and dependent children, and the financial and other responsibilities of the spouses towards each other and any dependent children, including the need for care and attention. Subsequent case law has elaborated upon the considerations a court must take into account in arriving at an appropriate maintenance payment. Any parent who is not a spouse of the other parent can apply for maintenance in respect of their child/children only but not in respect of themselves.

The District Court, and on appeal the Circuit Court, has a maximum jurisdiction to award €500 per week maintenance in respect of a spouse and €150 per week each in respect of a dependent child or children[93]. The Circuit Court has jurisdiction to award unlimited maintenance (except on appeal from the District Court where it is confined to the above limits) as has the High Court. Such periodical payment orders of maintenance are usually made in the course of judicial separation or divorce proceedings.

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92 By the Judicial Separation and Family Law Reform Act, 1989 and the Family Law Act, 1995 and added to by the Family Law (Divorce) Act, 1996.

93 Under the Courts and Court Officers Act, 2002

6.2.2 Operational rules in relation to maintenance attachment

Prior to 1976, where a spouse had failed to pay the amounts due under a maintenance order, the only way to enforce the order was to seek to have the spouse imprisoned[94]. Effectively, this was the same method as described earlier in relation to committal orders for non-payment of civil debt. However, as Walls and Bergin (1997: 139) note:

> *"It is most unusual for maintenance debtors to be imprisoned for failing to make payments unless the failure to do so is clearly contemptuous and deliberate. The court would also have to be quite satisfied that the maintenance debtor had sufficient funds to make the payments"*[95].

Although it is still possible to be imprisoned for failure to pay on foot of a maintenance order, The Family Law (Maintenance of Spouses and Children) Act 1976 introduced attachment of earnings as an alternative method of enforcing maintenance orders to the committal order process[97]. As with attachment of earnings orders in general, the application can only be made in relation to a person 'to whom earnings fall to be paid' so that this procedure does not apply to the self-employed for whom the committal procedure is the only option in the event of non-compliance. In relation to any proposed Attachment of Earnings Bill for non-payment of civil debt or fines, the same is likely to be the case.

Under the 1976 Act, the order could be applied for by the spouse or by the District Court Officer to whom payment was likely to be made, but it was only possible to apply for an attachment of earnings order where the maintenance debtor had defaulted in making payments under the maintenance order. Default, therefore, had to be proved before the order could be made. However, since the Family Law Act 1995[97] and the Divorce Act 1996[98] it is now possible to look for an attachment of earnings order at the same time that periodical payments of maintenance are ordered. Indeed, it would appear that the onus of proof is on the maintenance debtor to show that they are likely to make the payments without them having to be attached, rather than the other way round. In order to decide on this issue, the court would have to consider the maintenance debtor's financial record and spending patterns.

It would be critical not to replicate such an approach in any prospective attachment of earnings legislation for non-payment of civil debt. This would be the equivalent of granting an attachment of earnings order at the same time as the Instalment Order granted to enforce the judgement debt. It is only fair that a judgement debtor be given the opportunity to meet the terms of the Instalment Order before any communication would take place with their employer, with all the negative consequences that might entail. It is also worth noting that in other jurisdictions (for example, Northern Ireland or England and Wales) a court has the option, following the failure of the debtor to meet the terms of an Instalment Order, to make a suspended attachment of earnings order whereby the judgement debtor undertakes to pay the instalment amounts and the attachment of earnings order is put on hold.

Walls and Bergin[99] also note, in relation to attachment of earnings for non-payment of maintenance and the employment situation of the debtor, that

> *"The making of an attachment of earnings order can sometimes lead to difficulties with promotion at work, whether consciously or unconsciously on the part of employers. The making of such an order generally implies that the paying party either has defaulted or will default in supporting his or her spouse and infants. An attachment of earnings order should not be made lightly and, indeed, should not be sought by practitioners on their client's behalf without first considering the long-term effects of the order".*

94 Section 8 – Enforcement of Court Orders Act, 1940
95 Walls.M & Bergin.D *The Law of Divorce in Ireland* (Dublin. Jordan's March 1997)
96 Section 10 – Family Law (Maintenance of Spouses and Children) Act, 1976
97 Section 43 (d)
98 Section 13(6)
99 The Law of Divorce in Ireland (1997: 140)

And further that[100]

> *"There is also no doubt that some employers would allow, either consciously or unconsciously, the making of an attachment of earnings order to interfere with the promotion and advancement of the paying spouse. An employer may feel that an employee who is involved in serious matrimonial difficulties is unable to devote himself fully to his job. If indeed the situation has advanced to the stage of the making of an attachment of earnings order, then an employer may be concerned that there will be numerous future applications to the court which will seriously interfere with the time spent by an employee at his place of work"*

If attachment of earnings is to be introduced in the area of civil debt, similar problems with employers might well apply, with the additional difficulty that a judgement debtor may be subject to more than one judgement debt, hence the possibility of more than one attachment or a consolidated attachment. The issue of the detrimental effect of attachment of earnings orders on the employment prospects of the debtor and indeed, the continuation of the debtor's employment will be revisited when looking at AOE in other jurisdictions[101].

6.2.3 Calculating the Maintenance Sum to be attached

Basically, a maintenance AEO issued by a court must specify:

(I) The normal deduction rate (NDR)
and
(II) The protected earnings rate (PER)

The normal deduction rate can be made up of two sums; the regular weekly or monthly maintenance payment due and a further sum in respect of arrears due, if any. The protected earnings rate, on the other hand, is the minimum income that the maintenance debtor is entitled to retain after the attachment has taken place having regard to the resources and the needs of the maintenance debtor. If the NDR, when subtracted from the employee's net earnings brings the maintenance debtor's income below the PER, it must be decreased in order for the debtor to receive the PER figure after the deduction has been made. Thus, the PER is meant to guarantee the maintenance debtor a minimum income in order to live. However, the legislation provides no guidelines on how to calculate this sum and it appears to be dealt with on a case-by-case basis by any given judge hearing the application.

The setting of a realistic PER is an issue of fundamental importance in relation to attachment of earnings, whether it is in respect of maintenance or non-payment of judgement debts or fines. Anecdotal evidence and some limited research evidence would seem to indicate that punitive attachment of earnings orders resulting in a low PER are a major employment disincentive as the prospect of a very limited income at the end of the week or month is likely to discourage the maintenance debtor from continuing in work[102].

Although, theoretically, the maintenance debtor who leaves their employment whilst an attachment of earnings order is in place is obliged to inform the court within ten days of that fact, there is no effective sanction in the current legislation for failing to comply with this obligation. Moreover, a maintenance debtor who leaves a PAYE employment may feel that obtaining a social security payment, with the possibility of work in the informal economy where earnings would not be attached, is a more attractive option than taking up another PAYE job. If maintenance debtors take this approach towards spouses and/or dependent children, it is unlikely that they will feel any greater moral duty towards credit institutions or other creditors who obtain attachment of earnings orders on foot of judgement debts.

100 Ditto (1997: 141)
101 See further Sections 8, 9 and 10
102 See Zaborowski.C and Zweifel.P *Getting out of Debt; Attachment of Earnings - In Who's Interest?* Page 16- In Switzerland 70% of Attachments ended up in a Certificate of loss being filed by the creditor. The authors speculate that this is due to lack of work incentives for debtors

6.2.4 Maintenance Attachment - Rates of Success

In the Irish context, a key study published in 1990 analysed the enforcement of maintenance orders granted in the District Court in the course of studying the general financial aspects of marital breakdown.[103] There follows a summary of the relevant findings of that study to this report:

1. Of maintenance orders payable through the District Court Clerk (as opposed to payable to the maintenance creditor herself) **28%** were never paid, **48%** were in arrears of six months or more, **10%** in arrears of six months or less and only **13%** were paid up to date. These figures were based on a sample of **705** orders made between 1976 and 1986.

2. Significantly, there was a higher default rate in relation to orders amounting to **less** than £60 (€76) as opposed to **over** £60. The author speculates that the reason for this may be that spouses against whom the higher awards were made were in better paid and more secure employment and, as such, may not have considered the burden of payment a sufficient reason to leave their job to avoid compliance, as would spouses in receipt of lower pay[104].

3. Attachment of earnings as a method of enforcement was **more** successful than the committal order procedure previously described under the Enforcement of Court Orders legislation. However, this finding must be placed against the general conclusion that an examination of maintenance orders in the District Courts revealed that (i) low amounts were awarded and (ii) there was generally a high rate of default.

4. In relation to the outcome of attachment of earnings applications, of the **165** applications made by wives with a maintenance order (some 20% of the original sample of 705), **61% (101)** were successful, **4%** were refused and **30%** were withdrawn. In **26%** of the cases in which an order was made, it was followed at some time by a notice from the employer to say that the husband had left that employment. In half of these cases, the notice was served by the employer within **six months** of the order being made. Ward suggests as a result that;

   "It can be inferred that in a significant number of cases the making of the attachment of earnings order precipitated the employee leaving his employment. Though the attachment of earnings order is effective for any further employment of the husband, there is great difficulty for the wife in tracing him to a new job. While some men in this situation will simply cease work and claim social welfare, others will move to new jobs in the hope of remaining undetected".[105]

An explanation for the high rate of departure from employment may be demonstrated by the protected earnings rates set by the District Court when granting the attachment of earnings order. In **54%** of these orders, the rate was set at a level less than the husband would receive on unemployment assistance (at that time £34 or €43). In **76%** of cases the amount of protected earnings was less than the single rate of unemployment benefit (at that time £41 or €52). Ward concludes:

> *"If the deductions from a husband's wages brought his net income down to the level of his protected earnings, half of the husbands would be better off financially if in receipt of unemployment assistance and three-quarters would be better off if in receipt of unemployment benefit".*[106]

6.2.5 Conclusion

Although this study was based on a sample of files taken between 1976 and 1986 and is, therefore, considerably out of date, it does demonstrate that a low protected earnings rate is a major employment

103 Ward.P *Financial Consequences of Marital Breakdown* (Dublin: Combat Poverty Agency May 1990)
104 (Ward 1990: 37)
105 (Ward 1990: 45)
106 (Ward 1990: 44)

disincentive and this ultimately led to maintenance creditors not obtaining the sum ordered in many cases. There seems little to suggest that the picture would be in any way markedly different in 2003.

There are clear lessons here for any attachment of earnings legislation in relation to non-payment of civil debt. The order will often be made in favour of credit institutions with high profit levels and it is likely that in many cases, this could lead to the debtor leaving his/her employment rather than allowing the payments to be deducted. A protected earnings rate that is too low may, therefore, result in any given creditor receiving less money than would have been the case if the protected earnings rate allowed the judgement debtor an adequate level of income. Quite apart, therefore, from the moral and legal issues as to whether a credit institution or other creditor should have a hold over the debtor's income at source, attachment may be unlikely to work unless the PER allows for a reasonable quality of life for the debtor and his/her dependants.

6.3 The Household Budget Scheme

The Household Budget Scheme (HBS) was introduced in 1993 to enable social welfare recipients to manage their household finances in a more structured manner. Two important points to note about this scheme are that:

- the HBS is *optional*, which makes it very different from *compulsory* attachment of earnings orders issued by a court for non-payment of civil debt
- the deductions are subject to a limit of 25% of the recipient's weekly payment. This limit is intended to ensure that the recipient has sufficient funds for other expenses.

From this 25%, deductions may be made to:

- Local authorities (for rent, tenant purchase or mortgage payments),
- The ESB in respect of consumption of electricity and in certain circumstances, repayments on credit sales for electrical appliances.
- An Bord Gais in respect of consumption of gas and the credit sale purchase of gas appliances from the Board
- Eircom in respect of telephone bills.

The deductions can also be subject, in the case of ESB, Bord Gais and Eircom to minimum payments per week. With ESB and Eircom, the minimum payment is €3.50 per week and in relation to Bord Gais, the minimum payment depends on the tariff applicable to the individual. Because the maximum amount that can be deducted under the scheme is 25%, there is anecdotal evidence of a 'priorities problem' in relation to deciding which bill should be placed at the head of the queue. Research enquiries indicate that the informal pecking order operated by An Post is local authority, ESB, Bord Gais and Eircom in that order. Given that each of these payments is considered by money advisors to be a priority, this issue has proven, in some cases, to be problematical.

The situation becomes more complicated when the recipient is in arrears in relation to any of these services. For payments to local authorities, the amount deducted will be equal to the weekly payment whether it be rent, tenant purchase or mortgage, but if the local authority tenant is in arrears, any extra deduction must be sanctioned by the relevant housing officer and, in practice, this can be a lengthy and cumbersome procedure. In addition, this is likely to mean less or no money being available to go towards utility bills. These problems could potentially be circumvented by increasing the percentage that could be deducted, but this would be unacceptable to many, given the relatively low level of social welfare payments and the necessity to provide shelter, clothing, and food as further priorities.

The HBS is of peripheral relevance to this report, but given that there was a suggestion in the Fine Gael Private Member's Bill that an option should exist for the Minister for Social and Family Affairs to introduce attachment of earnings in respect of social welfare payments, an evaluation of the scheme and the pressure it has helped to relieve or indeed impose upon its participants, would be welcome.

In the view of this report, it is impossible to reconcile the widespread view that social welfare payments are inadequate to meet the needs of those in receipt of them with any moves towards compulsory attachment of such payments for non-payment of civil debt. There is a significant possibility that if such an option was to be introduced, the utilities, who do not appear to subject their customers to rigorous credit checking criteria in relation to the credit sale purchase of consumer goods, would attempt to recover money outstanding on credit sale agreements in this way. If such an option is ever introduced, the question of irresponsible lending by the creditor should be an important consideration here prior to any decision to allow attachment, as with the extension of credit in general.

6.4 Provision in relation to compulsory rent deductions

The Housing (Miscellaneous Provisions) Act 1997[107] contains a little-known provision that allows for the potential compulsory deduction of local authority rent at source from social welfare payments where a tenant is in arrears. This is an enabling provision in that it empowers the Minister to introduce regulations at some time in the future and, as yet, there is no indication of any such regulations. There is a view that introducing this apparently draconian measure might, in fact, benefit tenants in that arrears will not be allowed to build up, especially given the policy of some local authorities not to accept any part payment of rent[108]. The argument here is that evictions would be drastically reduced as a result thereby protecting spouses and children from wilful failure to pay rent. The downside, of course, is that the disposable income of the social welfare recipient is reduced and that this could lead to tenants becoming involved in high cost and, in some cases, extortionate credit arrangements to offset a shortage of cash to pay for other priorities.

107 Section 17

108 Although, note that the Code of Practice *'Guidelines for Local Authorities in Rent Assessment, Collection, Accounting and Arrears Control'* (Dublin: The Housing Unit, 2001) recommends that this practice be discontinued

SECTION 7

DEBT SETTLEMENT LEGISLATION IN OTHER JURISDICTIONS

7.1 Introduction

In the following sections, it is proposed to examine in some detail attachment of earnings systems in operation in other jurisdictions. However, a key structural difference to highlight first between the Republic of Ireland and these jurisdictions is that many have specific consumer insolvency schemes in place that allow for the settlement or partial settlement of debts whereas the Irish legal system does not. Before turning to attachment of earnings, therefore, it is proposed in this section to briefly outline the purpose and types of consumer insolvency schemes in operation in Europe. This section will emphasise the importance of debt settlement in the context of attachment of earnings, in particular where the level and multiplicity of debt is such that attachment of earnings on its own is unlikely to be of much use in providing a resolution to the over-indebtedness of the consumer in question.

In brief, consumer insolvency or debt settlement legislation involves the chronically over-indebted consumer (usually with multiple debts) coming to a voluntary accommodation with his or her creditors to repay as much of the debts as possible over a specific time period, whilst retaining a reasonable minimum income. If a voluntary settlement with all creditors cannot be successfully negotiated, a court or other adjudicating body will impose a settlement on the parties as it sees fit. Interest on debts is normally suspended and all legal proceedings stayed during the repayment period provided the debtor maintains the stipulated repayments.

Incorporated into the majority of these systems is the concept of what is variously referred to as the **fresh start**, **early discharge** or **debtor release** principle whereby the debtor who acts in good faith throughout an agreed repayment period (usually somewhere from 3-7 years) can look forward to a write off of the remaining unsecured debt at the end of a set period (loans secured on property obviously being excluded from the write off principle).

Equally, if the debtor has assets that have value and can be realised and are not essential items, these may need to be incorporated into any settlement. A sale of the family home may also be required as part of the settlement if a debtor has a high level of equity in it. However, most settlement arrangements treat the retention of the debtor's accommodation as a priority. For example, from 1993 to 1998, almost 90% of home owning applicants under the relevant debt settlement legislation in Norway managed to hold on to their dwelling and in these cases payment of the principal was suspended leaving only interest to be paid until the debtor was released from the repayment programme and could resume paying the principal.[109]

There is no such legislation or scheme in operation in Ireland at present, although as explained earlier, some debtors may come to a negotiated accommodation with their creditors sometimes through the medium of a money advisor that can involve, on occasion, reduced repayments and/or a write off element.

It is vitally important to distinguish debt settlement from attachment of earnings. Inherent in the former is the prospect of a write off of residual debt at the end of a finite repayment period where the level of debt is such that there is no reasonable prospect of total repayment. With the latter, however, it is envisaged that the **entire** amount of the debt/s will be paid within a reasonable timeframe, although this may not always be the case especially if the employee whose income is being attached leaves or loses their job.

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109 Rokhaug.E (Ministry of Children and Family Affairs, Norway) – From a Paper delivered at CDN/ NSSB Conference, Malahide, Co. Dublin, September, 1998.

7.2 Statistical and Economic backdrop

Consumer Credit statistics

In recent years, Ireland has experienced considerable economic growth and it is commonly accepted that we enjoyed a consumer credit boom during this period. The following tables are drawn from the series of Quarterly Bulletins of the Central Bank of Ireland issued over the past 7 years, the most recent to hand being that of Winter 2002.[110]

Residential Mortgages (including Fixed and Variable rate)

	Outstanding Indebtedness	% Increase
August 1995	€ 11430 million	
December 1999	€ 24408 million	114% approx
December 2000	€ 29474 million	21% approx
December 2001	€ 34025 million	15% approx
September 2002	€ 40547 million	19% approx

From August 1995 to September 2002, there has been an increase of approximately **255%** in the amount of outstanding indebtedness in relation to residential mortgages.

Other Personal Credit

	Outstanding Indebtedness	% Increase
August 1995	€ 2920 million	
February 1998	€ 4060 million	39% approx
December 2000	€ 7751 million	91% approx
September 2002	€ 9960 million	28% approx

This amounts to an increase in other personal credit apart from residential mortgages of **241%** over the same approximate 7 year period.

These figures relate to credit extended by licensed banks, building societies and hire purchase finance companies only and does not include credit unions or licensed moneylenders.

Finally, perhaps the most revealing statistics relate to the growth in the use of credit cards in the last four years, a category that now merits a separate category in the Central Bank's bulletin.

110 Central Bank of Ireland- Quarterly Bulletin, Winter 2002 –Table C13, Page 69 (Residential Mortgages vis-à-vis Irish Residents), Table C8, Page 61 (Sectoral Distribution of Advances), Table C14, Page 70 (Credit Card Statistics)

Credit Cards

	Outstanding Indebtedness	Number of cards	A.P.R
December 1998	€ 666 million	1,561,000	22%
December 1999	€ 829 million	1,576,000	19.5%
December 2000	€1001 million	1,873,000	18.2%
December2001	€1210million	2,158,000	18%
December 2002	€1379 million	2,397,000	18%

These figures are for credit cards only (some of these will be business use credit cards) and do not include store cards. They reveal an increase of **107%** in the amount of money outstanding on credit cards in the past four years with a corresponding increase of **54%** (approximately half) in the number of credit cards. Even a strictly amateur mathematician can only come to one conclusion in relation to these figures. More is owed per credit card on average than was the case in 1998.

By any standards, these are very significant increases. Apart from some credit cards that are likely to be used for business purposes, they relate to the extension of consumer credit only, but in the absence of any official figures on over-indebtedness, they are all we have to go on in terms of a potential national picture apart from anecdotal evidence from MABS and data such as that contained in 'Poverty in the 90's'[111].

The Irish economy is particularly vulnerable to external economic shocks. Rises in oil prices, US or Asian recession, stock market tumbles and falls in E.U interest rates coupled with internal economic pressures such as rising inflation, equity release and over relaxed lending criteria had all begun to affect our economic position before the tragic events in the United States in September, 2001. The horrific scale of the war in Iraq, quite apart from the humanitarian disaster it involves, is likely to affect economic prospects worldwide.

The views of economists are notoriously variable and it is difficult to get any consensus on our current economic position. However we appear to have a serious problem with both our rate of inflation and our levels of public spending and these problems have or are likely to lead sooner or later to recessionary trends. Equally, redundancies have begun to become a feature of the employment landscape recently in a manner not seen for a number of years. Regardless of whether there will be a full blown recession or a mere economic downturn, borrowers with highly geared loan to value ratios and multiple credit commitments who lose their jobs are likely to be exposed to prolonged over-indebtedness (in addition to the large number of consumers already in this position) with often only a statutory redundancy lump sum as a cushion[112].

Attachment of earnings will not provide a solution to this situation. Indeed, the potential chase to be the first to attach the earnings of a chronically over-indebted consumer could exacerbate an already difficult situation. Only debt settlement legislation with firmly established debtor release and protected earnings criteria can provide the framework necessary to resolve the conflict of interest between the right of the

111 Of a sample of 4048 households in the 'Living in Ireland' survey (1997) conducted by the Economic and Social Research Institute, 12% were over-indebted due to ordinary living expenses. 50% of those living on an income of less than half the national average income had debt problems.

112 The Redundancy Payments Acts, 1967-79, as amended, only allow half a weeks pay per year of service while the employee was under 41 and one weeks pay per year of service while the employee was over 41 plus one week in either case as statutory compensation for the loss of a job on grounds of redundancy (as defined). In addition, the sum is capped at € 509 per week. At the time of writing, the new proposed social partnership agreement promises an improvement in these entitlements, to 2 weeks per year of service regardless of age.

lender to recover as much as possible of the amount loaned and the right of the consumer and his/her dependants to live with dignity in a society that, through its vigorous promotion of credit consumption, has arguably contributed to their over-indebtedness.

There follows a brief summary of the types of debt settlement models in operation in other European jurisdictions.

7.3 Models of Consumer Insolvency

Groth[113] drawing on information in the report 'Consumer over-indebtedness in Europe – are extra-judicial insolvency procedures the answer?[114] has identified four basic models of consumer insolvency or bankruptcy as follows:

The liberal economic model – this model incorporates the principle of 'fresh start' or release from residual debt. With its genesis in the United States, it sees the consumer as an entrepreneur who has become a casualty of the system and whose rehabilitation as a spending consumer should be achieved as quickly as possible to ensure the continued success of a free market economy. The main disadvantage to this model is its disregard for the causes of debt and the resulting lack of a guarantee that insolvency will not recur.

The conservative social model – This model sees the debtor as the author of their own destruction and the creditor as having been wronged and has its roots in traditional bankruptcy legislation[115]. Essentially, the debtor is forced to undergo a punitive rehabilitation whereby the State, usually through a court officer, supervises repayment and rigorously controls the affairs of the debtor eventually leading to discharge after a long period, often greater than 7 years. Its principal disadvantages are the moral assumptions made about the debtor resulting in an unduly restrictive, long and demoralising wait for discharge and the likelihood of carrying the associated stigma thereafter.

The French model – In this model, the State regulates phased repayment of debts in a bureaucratic and complex manner that is designed to encourage creditors to accept voluntary proposals by the debtor rather than enter into the labyrinth of the State regulated scheme. Its principal disadvantages are the lack of a debtor release provision and an insistence in principle (if not always in practice) that debts should be repaid in their entirety.

The liberal social model – This model is intended to allow the debtor to manage his/her affairs by adapting to a forced change in financial circumstances and coming to an accommodation with creditors on that basis. Formal court backed insolvency is considered to be the last resort in this model that places voluntary arrangements at the heart of the procedure. The importance of money advice/debt counselling to assist the debtor to make his/her proposals and the principle that the debtor must act in good faith are strongly emphasised. Debtor release is an integral part of this model (except in the case of loans secured on property) together with educative strategies to ensure that the situation does not recur, as a debtor is generally only allowed to avail of a debt settlement once.

On the face of it, this final model appears to be the most socially progressive of the models with its simultaneous emphasis on unforeseen triggers of debt, voluntary arrangements, good faith, debtor release and prevention of a recurrence. However, research enquiries have also revealed that, in practice, these schemes are not without their practical difficulties. This school of debt settlement originates in the Scandinavian countries with Denmark (Bankruptcy Code, 1984) Norway (Debt Composition Act, 1992) Finland (Debt Adjustment Act, 1993) and Sweden (Debt Insolvency Act, 1994) all having passed similar legislation (albeit with some significant procedural differences) around the same period.

113 *Money Matters*, The journal of the Consumer Debt Network – Edition No 3/2000
114 IFF Hamburg, Hamburg Consumer Centre, Vienna Money Advice Centre, Money Advice Trust (UK) – 2000
115 The Irish Bankruptcy Act 1988 is an example of this model

With the Netherlands (Consumer Bankruptcy Act, 1998), Belgium (Law of July 15th, 1998), Germany (Insolvency Act, 1994 that only came into operation on 1.1.99), Austria (Code on Personal Bankruptcy, 1995) and Luxembourg (draft law 6/7/93) all introducing regulations in recent times that operate along broadly similar lines, and with France having updated and reformed its legislation in the interests of the debtor[116], it is apparent that a major recognition of the reality of chronic **consumer over-indebtedness** has taken place in recent times in many Member States of the European Union.

In the U.K, the relevant insolvency legislation (The Insolvency Act, 1986) does not have any specific rules in relation to consumer debt, but the general discharge period of 3 years after bankruptcy and the possibility of making 'Individual Voluntary Arrangements' (IVA's) with creditors together with the Administration and Composition Order procedures provides an array of possible alternatives for over-indebted consumers[117].

Hence, of the current Member States of the European Union, only Ireland and the southern countries comprising Italy, Spain, Portugal and Greece, have not made specific interventions in this area. The most recent legislation in Ireland is the Bankruptcy Act, 1988. However, this legislation is seldom used and entirely unsuitable for consumer over-indebtedness. The procedure is costly and if the bankrupt person cannot pay the entire amount of the debts, s/he can only be released when the court believes their entire estate has been realised and only then after a period of 12 years[118]. This is light years behind most of our European counterparts and clearly places Ireland into the conservative social model mentioned above. It also constitutes a signal failure to recognise that though we now live in a country with high levels of consumer credit and over-indebtedness, our system for tackling these problems is inflexible and out of date.

7.4 Towards a European Directive

The Leyden and the European Consumer Law Group reports

In the absence of any domestic initiative thus far, the question as to whether action is likely to be taken at European Union level is pertinent. The seminal report on this issue was drawn up for the European Commission by the Leyden Institute for law and public policy in 1992.[119] This report commissioned an analysis of consumer indebtedness in each Member State of the E.U and made policy recommendations on how the problem of over-indebtedness should be tackled. Contrary to the standard argument that debt enforcement law is a 'subsidiarity' issue that the Member States alone had the right to regulate, the Leyden Report argued that Community action was needed.

The rationale behind their argument was that the Community itself has vigorously promoted the use of consumer credit as a means of stimulating growth in the economies of the Member States and it must therefore take responsibility for the flipside of credit, namely debt. On the subsidiarity argument, the report concluded that the problem of consumer over-indebtedness does not just affect those in debt but also creditors and the rest of the community. Further, that the existence of different legal methods to resolve these problems in the Member States may have the effect of distorting competition, especially in a single market where financial services are offered on a cross border basis.

Essentially, this amounts to a moral argument on the one hand and a community law competition argument on the other. It is the view of this report that the combination of these two points should have been sufficient to stimulate proposals on the part of the European Commission to the Member States. However as of 2002, it appeared that a Directive on common principles to be applied to debt settlement situations was as far away as ever in that responsibility within the Commission for furthering the search

116 By Laws 95/125 and 98/657 respectively

117 See Section 8, Page 80.

118 For further detail, See Section 3, Page 23

119 "Over-indebtedness of consumers in the EC Member States: facts and search for solutions" Leyden Institute for law and public policy - September 1992

for solutions to the problem of consumer debt was being passed from one Directorate General to another.

Whilst the protection of the consumer in relation to goods, services and capital and an increasing amount of cross border commerce are within the remit of the Commission, consumer debt does not appear to be. A Council resolution towards the end of 2001 during the Belgian presidency again formally recognised the problem of consumer debt and called for 'precise information of both a statistical and an economic, legal and sociological nature' to be collated on a regular basis[120]. However, proposals from the Commission in relation to the issue of indebtedness still appear to place reform in the context of the review of the Consumer Credit Directives. Following the Council resolution, the current E.U Commissioner for Health and Consumer Affairs, David Byrne, stated that such a revision would contribute to preventing the risks of over-indebtedness.

The Leyden Report went on to recommend specific measures that might be included in a debt settlement Directive and these are analysed in some detail in a report compiled by the European Consumer Law Group in March, 1995[121]. In essence, this report agreed with the thrust of the Leyden Report and argued that special procedures should be created to cope with consumer debt for two principal reasons:

- **The inadequacy of commercial bankruptcy procedures to consumer situations**. ECLG (1995: 2) states:

  '*Several countries in the EC have mixed regulations in which commercial bankruptcy procedures are applicable to individuals. These procedures which are, by the way, too complex and costly, are poorly adapted because they are based on a philosophy which is not applicable to individuals: based on the principle of liquidation of goods, it aims either to give the company another lease on life or to enable the debtor to start from scratch in the framework of a new company. A family is not a company: it often does not have goods it can usefully use and must continue to live while protecting the rights of its creditors*'

- **The inadequacy of traditional debt enforcement methods in consumer indebtedness.** ELCG (1995: 2) states:

  'Over-indebtedness is not characterised just by debts which are too great: it is also the result of multiple debts. But, traditional recovery proceedings are individual procedures. Each creditor is obliged to pursue the debtor separately while using the maximum resources so as to be the first to be compensated. The effect of the harassment which results from this, other than that it swells out of all proportion the debt principal, paralyses a debtor who often does not know his rights.'

This latter comment will be readily understood by money advisors everywhere and neatly sums up the current shortcomings of the Irish legal system with its adherence to traditional notions of contract in the resolution of debt problems; what we have earlier characterised as the 'vertical' as opposed to 'horizontal' approach to debt enforcement[122]. Attachment of Earnings legislation alone will certainly not redress these shortcomings. Indeed, as already noted, the rush to be the first to obtain an attachment might possibly engulf the multiply indebted consumer in a greater morass of legal proceedings than heretofore.

The Leyden Report concluded that over-indebtedness is mainly linked to the huge development in financial services, a conclusion echoed by recent Central Bank statistics in an Irish context[123]. It argued that the debtor should not be made to carry the burden of inability to pay alone, as the extension of credit carries an inherent risk which credit providers can both assess in advance and cost into their products. The ECLG is slightly critical of this approach in that it confines the argument to considerations of credit

120 Council Resolution on Consumer Indebtedness, adopted November 2001.
121 *The over-indebtedness of Consumers in Europe, Towards a European Solution*' (Brussels: European Consumer Law Group 21 March, 1995)
122 See Section 3 - Page 19
123 See Section 7 - Page 59

alone although it is noted that it does have the advantage of freeing the debate from assigning blame in individual situations. Equally, this argument is primarily an economic one and therefore is more likely to fit in to the competence of the Community to introduce common measures in this area.

What should the procedure contain?

The Leyden Report recommended the following basic model:

- As a preliminary step, the debtor must do as best they can to compensate their creditors.
- S/he must put part of future income at the creditor's disposal and must sell possessions which are not indispensable.
- On the basis of an agreed plan, the debtor must pay as much as possible to creditors for **four years** whilst retaining a basic income.
- At the end of this period, the debtor will be released from his/her debt (subject again to the exception of loans secured on property)
- Insofar as possible, the procedure should be an out of court one through what the report calls **'independent councils with special powers'** and courts should only become involved where enforcement of the settlement becomes necessary.

In their analysis of the debt settlement procedure recommended in the Report, the ECLG concentrate on the following aspects:

Access conditions for the procedure

Here it is suggested that the notion of what constitutes over-indebtedness should be widely interpreted. For example, it is suggested that prior business debts should be taken into account in deciding available income for repayments even though as non-consumer debts, they would not be included in the repayment plan itself. Even this is questionable, in the opinion of this report, in the sense that small business debt and consumer debt are often intertwined to a degree that makes it impractical to separate them.

Equally, the suggestion that the debtor must act in **good faith** is questioned. It is suggested that this should not be interpreted in the strict legal sense in that the procedure is not intended to do the debtor a favour, but to force him/her to come to an accommodation with his/her creditors and that, therefore, **bad faith** on the part of the debtor would need to be specifically shown to exclude them from the procedure.

Out of court or judicial procedure?

The ECLG are in favour, in principle, of the out of court approach with its informality and continuity, both absent in the context of formal once off court proceedings. However, they do point to some disadvantages, in particular the fact that only a court could suspend existing litigation against the debtor or check the legality of the debts and amend or cancel them. Of course, this ignores the possibility of legislation being introduced to allow other bodies to perform these functions. However, it could also be argued in the Irish constitutional context that such a measure could go uncomfortably close to interfering with the independence of the courts.

In any case, the ECLG argues that the ideal solution would be a combination of the two with the court being given the power to review agreements and legal proceedings in order to assist the 'independent council' in its primary work of drawing up the settlement plan between the debtor and his/her creditors.

Conditions for the plan's success

In its evaluation of the Leyden Report's proposed debt settlement procedure, the ECLG suggests that some features are essential for the success of such repayment plans. Two basic conditions to begin with are considered to be **the suspension of current legal proceedings** and **the freezing of interest and**

expenses, the former because for the plan to be a success all creditors must be on board and the latter because if interest charges continue to mount whilst repayments are being made, the notion of debtor release is fatally compromised.

The ECLG go on to add that the repayment plan must be realistic taking into account the needs of the debtor and his/her dependants. This is essentially the same reasoning as would apply to protected earnings in an Attachment of Earnings situation. Unless the debtor is provided with sufficient income to meet his/her basic outgoings, there is little prospect they will adhere to the repayment plan over the suggested period of 4 years, given the sacrifices involved.

Debtor release

ECLG expresses some uncertainty about what it describes as the shortness of the repayment period, the shortest that it is aware of. Since the ECLG report in 1995, The Netherlands has introduced a basic repayment period of 3 years. Ultimately, however, the ECLG comments that a short length is essential to the relief of the debtor. In overall terms, the report argues that debtor release or the **'New Chance Policy'** as the Leyden Report describes it, is a key element in the procedure. Numerous arguments are made in the Leyden Report in support of the policy and they include the following:

- Moral arguments based around the general contention that debtors should not have to bear the risks of credit provision alone especially since the extension of credit results in the main in profit for the creditor.
- Economic arguments based on the contention that indebtedness carries a significant degree of costs to society in general, for example in terms of healthcare, and, further, that a person in debt is no longer consuming at near the same level as heretofore with the consequent impact on economic growth.
- Effectiveness arguments based around the contention that creditors in the main are better reimbursed within the framework of a recovery plan and that the existence of specific debt settlement schemes with debtor release has a preventative effect on the commercial practices of creditors, for example in relation to the irresponsible extension of credit.

What might a Directive achieve?

The ECLG argue that (ECLG Report, 95:8)

> *"A Community intervention on the basis of A 129A of the European Union Treaty seems particularly desirable in order to back up and complement the present initiatives taken by many Member States in this particularly serious area of protection of the economic interests of consumers, over-indebtedness."*

The Group believes that a Directive would make way for *"a more extensive and efficient protection of the economic interests of the citizens in the countries where over-indebtedness exists"* and in certain countries, especially in Southern Europe where the phenomenon of debt is less common according to the group, *"it might be useful to help their nationals to benefit from the reflection and progress of other Member States"*.

Conclusion

Ireland might easily have been added to this latter category with its absence of debt settlement legislation except that there is evidence from the consumer credit statistics already cited in this report that we are no longer living in a country where the phenomenon of over-indebtedness is not a common problem. Unfortunately, there appears to be no reliable statistical recording system in the State to monitor levels of over-indebtedness and this appears from the recent Council resolution to be a European wide problem. The call for the introduction of debt settlement legislation is therefore based on feedback from money advisors working for MABS on the problems being encountered by their clients and the logical inevitability of increased levels of consumer credit provision leading to increased over-indebtedness. Finally, the introduction of such legislation in 10 out of 15 Member States of the European Union in recent years should be enough to concentrate minds on how to deal with this growing phenomenon.

7.5 Domestic Developments- MABS/ IBF Debt Settlement Programme

7.5.1 Background

At the time of writing, negotiations have recently concluded between the Money Advice and Budgeting Service (assisted by Free Legal Advice Centres) and the Irish Bankers Federation (IBF) incorporating the Irish Mortgage Council (IMC) on an agreed debt settlement programme in selected areas of Dublin. The programme is in its early stages and is being run initially on a **pilot basis** limited to **100 cases**. The impetus for this development stemmed from ongoing discussions between the relevant parties at a variety of fora involving debt/credit matters and the growing realisation that MABS was performing a creditable and responsible role in negotiations on behalf of over-indebted consumers with a variety of creditors including the client members of the IBF / IMC.

Both sides had made various submissions to the Department of Justice seeking a review of current debt enforcement procedures from their respective vantage points[124]. However, some common ground already existed in a shared view that some current practices were outdated and counter productive for both sides, for example, the Committal Order procedure, and that an update of the legislation was overdue.

Despite these submissions, no proposals have yet emerged from the Department of Justice apart from those details that have been outlined in preceding chapters on introducing attachment for non-payment of fines or debt to replace the existing Committal Order procedure. In the belief that concrete developments from the Department may be a long time in gestation, it was decided that exploratory discussions between the IBF and MABS should take place towards a voluntary accommodation in cases of obvious over-indebtedness where the legal process is unlikely to benefit the debtor or his/her creditors.

The result of these rather prolonged and at times difficult negotiations is a Debt Settlement Pilot Programme that attempts to achieve a compromise between the right of the creditor to recover as much as is feasible of the money loaned and the right of the indebted person and his/her dependants to live and work with dignity during the repayment period, with the prospect of release from residual unsecured debt at the end of this period.

7.5.2 Main Features of the Pilot Programme

Income and Assets

It is envisaged that the process will begin by calculating the net income (after PAYE and PRSI deductions) of the debtor, the earnings of a spouse/partner and other sources of income, where appropriate. Equally, assets that have a potential cash value may have to be realised as part of an initial reduction of the amount outstanding before the debtor enters into the pilot.

Priority payments

Any loans secured on the principal private residence (i.e. housing loans) or loans secured by a guarantee are exempted from the programme both in the sense that payments in respect of them must be allowed for before calculating the disposable income of the debtor for repayment of outstanding debt, and in the sense that there is no write off in respect of these at the end of the repayment period.

In this way, the debtor can be assured that their housing needs are met (rent in respect of accommodation is also subtracted before calculating disposable income) whilst repayments are being made. Equally, any sums that fall due by way of court orders such as Maintenance or Instalment Orders are deducted from the debtor's income.

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124 See, for example, IBF press release, October 1997 on a position paper proposing a complete overhaul of the debt enforcement system or submission by MABS complementarity sub-committee on the role of the Department of Justice in the national anti-poverty strategy.

Protected earnings

Having made deductions in respect of housing costs and any maintenance or existing court orders, basic Social Welfare rates that would be applicable to the individual or family if they were not working are calculated. Added to these are reasonable work related expenses, expenses that arise from special circumstances such as the needs of a family member with a disability or medical condition, and some leeway for a social life.

This total figure is then subtracted from total net income to arrive at the disposable income figure for the purposes of distribution to other creditors in the pilot. The following summarises the position:

Figure 1. ADD TOGETHER

Net income of debtor
Net income of spouse or partner
Other income (rental, investments, child benefit etc)

TOTAL FIGURE _____

Figure 2. ADD TOGETHER

Mortgage/Rental payments
Other Secured Loans
Any Court Orders/ Maintenance
Appropriate Social Welfare rates
Work expenses
Special expenses where appropriate
Social Life expenses

TOTAL FIGURE _____

Figure 2 is then subtracted from **Figure 1** and the surplus (if there is any) is allocated for distribution to unsecured creditors on a *pro-rata* basis weekly or monthly, as appropriate. The debtor is, therefore, effectively prevented from spending their surplus income as they see fit and in return, the Pilot allows for a finite period in which these repayments will be made. Clearly, the length of this period will vary according to the level of debt involved but, on average, should last somewhere between 3 and 5 years. Although this is a considerable commitment on the part of the debtor, this is mitigated by the fact that legal proceedings cannot be brought by creditors, that interest is frozen for the duration and by the prospect of a write-off of residual debt at the end of the repayment period, leaving only outstanding secured debt to be paid, all considerable commitments on behalf of creditors. Once the terms of the settlement have been complied with, creditors also agree to notify relevant credit reference agencies that the debt has been settled to their satisfaction, thereby allowing the debtor a genuine fresh start.

As yet, this is only a blueprint and there are likely to be many problems and disputes to iron out during the course of the pilot. For this reason, a Conciliator has been appointed and his job will be to oversee and approve any voluntary settlements achieved under the pilot and to adjudicate on appropriate repayments and protected income in the more difficult and contentious cases. It is important to re-emphasise that this is a pilot only and that any repayment agreements reached are voluntary and have no legal standing.

It is intended that the evidence gathered from the scheme will be analysed and may be used to propose arrangements with greater permanence should the pilot prove successful in some of the settlements reached. Much will also depend on the attitude of other creditors who have not been directly involved in the negotiations but who have, in the majority of cases, given their informal assent and have indicated that they will co-operate in the pilot.

SECTION 8

ATTACHMENT OF EARNINGS IN ENGLAND AND WALES, NORTHERN IRELAND AND SCOTLAND

8.1 GENERAL INTRODUCTION

It is proposed in the following sections to examine attachment of earnings models in other jurisdictions in order to illustrate what can be learned from experience and practice elsewhere to avoid difficulties and mistakes in any potential Irish legislation.

This analysis is divided into three parts:

This section will examine how attachment of earnings operates in England and Wales, Northern Ireland and Scotland respectively.

Section 9 will analyse how attachment models in mainland Europe work and will also provide a comparative analysis of the European and U.K models.

Finally, Section 10 will describe the basic principles of the system in the United States of America.

8. 2 ENGLAND & WALES

8.2.1 Introduction

With a legal system having most similarity to our own, the procedures in England and Wales in relation to debt enforcement are of particular interest. It is beyond the scope of this report to examine that system in any great detail. However, in order to explain and understand the Attachment of Earnings procedures in England and Wales, it is necessary to briefly document the steps that might be taken by a creditor and debtor prior to arriving at the option of attachment. The attachment legislation will then be examined.

8.2.2 Overview of Debt Enforcement in England and Wales

On 26 April 1999, new so-called 'unified' rules were brought into effect in relation to debt enforcement in the County Court and High Court in England and Wales. The relevant legislation is the Civil Procedure Act, 1997 and new rules of court called the Civil Procedure Rules that deal with substantive matters. In addition, 'practice directions' have been issued by the courts to deal with procedural elements of debt enforcement[125].

The procedure to recover payment of a money debt in England and Wales begins by the service of a default notice under the Consumer Credit Act 1974, if the agreement is a credit agreement that is regulated by that Act[126]. Failure to pay may result in legal proceedings being brought by the creditor, although the intervention of a money advisor may prevent this and money advice has been a well recognised service in England and Wales, since the establishment of the Birmingham Settlement in 1971. Procedures under the new rules vary, depending on whether the claim is purely for a liquidated sum (i.e. a specific money debt) or for the recovery of goods or repossession of land or other specific claim under the Act. For the purpose of this analysis, we will concentrate solely on the new rules in relation to claiming a money debt (or liquidated sum). The steps are as follows[127]:

125 These measures were passed as a result of the publication of the 'Access to Justice' report by Lord Woolf.

126 This notice is similar to the notice required under Section 54 of the Irish Consumer Credit Act, 1995. However, an important difference is that the default notice in England and Wales names agencies – Citizens Advice Bureaux, Money Advice Centres, for example – that can provide assistance to the debtor whereas the Irish notice, in general, does not.

127 For further detail see Madge.P, *New court procedures for debt* (The Adviser, Journal of the Money Advice Association (MAA) Number 72), March and April 1999

1. The creditor (or claimant) issues a claim form.
This must contain information relating to the nature and type of the claim and the amount of the claim (called the statement of value). This claim form must be served on the defendant within four months of being issued and the claim form should either include "particulars of claim" or these particulars should be served within fourteen days of service of the claim. The particulars of claim must include:

- A statement of facts grounding the claim – for example, the fact and dates of failure to pay agreed instalments;
- A statement of truth verifying the facts of the claim;
- A form for the defendant to acknowledge service of the claim;
- A form for the defendant to admit the claim.

2. Defendant responds to claim form.
In response, the defendant can;

- File a defence within 14 days of the particulars of claim being received;
- File an acknowledgement of service within 14 days where a defence cannot be filed within 14 days;
- File an admission of ***part*** of the claim;
- Serve an admission of liability on the claimant of ***the entire*** claim within 14 days.

3. If a defendant admits a claim.
Frequently in consumer debt cases, the defendant will have no legal defence to the creditor's claim and will be confined to pleading their inability to pay the required amount. In these circumstances, the defendant can return the admission form within 14 days, request time to pay the amount due and submit a statement of means for this purpose. This request can include a proposal as to when the total amount will be paid or, as is more likely, a proposal to pay the amount due by instalments based on the statement of means submitted.

Assuming an offer of payment has been made; the claimant (creditor) can accept or reject this offer. If the offer is accepted, the claimant files a request for judgement together with details of the defendant's admission and offer, and judgement will be granted by the appropriate court officer on these instalment terms.

If the defendant's offer is rejected, the claimant must file a note to that effect in the appropriate court, complete with the admission and details of the offer. Judgement will then be entered for the claimant for the amount involved but the court will then determine the appropriate rate of instalment itself. If the amount of the claim is less than £50,000 (the vast majority of claims will be for less than this amount) the rate of payment is to be determined by a court officer and it is not necessary for the matter to go before a judge. If the amount claimed is over £50,000, the appropriate rate must be decided by a judge. It appears that it is for the judge to decide whether a hearing (requiring both parties to be present to make submissions) is necessary to make a decision. If a hearing does take place, it will automatically be transferred to the local County Court of the debtor.

In coming to his/her decision, the judge or court official must take into account the defendant's statement of means, any objections from the claimant and any other relevant factors.

4. Appeals
Where the amount claimed is under £50,000 (Sterling) and the decision on the appropriate instalment payment has, therefore, been made by a court officer rather than a judge, either party may apply for a

determination of the decision within 14 days of being served with it. This is a form of appeal and will come before a judge. The party appealing must ask for a formal hearing, otherwise the judge will consider the matter in chambers. Where the amount claimed is over £50,000 and where, therefore, a judge will have determined the appropriate rate (either with or without a formal hearing), either party may apply to have the judge's decision varied in amount.

5. Variation of Instalments

As with Instalment Orders in Ireland, a defendant can apply at any time to have the order varied in the County Court and this will usually be done where a material change in circumstances means that the original instalment or offer of payment is no longer affordable. The claimant is given the opportunity to respond to the defendant's application within 14 days. If s/he does not, the variation will be automatically granted. If the claimant does object to the variation, the court officer will decide the appropriate revised instalment. A further right to apply to have this order reconsidered is available to either side before a judge.

6. If the Defendant fails to respond to the claim

In cases where the defendant does not respond to the claimant's claim form and particulars of claim within 14 days, or where the defendant serves an admission but makes no offer of payment, the claimant may enter a judgement on their own terms, including seeking payment in one instalment (known as payment forthwith). This means the amount of the judgement becomes immediately payable and failure to pay may result in the creditor using other enforcement measures such as seizure of goods, charging orders (the equivalent of a judgement mortgage) or attachment of earnings. Similarly, where an offer of payment has been made by the defendant and accepted by the claimant, or alternatively a court official or judge has determined the appropriate instalment rate and the defendant defaults in making the payments, attachment of earnings orders, amongst other methods of enforcement, can be applied for.

Conclusion

By comparison with the debt enforcement system in Ireland already described[128], it is apparent that the English system engages the debtor in the process to a much greater extent than its Irish equivalent. From the outset, prior to any threatened legal action, the default notice must provide details of agencies where the debtor (who often will have no access to legal advice) can turn for assistance. The admission form and request for time to pay give the debtor the option to make an offer, however small, and failure to accept that offer leads to a court official making a decision based on the debtor's means. In Ireland, the failure to defend a claim for payment of a debt removes the only opportunity the debtor will have to be heard until the creditor selects his or her method of enforcement.

In summary, the England and Wales system appears to recognise some of the principles of money advice and practice by acknowledging the fact of **inability to pay**. The debtor can effectively stall the proceedings and make an offer of payment based on a realistic assessment of means. If this is not accepted, a third party must adjudicate upon it. We would do well to look at introducing this option in Ireland and it is certainly arguable that such changes would result in a quicker and cheaper resolution of civil debt matters for all concerned.

8.2.3 Overview of the Attachment of Earnings Model in England and Wales

Attachment of earnings in England and Wales is governed by the Attachment of Earnings Act 1971 (as amended), described as "*an Act to consolidate the enactments relating to the attachment of earnings as a means of enforcing the discharge of monetary obligations*"[129]. It works in tandem with other pieces of legislation or regulations such as the Maintenance Enforcement Act 1991, the Child Support Act 1991 and the County Court Rules of 1981. For the sake of clarity, it is proposed to adopt a question and answer format to describing the attachment of earnings model in England and Wales.

128 See Section 3

129 Attachment of Earnings Act, 1971 (1971 c. 32) Preamble to general notes

Q.1 To what types of debt and in which courts can attachment apply?

Attachment can be ordered:

- By a Magistrate's Court[130] in respect of non-payment of fines, sums ordered for legal costs, forfeited bail bonds and legal aid contribution orders (a priority AEO).
- By the High Court,[131] a County Court[132] or a Magistrate's Court in respect of non-payment of periodical maintenance orders for the support of the spouse (a priority AEO).
- By the Child Support Agency in respect of non-payment of child support maintenance called a deduction from earnings order (DEO).
- By a local authority in respect of non-payment of council tax (CTAEO).
- By a local authority in respect of non-payment of community charge i.e. poll tax (CCAEO).
- By a County Court or County Court Official in respect of non-payment of a judgement debt of £50 or over (non-priority AEO).
- By a County Court in respect of payments due under an Administration Order (non-priority AEO).

The last two potential attachment of earnings orders in respect of judgement debts and administration orders, are of most interest in the context of this report and potential legislation in Ireland. The Administration Order procedure will be explained in more detail at a later stage[133]. In brief, it involves a County Court, either on the application of a debtor, or a creditor seeking an attachment of earnings order, making a decision to consolidate all the relevant debts of the judgement debtor and ordering the payment of one periodical sum to be distributed *pro rata* to that debtor's creditors. It is, however, subject to a maximum limit of £5,000 sterling total debt, although money advisors in the UK have lobbied for many years to treble or quadruple this amount. The potential of the Administration Order procedure for use in the Irish legal system in relation to debt enforcement should be carefully examined. It can also be proactively used when attachment of earnings is being sought. This view will be expanded upon in due course.

A wide range of debts may be attached in England and Wales. The introduction of attachment of earnings by local authorities in relation to council tax and community charge has further complicated an already complex area, particularly in relation to priorities between orders and the calculation of the protected earnings rate. Such taxes are not currently applied in Ireland. In addition, domestic, water and sewage service charges were abolished on 1/1/97.[134] Local authorities, at their discretion, may charge for collection of domestic refuse and this has become a widespread practice. The local authority itself can choose the amount of the charge and how it is levied. Clearly, failure to pay a local authority in respect of domestic refuse collection service charges could constitute a debt and there is evidence of some cases being processed against householders.

Q.2 Who can apply for an Attachment of Earnings Order?

- A creditor who has obtained a judgement.

130 Magistrates Courts are used in general in England and Wales for the prosecution of minor criminal offences.
131 The High Court in England and Wales is the civil court of original jurisdiction.
132 County Courts are used in England and Wales in the main for dealing with minor civil matters including the majority of cases involving personal debt
133 See further Page 80
134 By the Local Government (Financial Provisions) Act, 1997

- In the case of an Administration Order, any one of the debtor's existing creditors where there has been a default in making the payment under the order.
- A clerk of a Magistrate's Court where a maintenance order has been made.
- In the case of criminal proceedings brought by or on behalf of a maintenance creditor for non-payment of a maintenance order, the High Court, County Court or Magistrate's Court can substitute an attachment of earnings order for any committal order.
- Where criminal proceedings are brought by a judgement creditor in a County Court for non-payment of a judgement debt relating to taxes, social security contributions or non-payment of other debts to the State, the County Court may substitute an attachment of earnings order for the criminal proceedings.
- The debtor may also apply to a Magistrates Court, a County Court or the High Court seeking an order to secure maintenance payments by way of attachment of his/her own income. Presumably, the purpose of this is to ensure that the maintenance payment is deducted at source and so the temptation for the debtor to otherwise spend the money involved is removed.

Q.3 What is considered to be earnings for the purpose of allowing an attachment?

Earnings comprise sums payable to a person by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary or payable under a contract of service). In addition, sums by way of pension are included, as are sums paid in respect of statutory sick pay.

However, the Attachment of Earnings Act 1971 does not apply to the self-employed as a self employed person is not in receipt of earnings as defined. It is unlikely that any Irish legislation will do so either for the same reason. To be attached, wages or salary must be payable under a contract of service. The contract **of** service is synonymous with the employer/employee relationship as opposed to the contract **for** services, where one party supplies services to another party under an ordinary commercial contract to which, for example, employment legislation protecting individual employees does not apply. Courts and tribunals both in Ireland and in the U.K have devised a number of tests over the years to determine whether a relationship is that of service (an employee) or for services (self employed) but each relationship must be examined on its own merits[135].

A Review of debt enforcement procedures recently carried out in England and Wales by a panel of experts appointed by the Lord Chancellor[136], considered the issue of applying AEO's to the self-employed and reported as follows;

> *"The panel concluded, therefore, that attempting to widen the scope of AEO's to cover all of the self-employed would serve only to produce an unworkably complicated and expensive system that would be of no practical use".(1.32)*

The Review continued:

> *"The panel was, however, keen that the scope of AEO's should be extended as widely as possible. They were, in particular, keen to target those people who, although self-employed for tax purposes, had a particularly strong relationship with one "employer". Examples might be a self-employed, labour only building sub-contractor who receives regular payment from a single source or certain types of agency worker". (1.34)*

135 For a fuller discussion of these issues, see the High Court decision in Sunday Tribune Ltd (1984). I.R 505 or the Supreme Court in Henry Denny and Sons (Ireland) Ltd T/A Kerry Foods v Minister for Social Welfare (1998) I.R. 34

136 Lord Chancellor's Department Enforcement Review Consultation Paper 3 Attachment of Earnings (London: Lord Chancellor's Department, October 1999)

and finally:

> *The panel recommended that, for the purpose of an attachment of earnings, the test should not be whether there is a contract of service, but whether the debtor is in receipt of regular payments from a single source. If there are regular payments being made, then it should be possible to make an AEO in respect of those payments. The strict contractual arrangements between the person making the payments and the person receiving them are largely irrelevant and the court should have no need to concern itself with them (1.35).*

Q.4 (1) What is the procedure involved and (2) How is the amount of the attachment of earnings order calculated?

1. Procedure

In common with the Family Law (Maintenance of Spouses and Children) Act 1976 in Ireland, the Attachment of Earnings Act 1971 in England and Wales specifies that a normal deduction rate (NDR) and a protected earnings rate (PER) must be set in order to calculate the attachment. In order for the relevant court or court officials to calculate these figures, the debtor is asked to file certain information in the relevant court office in relation to their means. The procedure is as follows[137]:

- The judgement creditor seeking the attachment of earnings order must file his or her application certifying the amount owed and other relevant details (on Form N55).

- This application is served on the defendant, together with Form N56, a statement of means or financial statement form that the judgement debtor must fill out in order for the court or court official to make the appropriate calculation. If the judgement debtor refuses to return the statement of means, the court can order the debtor to complete it and, in addition, the debtor's employer can be ordered to supply a statement of his/her earnings.

- Ultimately, if the judgement debtor refuses to provide the required information, a summons to personally appear may be issued and failure to obey this may lead to committal to prison. The purpose of this summons, though, is not to imprison the judgement debtor but to have his/her financial circumstances before the court or court officer prior to any attachment of earnings order being made.

- The form N56 or statement of means also allows the judgement debtor to request a **suspended** attachment of earnings order. Here the judgement debtor agrees to make payments in instalments voluntarily and an attachment order only comes into force if the judgement debtor does not keep up payments. As noted earlier in the section on maintenance enforcement in Ireland, the effect of an attachment of earnings order on the judgement debtor's employment situation may be detrimental[138]. The suspended attachment of earnings order is effectively as close as can be obtained to a guarantee that the judgement debtor will pay by instalments without the necessity to inform his or her employer that a judgement has been obtained against them. Thus, it can provide a method of avoiding the possible consequences to the debtor of an AEO explained as follows:

> *"There are two principle problems with an attachment of earnings order. First, it reduces a debtor's flexibility to manage his/her own affairs and secondly it may endanger his/her employment because it notifies the employer of debts. Certain employers (e.g. security firms or those where money is handled) have policies of dismissing anybody against whom a judgement is made in the County Court. If this happens, the debtor should seek the advice of an employment specialist. The legislation allows a court to make an order rather than requiring it to do so and therefore if a*

137 According to the County Court Rules 1981 (Order 27).
138 See Section 6 – Page 52

debtor's livelihood is threatened by the making of an order, the debt advisor should always argue that it is unreasonable to do so"[139].

In order to preserve the employment status of the debtor, it is essential that this option be included in any prospective Irish legislation. Otherwise, the debtor and his/her dependants and ultimately the creditor whom the legislation is being introduced to primarily benefit, could all suffer.

Assuming that the N56 form has been filled out and a suspended attachment of earnings order has not been requested, a court officer may use the information set out in the N56 to make an attachment of earnings order and calculate the sums to be deducted. In relation to attachment of earnings orders sought on foot of judgement debts (as opposed to maintenance orders) the power to make the order has been devolved from a judge in the County Court to court officers themselves.

However, if the court officer feels that the statement of means does not contain enough financial information for him or her to make an order, the matter must be referred to a judge, either for an order to be made, or for further information to be sought. An order made by a court officer may also be appealed by either creditor or debtor within 14 days to a judge. If the court officer passes the matter on to a judge because of insufficient information, the judge's order can similarly be appealed within 14 days. Finally, the judgement creditor may be allowed a limited order of costs in relation to the application for an attachment of earnings order and these costs can be added to the amount unpaid under the judgement debt.

2. Calculating the amount of the attachment

Normal Deduction Rate (NDR) and Protected Earnings Rate (PER)
Under the 1971 Act, the NDR is the rate the court thinks reasonable to apply to the debtor's earnings in order to meet his/her liability.

The PER is the minimum level of income that the judgement debtor should be entitled to retain having regard to his/her resources and needs. This wording leaves a fair amount of discretion to a judge or court officer in deciding what is an appropriate PER.

To enable court officials to come to a decision on a suitable PER, a formula called the **protected earnings calculator**[140] is used. There is no obligation under the Attachment of Earnings Act to set a protected earnings rate above the figure prescribed by the Supplementary Benefits Commission (equivalent to Supplementary Welfare Allowance in Ireland) as a person's normal social security requirement. However, it has been held that in most cases it would be unreasonable not to do so[141]. The protected earnings calculator sets out the following criteria for determining the judgement debtor's means in order to set the PER or minimum income.

- The process begins by referring to current benefit (i.e. Social Welfare payments) rates to set the base line for the PER.
- The debtor may also be entitled to a variety of premium payments (e.g. a family premium, a premium for a disabled child, a pensioner, or for an adult suffering from a disability or a severe disability or for an adult entitled to carer's premium) over and above benefit rates.
- The court official is also allowed to take exceptional liabilities into account. Examples here include existing court orders (for example instalment or maintenance orders) and other essential regular commitments such as informally agreed maintenance payments to a spouse and/or to children.

139 Wolfe. M et al *Debt Advice Handbook*, 3rd Edition (London: Child Poverty Action Group, 1998) Page 197.
140 Determination of Means – Guidelines for court staff, Revised December 1998.
141 Billington vs Billington 1974. All E.R. p.546

- The final part of the protected earnings calculator allows for other liabilities. Here items that can be taken into account are essential travelling expenses to and from work, other expenses arising from employment such as childminder's fees, or depreciation on vehicles. As a general guideline, a court official is also allowed to add £10 sterling per week maximum for non-essential items.

The court official must then add the appropriate benefit rates plus any rent or mortgage payment and community charge, council tax and water rates and the aforementioned premia to the other liabilities category just described. Resources other than the defendant's earnings must be subtracted from this total to arrive at the PER and these can include any child benefit, any income from other sources such as lodgers or tenants and any earnings of the spouse or partner over £5 per week.

Having calculated the PER, it is then subtracted from the defendant debtor's *net* earnings in order to calculate the attachable income. Clearly, if the PER is equal to or exceeds the defendant's attachable earnings, no amount is payable. If the attachable earnings exceed the PER, there is then an attachable sum available. At this point, the protected earnings calculator recommends that the normal deduction rate should not be less than 50% and not more than 66% of the attachable income.

The protected earnings calculator states that;

> *"The band is intentionally broad in order to allow you to take needs other than those specifically allowed for into account if you consider that you should do so. You will therefore need to exercise a degree of common sense and discretion in deciding which end of the band to use"*[142].

To reiterate, both parties have 14 days to appeal the court official's decision on the appropriate attachment, at which point a formal hearing before a judge will take place.

It can be seen from the above that the entire amount of the attachable income does not have to be deducted at any one time. However, the situation becomes more complicated if there is more than one AEO in operation and this often appears to be the case where, for example, there is an attachment for non-payment of maintenance and an attachment for non-payment of civil debt or two civil debt attachments.

Further complications arise when attachments for non payment of community charge or council tax are added to the mix, as the method of deducting income is entirely different. With these orders, no PER is set. Tables are used by the relevant council officials, whereby a percentage of the debtor's income is automatically deducted.[143] Where an individual is liable for council tax/community charge debts, as well as attachment for non-payment of civil debt or maintenance, their situation can become very precarious. A letter from a money advisor to the Adviser, the bi-monthly magazine of the Money Advice Support Unit in the UK, illustrates the problem:

Attachment of (Low Earnings)
"Following the article on AEO in Money Advice 44, I am writing to endorse the Money Advice Unit's concerns about multiple attachments. I recently interviewed a client with a total of 6 AEO's for debts relating to a bank loan, mortgage shortfall and four council tax/community charge debts. Our client is a single man and his only income is £160 per week. A total of £62 per week is being deducted for the AEO's, leaving him with only £98 for his rent (£55), clothing, fuel, etc"[144].

The important point here is that although the protected earnings calculator only authorises a deduction of between 50% and 66% of the attachable income in respect of any one order, any remaining attachable income might well be deducted anyway in respect of other orders as no PER is set in respect of Council tax /Community Charge attachments.

142 Determination of Means - Guidelines for Court Staff, UK, Page 15
143 See, for example, The Council Tax (Administration and Enforcement) Regulations, 1992 as amended
144 From The Adviser (Journal of the Money Advice Association) No 44, 1997 - Letter from Baldwin. K, Altringham Citizens Advice Bureau.

Although Ireland does not have the complications of council tax and community charge to deal with, it is clear that many over-indebted people have a wide-ranging number of debts to various different creditors, from credit institutions to the utility companies, credit unions and moneylenders. The issue of the PER is, therefore, crucial in terms of protecting low and middle income consumers. It is the bottom line below which the indebted person's income is not allowed to fall. This is not just a question of protecting that individual, but also their dependants, in particular dependent children. The question of how multiple attachment would be dealt with will be crucial in the context of any proposed Irish legislation.

Q.5 What is the relative priority between different AEO's?

The varieties of debts to which possible AEO's can apply have been outlined. The point has also been made that many debtors have multiple debts, as opposed to just one, and can therefore be subject to a number of AEO's simultaneously. Money advisors and creditors, therefore, need to be very clear as to the relative priority between the different orders. From a creditor's viewpoint, it is particularly important to understand these rules as there may be little point in applying for an AEO where other priority orders exist and there may be no attachable income left (before the protected earnings rate is arrived at). The difficulty here from a debtor's viewpoint is that if attachment of earnings is not a viable option, this does not appear to prevent a creditor from using any other method of debt enforcement, such as distraint of goods. The seizure of goods seems to be a more common method of debt enforcement in England and Wales than it is in Ireland[145].

The variety of potential attachment orders is divided into those that are priority and those that are non-priority. Priority orders include payment of maintenance or child support, council tax and community charge levies. Attachments in respect of judgement debts or failure to pay Administration Orders are non-priority. The basic priority between the different types of deductions is as follows:

- All **priority** orders (maintenance, child support, council tax and community charge) take priority over each other by date order. An important amendment was introduced on 1 October 1998 whereby only two council tax orders can be levied at any one time.[146]

- As with priority orders, all **non-priority** AEO's take priority over each other by date order. Therefore, if respective creditors take legal proceedings in the County Court against a debtor and obtain a judgement for the amount claimed, it is the creditor who first applies for and obtains an AEO who takes priority. The second order can only be deducted from any residual attachable earnings. However, the second creditor may look for a **consolidated attachment** as explained below.

- Crucially, all **non-priority** AEO's (i.e. non-payment of civil debt or failure to pay administration orders) give way to priority orders regardless of the date on which they were obtained. Therefore, should a maintenance order or order of child support be made **subsequent** to an order in respect of a judgement debt, it will displace it. The same applies for council tax and community charge orders but these are not relevant to the Irish situation.

It would make sense that this basic rule, the overtaking of non-priority AEO's by priority ones, should be repeated in any prospective Irish legislation, given that maintenance/child support payments are used to meet the basic living costs of people, as opposed to orders to repay judgement debts, that will often be directed to an already profitable credit institution or creditor.

145 According to Official U.K Judicial Statistics in 1997, 622,408 warrants of execution against goods were issued. However, only 7,358 of these warrants actually resulted in the delivery of goods.

146 From research enquiries, Newcastle Welfare Rights Service.

Consolidated Attachment
S.17 of the Attachment of Earnings Act, 1971 allows a County Court to consolidate any number of AEO's made in relation to the non-payment of judgement debts into one order. Similarly, a Magistrate's Court has the power to make a consolidated order to secure the discharge of any orders it has made.

This system whereby two or more judgement debts can be consolidated into one attachment payment is worthy of consideration. In England and Wales, this application can be made either by the debtor or by any person who has obtained or is entitled to apply for an AEO. In terms of saving court time, administrative workload for the debtor's employer and creditors and most of all, distress for the debtor, the consolidated order makes sense, especially the right of the debtor to take pre-emptive action and look for a consolidated attachment to prevent further attachment applications.

Two further points should be noted here; the consolidated order is only available in relation to non-payment of judgement debts as opposed to, for example, maintenance or community charge. Secondly, when this consolidated order is made, the money is distributed *pro rata* to the creditors according to the amount of the judgement. As such, any party may object to the making of the order and the matter must be referred to a judge of the County Court, who may or may not grant the application. Lastly, where an AEO is already in existence and a second creditor seeks to enforce judgement by way of a consolidated AEO, the matter must be transferred to the court that made the original order.

Q.6 What are the obligations of employers under the Attachment of Earnings Act 1971?

The Act imposes a number of obligations on the employer who is responsible for deducting money from an employee's wages and these can be summarised as follows:

- Under S.14 of the Act, a court is empowered to order any person who has the debtor in his employment to give to the court a statement in relation to the debtor's earnings and anticipated earnings.
- Once the AEO is made and the employer is served with it, s/he has one week to comply with the order.
- If an employer is served with an AEO and the debtor is no longer in their employment or subsequently leaves, s/he must inform the court within 10 days at the latest.
- An employer is obliged to deal with AEO's according to the priorities already explained.
- An employer has the right to deduct £1 from the employee's wages in addition to the normal deduction rate under the AEO in respect of his/her administrative costs. In addition, the debtor must receive a statement in writing from his/her employer on each occasion detailing the total amount of the deduction.
- Any person who becomes the debtor's employer and knows that an order is in force is obliged to inform the court that they are the debtor's new employer within seven days and must include details of the debtor's earnings or anticipated earnings. However, it is unlikely that an employer will become aware that an AEO is in force without the employee openly declaring it.

These are standard administrative matters but they are necessary for the efficient functioning of an attachment system. **As such, if AOE were to be introduced in Ireland, these measures should be included.** However, it is reiterated at this point, that in light of the possible detrimental effects of attachment on the debtor's employment, a procedure for **suspended** attachment orders must be incorporated into such a system.

Q.7 Under what circumstances can the AEO be varied or discharged?

According to S.9 of the Attachment of Earnings Act, AEO's may be varied or discharged by order of a court as a result of a material change in the needs or resources of the debtor. In addition, AEO's lapse when the person leaves the employment of the employer to whom the order is directed, except insofar as outstanding earnings remain to be paid. This means that a deduction can still be made from any money that the employee is owed at the termination of their employment. In theory, the order recommences when the attached debtor next becomes employed.

8.2.4 The Case for an Enforcement of Judgements Office

Research enquiries have revealed that complications can arise where attachments in respect of the same person have been obtained in different County Court districts in England and Wales. The County Court Rules, 1981 provide that in general an application for an AEO must be made to the County Court of the district in which the debtor resides. If two or more debtors are jointly liable, the application may be made to a court for the district in which either debtor resides. If a debtor does not reside within England or Wales or the creditor does not know where the debtor resides, the application may be made to a court in the district in which the judgement was obtained.

In theory, therefore, a second attachment of earnings application should reveal that a previous AEO already exists, given that the application should be made in the Court area in which the debtor resides. However, when people change address, there may be difficulties for both creditors and court officials in becoming aware that other orders exist in order to seek to consolidate them. For this purpose, the County Court Rules also provide that a proper officer of a court shall keep a nominal index of existing AEO's relating to debtors residing in the particular district. Theoretically, if a court official becomes aware that a debtor in respect of whom an AEO has been made in that particular district has moved to another district, a copy of the order should be sent to the relevant court officer of the other district for entry into the index. It is then open to creditors to request that a search be made of the index of the court and certificates issued accordingly (form N336 is used for this purpose). In practice, however, the index of orders system does not appear to ensure that creditors and court officials become automatically aware of the existence of AEO's in other districts.

As far back as the publication of the Payne Committee Report[147] in 1969, the creation of a supervisory Enforcement Office was considered to be pivotal to reform of debt enforcement in the U.K and failure to introduce it has hampered the effectiveness of the attachment of earnings system. Consider the following view from an experienced money advice practitioner:

Whilst a few of Payne's recommendations were implemented swiftly, particularly the abolition of imprisonment for civil debt and its replacement with attachment of earnings, the key proposal for an Enforcement Office was ignored. With an Enforcement Office, Payne had envisaged a logical enforcement system ***based on information about the debtor's ability to pay,*** *and, under such a system, the committee anticipated that attachment of earnings would prevail. Without the Enforcement Office, attachment of earnings has remained the poor relation to warrants of execution.*[148]

Clearly, there are lessons for the Irish situation here, not only in relation to potential attachment of earnings legislation but also for the current method of enforcing judgements by way of Instalment Order, given that it is quite possible that a judge may make an Instalment Order in an Irish court without being aware that one or more is already in existence. It is illogical that a central register of proceedings in train and existing judgements, together with enforcement steps being taken in respect of them, does not form the basis of debt enforcement in England and Wales. This would enable creditors, judges and court officials to ascertain the true nature of any consumer's indebtedness.

147 Report of the Committee on Enforcement of Judgement Debts – The Payne Report (London: HMSO, 1969)

148 Phipps.J, *'What a Payne'* (From The Adviser, Journal of the Money Advice Support Unit, Number 77 January / February 2000)

This problem is solved in Northern Ireland by having an enforcement of judgements office through which all enforcement must take place.[149] The feasibility of setting up a similar office here is an issue that the recently established Courts Service might examine. At present whilst a judgement may be registered by a creditor in the Central Office of the High Court, this is not an obligatory exercise and, in any case, only indicates that a judgement has been obtained and does not indicate what enforcement steps have been taken in relation to it.

In the view of this report, a central reform needed in the Irish debt enforcement system is increased certainty and information in relation to the position of the parties to the proceedings. An Enforcement of Judgements Office, properly resourced, could achieve this.

8.2.5 Administration and Composition Orders

The Administration Order is similar in nature to a consolidated AEO. However, it is more proactive and preventative in its scope. Basically it can be obtained in two ways.

- A debtor who has at least one judgement debt against him/her in the County Court or High Court may themselves apply for an administration order[150].
- When a creditor applies to a County Court for an AEO to secure the payment of a judgement debt, the court, having considered the debtor's circumstances (which should be available on the statement of means that has to be furnished to the court), may intervene and decide that because the debtor has other debts, all liabilities should be dealt with together[151].

If the court is not in possession of all the relevant financial details, it may order the debtor to furnish to the court a list of all creditors and the amount owed to them. If the debtor fails to do this, the order may be enforceable by potential committal. Again, the purpose of this is not to imprison the debtor but to ensure that the court has all the relevant information before it in order to make a realistic decision. The court can then order that the debtor make a single monthly payment through the court which is distributed *pro rata* to creditors. There is no fee payable to process the application. However, **ten pence per pound (i.e. 10%)** is deducted to cover the court's administrative costs, a considerable additional expense for the debtor and a factor that leads to a significant reduction in the *pro-rata* payments received by each creditor in each period.

Disadvantages

One of the principal problems with the administration order procedure is that the upper limit of total indebtedness of the judgement debtor in order to qualify is £5,000 sterling (the County Court financial jurisdiction limit). This cap has been under review for a number of years but, despite consistent lobbying by the money advice sector, it has remained unchanged. The obvious effect of this cap is that the debtor with total indebtedness over the £5,000 limit cannot avail of the administration order procedure. The practice has, therefore, evolved whereby money advisors seek a partial write off from creditors in order to bring the total amount of the debt under the £5,000 limit. However, in the case of mortgage/housing debt where the loan is secured, a write off will be not available and if the arrears are sizeable, the chances of the limit being exceeded increase.

A second disadvantage with the administration order procedure is that a court order must have been obtained by at least one creditor in order for an administration order to be granted. On this point again, money advisors in England and Wales have argued that a more proactive approach would be to allow the debtor to apply for an administration order where there are several debts that cannot be repaid from current income in the foreseeable future, although no legal proceedings have yet been issued. For

149 See further Page 82
150 Section 112 - County Courts Act, 1984
151 Section 4 – Attachment of Earnings Act, 1971

example, it has been suggested that where a default notice has been served under the Consumer Credit Act, 1974, the right for the consumer to apply for an Administration Order should apply.

The addition of a charge of 10 pence per pound to the amount paid obviously imposes an extra burden on the debtor as well as reducing the amount paid to relevant creditors. Although it is inevitable that some costs will be involved, 10% is arguably too high a figure. Finally, the existence of the Administration Order is listed on the register of County Court judgements and this may have an adverse effect on the debtor's credit rating in the present and into the future. However, it is also arguable that becoming involved in further credit commitments during the Administration Order period may not be the most sensible option from the debtor's point of view.

Advantages

The administration order procedure appears to have many advantages. All creditors are treated on an equal basis (i.e. *pro rata*) and are guaranteed to receive some payment. Interest is frozen on all debts and creditors cannot take any other enforcement proceedings as long as payments under the administration order are being made. The procedure is also flexible in that it allows for variations, upward or downward, in the amount of the repayment through an application being made to the relevant court.

Section 5 of the Attachment of Earnings Act 1971, also provides that where an administration order has been granted by the court, it can be secured by an AEO, either at the time the administration order is issued or at any time while it is in force. This acts as a safety valve for creditors guaranteeing at least that if the debtor fails to pay the periodical amount under the order, there is an automatic method of enforcing payment if the debtor is employed.

Composition Orders

Finally, the court has the power, instead of making an administration order, to make a **composition order**. In this case, **the court decides** that a portion of the debts should be written off. This is based on the court's assessment that the debts cannot be paid in their entirety within a reasonable time frame, usually three years. Effectively, this amounts to a form of debt settlement on a small scale. The following example may help to illustrate how the composition order works:

> ***A person has £75 per month available income and owes a total of £4,500.***
> ***A sensible composition would be to offer 36 x £75 = £2700 total amount to be paid (less 10% handling) =£2430.***
> ***2430 divided by 4500 = 0.54 (the proportion to be paid).***
> ***0.54= 54% (the percentage to be paid)***[152]

Research enquiries reveal that compositions are a very common feature of the Administration Order procedure and that it is rare for a debtor to have sufficient disposable income after protected income to enable the entire amount of indebtedness to be paid off within the three year period. Composition offers are often made at a fairly low level by money advisors on behalf of their clients and any given creditor can question the amount of the offer. Ultimately, a hearing before a judge may be required to determine what a suitable composition is.

Conclusion

In conclusion, the administration order procedure has a lot to recommend it, both from the debtor's and potentially the creditor's point of view. It cuts down on expensive legal proceedings, is based on a realistic assessment of the debtor's means, the variety of their debts and their ability to repay. Creditors are treated equally on a *pro-rata* basis and the administrative costs involved in the procedure are deducted from the monthly payment.

152 Taken from Debt Advice Handbook, Child Poverty Action Group, 3rd edition, Page 232.

It is recommended that this option be examined in relation to debt enforcement in the Irish legal system. However, as has been noted, a common cause of concern for money advisors in the UK over the years has been the £5,000 sterling limit. Should the administration order procedure be introduced here, consideration should be given to setting the limit at a higher level, for example, the current financial jurisdiction of the Circuit Court – i.e. currently € 38092.

8.2.6 General Conclusion

Undoubtedly, the English and Welsh model needs to be analysed in considerable detail if AOE is to be introduced in the Republic of Ireland and it is indeed likely that any legislation in Ireland would draw heavily on the UK equivalent. There are many features in the UK system that should be examined with a view to incorporation into any proposed legislation here and these are summarised in the recommendations section. Equally, there some important omissions that are less than satisfactory especially the lack of a consistent source of information about the enforcement of judgements and the lack of a consistent method for setting a protected earnings rate.

8.3 NORTHERN IRELAND

8.3.1 Overview of debt enforcement in Northern Ireland.

The most significant feature to note in relation to debt enforcement in Northern Ireland is the presence of an Enforcement of Judgements Office (EJO) at the heart of the system. Effectively, this ensures that all judgements are enforced through one forum, which also maintains records of existing judgements that may not yet be at the enforcement stage. Thereafter, detailed procedural orders and rules provide for the steps applicable to the enforcement process.[153]

Once a judgement has been obtained and the amount remains unpaid, the creditor may obtain a decree from the relevant court and lodge notice of their intention to enforce that decree with the EJO. At that stage, the debtor has 10 days to pay. If they do not, the enforcement process begins. The creditor or their solicitor may begin by applying for a search in the EJO against the debtor in question in order to reveal whether there are other outstanding judgements against him/her and what stage they may be at (the fee for this is £3 sterling). Equally, this search could be undertaken before deciding to commence legal proceedings in the first place. The creditor may also seek a report on the debtor's circumstances if the debt is for more than £3,000. However, this report costs £100 which is not refundable if the creditor decides not to proceed with the enforcement. If they do decide to proceed, it can be deducted from the enforcement fee paid to the EJO.

The EJO has the right to request that the debtor, or other relevant parties, provide evidence of the debtor's means (income, expenditure, assets and liabilities). If the debtor chooses not to attend, a conditional order to issue a warrant for their arrest can be sought. If s/he further refuses to attend, an actual warrant will follow. Effectively, this is a compulsory examination order. Having conducted the examination, the EJO also has the power to issue a notice of unenforceability where it feels that, due to the debtor's lack of means, the debt cannot be enforced within a reasonable time. The creditor may object to this certificate being issued and a hearing may need to take place to determine this. In passing, it should be noted that the certificate of unenforceability can have a drastic effect on the debtor's credit rating.

153 The Judgements Enforcement (Northern Ireland) Order, 1981 and The Judgements Enforcement Rules (Northern Ireland) 1981, No 147 (as amended).

The EJO may also issue an Instalment Order based on the examination and this will apply unless a written objection is made within eight days. If there is an objection, a hearing takes place at which the matter is determined. In the event of an Instalment Order being made and not complied with, a creditor may apply for committal in the High Court or County Court. Again, it is interesting to note that a committal order will only be made if it can be shown that the defendant had, or but for his own fault would have had, the means to pay. The defendant must appear at the hearing before a committal order can be made in contrast to the situation in the Republic where a committal order is often made in the debtor's absence. The cost of the committal proceedings borne by the creditor may be added to the debt.

8.3.2 Attachment of Earnings Orders in Northern Ireland

AEO's in Northern Ireland are governed by Articles 73-79 of the Order and Rules 48-56 of the Rules[154]. A specific form (Form 7) may be issued by the creditor either at the same time as or after the application to enforce (£4.50 can be added to the debt in respect of this application). The EJO then issues a provisional order to the debtor based on his/her statement of means, and 8 days is allowed to file a reply. If no reply is filed, the order stands. If a reply is made, the matter is referred to the Master of the EJO and a hearing may then be organised at his or her discretion in order to assess whether an order should be made. Deductions are generally ordered on a weekly or monthly basis, depending on when the debtor receives his/her income.

In common with the English and Welsh system, the EJO can suspend the AEO provided all payments are made. In these circumstances, the debtor pays the money directly to the EJO without the need for the debtor's employer to become aware of the order. This removes the potential detrimental effect of AEO's on the debtor's employment and employment prospects.

The EJO must set a protected earnings rate (PER) below which the debtor's income must not fall. The income of any spouse or partner is taken into account in assessing the deduction. In common with the protected earnings calculator in the UK, the base line for determining the protected earnings rate is the rate of benefit currently paid by the Department of Health and Social Security. There are then additional allowances in respect of dependant children that vary according to the age of the child or children concerned. Child benefit, however, must be deducted from this amount, but the EJO is obliged to add any expenses in respect of rent, rates or mortgage interest. In addition, if a spouse is paying maintenance this must also be taken into account.

Having calculated the protected earnings rate and subtracted it from the debtor's net earnings, the attachable income is arrived at. EJO officials then have considerable discretion in deciding the percentage of that income to attach. However, where the difference between net earnings and the protected earnings rate is small, 100% of the attachable income will be attached. As with England and Wales, any subsequent order for maintenance or child support overtakes in priority the AEO made by the EJO.

In conclusion, debt enforcement in Northern Ireland appears to be well organised principally due to the existence of the Enforcement Office. However, it is arguable that the PER is less than generous to the debtor in terms of the items that are included in the calculation. This deficiency can be offset by the flexibility to deduct less than 100% of the difference between the PER and net income, where that difference is considerable. The Enforcement of Judgements Office was subject to a review in 1987 and it was recommended that it be retained, subject to some changes being made to its practice and procedure.[155]

154 The Judgements Enforcement (N.I) Order, 1981 and the Judgements Enforcement (N.I) Rules, 1981.

155 Report of the Enforcement of Judgments Review Committee (Northern Ireland), 1987

8.4 SCOTLAND

8.4.1 Overview of debt enforcement in Scotland

Debt enforcement in the Scottish legal system is referred to as "diligence". A court decree must be obtained against the debtor before diligence can proceed. The law in this area is currently regulated by the Debtors (Scotland) Act 1987. This Act deals comprehensively with the various forms of debt enforcement in the Scottish system. These include "earnings arrestment", the equivalent term for attachment of earnings. However, at this point, it must be noted that a fundamental review of diligence (or debt enforcement) is currently being carried out in Scotland and this is leading to the dismantling of the current system in favour of a more balanced alternative.[156]

8.4.2 Attachment of earnings in Scotland

Once a decree is obtained in a sheriff's court, the sheriff's officer (equivalent to a clerk of the court) serves a charge on the debtor on the application of the creditor and this gives the debtor 14 days to pay the judgement debt. If s/he fails to do so, a schedule of arrestment may be served on the debtor's employer by the sheriff's officer and a copy of the arrestment is also served on the debtor. The amount that the employer is required to deduct from the debtor's net earnings is fixed, according to tables set out in Schedule 2 of the 1987 Act. These tables calculate the deduction depending on whether the debtor earns a daily, weekly or monthly wage. No earnings arrestment may be made if the debtor's weekly income is less than £63. In effect, therefore, this is the protected earnings rate. Deductions are then graded once the income exceeds £63.

The key drawback for the debtor in the Scottish system is that no account is taken of family circumstances in calculating the amount of the deduction. The only relevant factor is the net earnings of the household - the number of dependants the debtor has is ignored as are housing costs. In addition, the deductions applied by the tables are quite draconian in their effect. For example, a monthly net income exceeding £800 sterling but not exceeding £860 attracts a possible deduction of £118, approximately 15% of a monthly income that yields less than £200 per week and the attachment is the same whether the debtor is a single person or has a partner and child dependants.

Sections 58 and 59 of the Act permit only one civil debt attachment and one maintenance attachment to exist at any one time. As with the English and Northern Irish systems, maintenance attachment takes precedence over civil attachment. As only one civil debt arrestment can be dealt with by an employer at any one time, a creditor who obtains an attachment where one is already in force cannot simultaneously enforce it. In this case, the employer is obliged to return the most recent earnings attachment to the sheriff's court and the creditor is duly informed. However, s/he can then apply for what is called a 'conjoined arrestment order' (similar to a consolidated attachment). If the conjoined arrestment is granted, the employer deducts the same amount and distributes it on a *pro rata* basis.

The following case studies demonstrate graphically the hardship that can result from a punitive attachment of earnings regime[157]. It is submitted that this is the type of outcome that any potential Irish legislation should strenuously avoid if increased levels of debt related poverty are to be prevented. Any attachment at these rates of income, if it is to exist at all, should be kept to an absolute minimum.

156 For further detail, See Section 11, Page 112

157 Case Studies submitted for the purpose of this report by the Social Work Department, Dundee City Council, February, 1999

Case Study 1 - A single parent with one child dependant

Ms A is a lone parent with one child aged 9 years. She is employed full-time and normally takes home £870 per month. Her only other income is Child Benefit of £74.10 per month. Despite earning what might be considered an average wage, Ms A struggles to manage her finances and since the attachment, she now finds it very difficult to cope.

Expenditure Monthly		**Income Monthly**	
Mortgage	203.98	Wages	870.00
Endowment	59.60	+ Child Benefit	74.10
Council Tax	76.00		944.10
Building Ins	19.56	- *Earnings arrestment*	132.00
House Contents Ins	8.12		
Electric	45.00		
Telephone	25.00		
TV Licence	10.00		
Clothing	30.00		
Travel (to work)	80.00		
Car insurance	30.00		
School Meals	25.00		
Childminding	160.00		
Housekeeping	180.00		
Total expenditure	**£952.26**	**Total Income**	**£812.10**

Total Income Deficit Monthly - £140.16

Case Study 2 – A married couple with 3 child dependants.

Mr & Mrs B have 3 children aged 15, 13 and 4. Mr B works full-time and earns £95.07 per week. Because his wages are so low, they are topped up by Family Credit of £104.10 per week. Both Mr & Mrs B have arrears of Community Charge dating back to 1992. An Earnings Arrestment has just been attached to B's wages.

Expenditure (4 Weekly)		**Income (4 Weekly)**	
Rent	149.48	Wages	380.28
Electric	100.00	Family Credit	416.40
Petrol (to work)	140.00	Child Benefit	120.20
Gas	12.00		916.88
House Insurance	10.00	- *Earnings Arrestment*	32.00 (£8x4)
TV Licence	10.00		
Road Tax	15.00		
Car Insurance	23.00		
Council Tax	70.00		
Housekeeping	360.00		
Clothing	45.00		
School Meals	48.00		
Total Expenditure	**£982.48**	**Total Income**	**£884.88**

Total Income Deficit 4 weekly - £97.60

SECTION 9

ATTACHMENT OF EARNINGS IN THE LEGAL SYSTEMS OF EUROPEAN JURISDICTIONS

9.1 - Introduction

In addition to information provided by individual money advice practitioners across a range of European jurisdictions, two publications have been relied upon as source material for this section.

The first is the Report of the Consumer Debt Network (CDN), Collection Watch Project entitled ***Debt Collection Practices across Europe***, February 1999[158]. Essentially, this is a survey which examines the legal system of a number of European jurisdictions in relation to debt enforcement practices.

The second report is entitled ***Report on the Garnishability of Earnings in 26 legal systems*****,** June 1997, by Charles Van Heukelen[159]. This publication presents a comparative analysis of attachment of earnings models in various European and African countries, concentrating in particular on how minimum income is calculated and to what extent social security payments form part of the attachment system. It does not explain in any great detail how the priority between various attachments is worked out, nor does it analyse the mechanics of the attachment procedure. However, the author does offer some detailed recommendations on the principles that should be used to calculate a fair minimum income or protected earnings rate within an attachment of earnings model.

This section of the report is divided into the following headings:

General Details of European Models

It is beyond the scope of this report to fully analyse attachment of earnings systems in every European State. It is proposed instead to begin by offering a general comparative model of European jurisdictions in terms of the following dimensions:

- Whether assignment of wages as a condition of the credit contract exists in a jurisdiction - i.e. assignment without having to obtain a court judgement;
- Whether attachment of earnings following a court judgement in relation to non-payment of civil debt exists in a jurisdiction;
- If attachment of earnings does exist in a particular jurisdiction, how the following matters are treated:

1. The protected earnings rate and whether it is set by a court or by regulation;
2. The extent to which dependants of the debtor are taken into account in calculating the protected earnings to be retained by the debtor;
3. The treatment of alimony (maintenance and child support) payments - i.e. whether the same formula exists for calculating minimum income as with civil debt or whether alimony creditors are treated more favourably;
4. The attachment of social security payments;
5. Any other notable features of the systems under examination.

Specific Comparative Analysis

It is then proposed to look in more detail at two European models that calculate the amount to be attached by regulation as opposed to at a judge's discretion, but use different systems in order to arrive at the appropriate deduction. These jurisdictions are Luxembourg and Germany. These will then be contrasted with the UK system where a judge or court official has some discretion in setting the amount

158 Collated by Laws. N and Mansfield. M - Newcastle Welfare Rights Service. The Consumer Debt Net is a European network composed of practitioners and experts in the field of credit and debt engaged in casework and/or research.

159 Charles Van Heukelen is President of the Belgian Bailiffs Association.

of the attachment. The relative strengths and weaknesses of these approaches will then be briefly assessed.

Further Research Issues

Issues around multiple attachments for non-payment of debt and the relationship between civil debt attachment and alimony/child support attachment are examined to some extent in this report but it is clear that inadequate information exists on these complex matters. This section will make some suggestions for possible future research in this area.

The Recommendations of the Van Heukelen Report

The concluding piece in this section of the report will examine the recommendations made by Van Heukelen (June, 1997) for arriving at a fair level of protected earnings based on his survey of 26 European and African countries.

9.2 General details of European models

9.2.1 Which Jurisdictions permit the Assignment of Wages in the Credit Contract?

Assignment of wages differs from attachment of earnings in that in the latter case the creditor must obtain a court judgement and seek to follow it up by looking for an attachment, whereas in the former case, **the loan agreement itself** allows the creditor to seek to have the borrower's wages assigned in the event of default, without having to bring court proceedings at all.

Of the countries where information was available, Germany, Austria, Belgium, France, and Luxembourg permit the assignment of wages as part of the credit contract. It would, of course, be necessary to have a term in the contract to this effect. This right to assignment in the contract is sometimes subject to restrictive conditions and in some cases, the debtor may object to the assignment.

Assignment of wages in the credit contract is not permitted in England and Wales, Scotland, Northern Ireland, Denmark, Spain, Finland, Greece, Iceland, The Netherlands, Sweden, Switzerland and Norway. As there have been no proposals to introduce assignment in Ireland, it remains a more marginal concern of this report. However, it is worth noting that the Collection Watch report (1999:4) recommends that ***"assignment of wages without reference to the court or enforcement authority should be banned"***[160]**.** It follows that any future proposal to introduce assignment in Ireland should be firmly opposed.

9.2.2 Which Jurisdictions allow attachment of earnings following court judgement

Every European country surveyed, with the exception of Greece and Iceland (and obviously Ireland), allows for attachment of earnings for non-payment of civil debt as a method of enforcement following a court judgement. Attachment often takes place through courts but there are other forms of enforcement[161]. In Iceland, legislation is pending in this area. In Greece, wages can only be attached in relation to debts owing to the State.

AOE is, therefore, the norm in the legal systems of European States. What are of interest are both the mechanics of the systems and the level of income that cannot be attached in any given country. Again details are provided in the next section.

160 Debt Collection Practices Across Europe, Consumer Debt Net, 1999.
161 For example, in Denmark, attachment takes place through the office of the Public Bailiff.

9.2.3 Details of attachment of earnings in each jurisdiction in terms of issues such as:

- **protected earnings,**
- **treatment of dependants,**
- **treatment of maintenance debt,**
- **social security attachment,**
- **other relevant features**

(Please note that complete details in relation to each of these headings are not available for each jurisdiction depending on the information provided by the relevant contact).

Introduction

Germany, Austria, England and Wales, Scotland, Northern Ireland, Belgium, Denmark, Spain, Finland, Italy, Luxembourg, the Netherlands, Portugal, Sweden, Switzerland and Norway allow for attachment of earnings following a court judgement or other enforcement method. Their approach to the vexed question of protected earnings (i.e. the income the debtor is entitled to retain following the attachment) varies considerably, not just in relation to the amount but also the method by which that figure is arrived at.

The figures quoted below for each country are based on Van Heukelen's research published in **June 1997**. **It is essential, therefore, to bear in mind that many of these protected earnings rates are index-linked and will be much higher at this stage.** Van Heukelen used the French Franc as the common basic currency for the figures quoted. For the purpose of this report, these figures are transferred into Euro even in relation to those jurisdictions outside the Euro zone. In any case, these figures are approximate and are designed to give an indication only of protected income in each jurisdiction.

Germany

In Germany, attachment of earnings is regulated by Article 850 of the Civil Law Code. Protected earnings are calculated by reference to very detailed and precise tables. These tables dictate the exact amount that can be attached according to the band of income into which the debtor's earnings fall and the number of his/her dependants (if any). The effect of these tables is to attach more as income rises and to attach less for those debtors with dependants. Those on lower incomes, therefore, have less deducted in percentage terms than those on higher incomes. Those with dependants have less deducted than those without.

Some forms of remuneration such as annual bonuses cannot be attached. Social security payments are in theory subject to attachment but some exceptions exist to this, such as invalidity benefit. In addition, any such attachment is subject to the protected earnings rates already set out in the tables. Alimony payments are treated differently. The debtor is only entitled to retain sufficient income necessary to support himself.

Special circumstances can be taken into account in deviating from the protected earnings tables thus allowing the debtor to retain a larger level of income. Disability appears to be the most frequently used ground here. The debtor's housing costs must be met from protected earnings, although housing subsidies may be available where accommodation costs are high and insufficient income is left over for household budgeting.

Lastly, in terms of employment protection, express dismissal of an employee by an employer because of attachment is prohibited. Research enquiries have indicated that although this protection exists in theory, it is difficult to establish that this was the reason for the dismissal and in practice it is not uncommon for an employer to discriminate against an employee on the ground that his/her income is being attached.

A practical demonstration of the German model follows later in this section.[162]

162 See Page 96

Austria

The Austrian system also works on tables although details of those tables were not available at the time of writing. However, research enquiries revealed that the level of earnings, the number of dependants and the type of debt involved is taken into account in assessing protected earnings.

The treatment of the alimony debtor is harsher than that of the civil debtor. For example, a person with two dependants and a monthly net income of approximately € 800 can only have around € 8 of that sum attached if it relates to civil debt. On the other hand, they would have to pay over € 125 to an alimony creditor.

Belgium

The system in Belgium also works on fixed bands, with rising scales of deductions. These bands are index-linked to keep pace with inflation.
However, dependants are not taken into account in the Belgian system.

Alimony/child support payments are treated separately from civil debt and much less favourable treatment is accorded to the maintenance debtor.

- A debtor is entitled to a minimum monthly income of approximately € 780 per month before any attachment can take place.
- 20% of the amount between € 780 and € 840 is deducted.
- 40% of the amount between € 840 and € 1015 is deducted
- Any portion of income over € 1015 per month is subject to 100% attachment.

Welfare benefits are attachable in principle but subject to the protected earnings rate of € 780 set out above. In relation to the priority between attachments, alimony/child support attachments overtake prior civil debt attachments.

Denmark

In Denmark attachment takes place through an office called The Public Bailiff.

The Public Bailiff is entitled to attach a maximum of 15% of income, taking into account the debtor's entitlement to retain resources necessary to ensure a modest standard of living, given the economic circumstances of the debtor's dependant family.

As a bottom line, protected earnings equivalent to the minimum social security payments for the individual/family must be retained. As a result, social security payments are not attachable.

Child support payments are subject to different rules, as are debts to the State.

Spain

The Spanish system involves a protected earnings figure free from attachment (equivalent to the Spanish minimum wage) and deductions thereafter, rising according to the amount earned.

Alimony payments are treated differently and a judge has complete discretion in this area.

Social Security payments (including pension benefits) are attachable but subject to the protected earnings rate.

- The protected earnings rate is approximately € 405 per month.
- Income between € 405 and € 810 is attachable at the rate of 30%.
- Income between € 810 and € 1220 is attachable at a rate of 40%.
- The percentage deductions rise gradually until 90% of income above € 2440 monthly can be garnished.

The Spanish system does not take into account dependants in arriving at the attachable sums.

Finland

Dependants are taken into account in the Finnish system.

Social security payments are attachable subject to the protected earnings rate.

- The protected earnings rate is approximately € 470 per month for an individual, with an extra € 170 added to this figure in respect of each dependant.
- For an individual, the portion of income between € 470 and € 850 is attachable at a rate of 75%.
- The portion of income over € 850 net is 100% attachable but this is subject to the important proviso that a maximum of 33% in total of overall net income can be attached.

A further finding from research enquiries is that in addition to protected income, the state can also provide other financial assistance to a debtor, in particular housing subsidies where accommodation costs are relatively high and the debtor's income is inadequate to meet these following the attachment.

France

The protected earnings rate in France is equivalent to the Revenu Minimum D'Insertion (RMI) (which is a similar concept to Supplementary Welfare Allowance) and this figure is approximately € 350 per month for an individual.

France does not allow attachment of social security payments.

Different and less sympathetic rules are used for alimony attachment.

The French system again operates by deducting a set percentage within income bands, rising progressively.

- Up to € 220 per month, 5% is attachable.
- From € 220 to € 440, 10% is attachable
- These percentage deductions rise until any amount earned monthly above € 1320 is 100% attachable.

These figures relate to an individual with no dependants. Approximately € 80 in addition to these sums is allowed monthly per dependant. Whatever the outcome of the percentage calculations, these deductions must not leave the debtor with less than the protected income outlined above, i.e. € 350.

Greece

Greece is one of the few remaining European countries that do not permit the attachment of earnings for non-payment of civil debt. The exception to this rule is where debts are owed to the State. In this case, 25% of the debtor's monthly salary can be deducted. Dependants are not considered when calculating this sum.
In relation to alimony/maintenance, up to 50% of the maintenance debtor's salary can be attached.

Italy

The rules in Italy appear to be reasonably straightforward.

- Up to 20% of the debtor's salary can be attached in relation to non-payment of civil debt.
- 50% of salary can be attached in relation to tax debts owed to the State.
  Alimony/maintenance are treated in the same fashion as civil debt.

Social security payments are not attachable.

Luxembourg

The protected earnings system in Luxembourg again operates on a progressive deduction basis.

Dependants are not considered in calculating the attachable sums.

- There is a protected earnings rate of approximately € 450 per month.
- Income between 450 and 700 is attachable at a 10% rate.
- Income between 700 and 870 is attachable at a 20% rate,
- Income between 870 and 1415 at a rate of 25%.
- Any amount earned over 1415 is attachable at 100%.

Alimony/maintenance is treated differently in the sense that up to 100% of monthly earnings can be attached for this purpose.

Social security payments are not attachable in relation to non-payment of civil debt.
Multiple attachments are permitted in the Luxembourg system.

A practical demonstration of this system will be given later in this section[163].

The Netherlands

In the Netherlands, the protected earnings rate is set at 90% of the relevant social security payment that the debtor and his/her dependants would be entitled to.

- Social security rates for a couple with no dependants correspond to approximately € 890 per month.
- For an individual the relevant rate is approximately € 635 per month.
- Social security payments are therefore attachable up to 10% - i.e. the difference between the 90% minimum rate and 100%. Some discretion exists to attach less than the 10% (down to 0%) where the debtor has very high rent, mortgage or work expenses.

Alimony payments are similarly treated in terms of minimum income. Attachment in relation to alimony/child support has priority over civil debt attachment.

Although multiple attachments are permitted, the first creditor to obtain an AEO becomes responsible for distribution of the available income to other creditors who obtain subsequent orders. This means that the first creditor is saddled with the administration costs of the exercise. This may be designed to discourage applications.

Portugal

In Portugal the debtor is entitled to retain a minimum of two-thirds of their income or social security payment as appropriate so a maximum of one-third of income can be attached. Portugal also has a minimum attachment of one-sixth of net income. There is a wide judicial discretion, taking into account family circumstances, the number of dependants, etc, as to what portion between one-third and one-sixth is attached. Alimony/maintenance is treated differently.

Sweden

In Sweden the protected earnings figure following an attachment for an individual without dependants is approximately € 440 per month **plus** the cost of accommodation, transport to and from work and medical expenses.

This sum is increased by approximately € 285 per month in relation to a dependant spouse or partner, € 265 for a child over seven years of age and € 230 for a child under seven.

Attachment takes place through a government office called the Enforcement Service. These decisions are subject to a right of appeal in the courts.

Alimony debtors enjoy less protection. The minimum income for the alimony debtor is lower and is set at approximately € 395 per month.

163 See Page 94

The Swedish system contains some features of note. Whilst a set protected earnings figure exists, accommodation and other costs are **added** to this figure. This differs from the norm in most European countries where housing costs must be discharged from protected earnings.

The other notable feature is the setting of different rates of allowance for different categories of dependants. This appears to be logical on the basis that the age of the dependant may determine their cost to the household.

Switzerland

Federal rules in Switzerland prescribe that a protected income must be left to the debtor and his or her dependants following an attachment but they do not provide a method for calculating what this sum should be. It is described in rather vague terms as an amount that can guarantee the payment of minimum living expenses for the debtor and his/her family including housing costs.

In addition, the figure ultimately arrived at is a gross sum because of the Swiss tax system so that it does not cover income tax liability, thereby creating ongoing debt problems even where the attachment has been discharged.

Any income above the minimum figure can be attached.

The Public Prosecutor's Office decides what the appropriate amount should be given the circumstances of the particular debtor and family. This decision can be appealed by creditors.

Social security payments are attachable in theory given that they might leave the debtor a higher income than that assessed as being minimum subsistence.

Research enquiries found that attachment often ends in unemployment, due to the reluctance of employers to deal with the attachment and a lack of protective employment legislation to counter this.

In the course of these enquiries, the following research report was sourced and it provides an interesting analysis of the effectiveness of the attachment of earnings system in Switzerland[164].

Getting out of debt: Attachment of wage in whose interest? – A Summary

Zaborowski and Ziefel begin their report by arguing that attachment of earnings is not very successful in several European states and speculate that this may be due to two factors; namely the high levels of income attached and the lack of provision for debtor release. They note that the number of debt recovery proceedings in Switzerland grew by 28% between 1990 and 1996 (from 1.43 million in 1990 to 1.83 million in 1996). In 80% of cases where enforcement is necessary, attachment of income is the preferred option, usually due to a lack of attachable assets in the debtor's possession[165].

However, in 70% of these cases (a ratio that the authors also say applies to Germany[166]) the value of the attachment is not sufficient to meet the outstanding debt over the permitted attachment period.

The report then goes on to evaluate two proposals for reform by statistically analysing the behaviour of a household being attached. At this point it is important to stress that, in the Swiss system, once the debtor's protected earnings are calculated, excess income thereafter is 100% attachable, unlike the majority of European models where a minimum income is guaranteed and attachment is calculated by rising percentages within income bands thereafter.

The authors conclude that a so-called "pareto improvement", one whereby all parties to the problem (in this case the debtor, creditors and the State) improve their situation as a result of a change in the system of attachment, is not possible as there is always a party whose position deteriorates. However, they

164 Zaborowski. C & Zweifel. P, *Getting out of debt- Attachment of Wage in whose interest?* (University of Zurich: Socio Economic Institute, April 1998)

165 This interesting finding seems to confirm anecdotal evidence in Ireland that seizure of goods is becoming a less popular method of enforcement.

166 From figures provided by the Union of German Debt Collecting Agencies, 1997

concede that a reduction of the attachment rate from 100% of the residual income above protected earnings to something lower would strengthen incentives to work, thus conveying an advantage not only on the debtor but on taxpayers (i.e. the State) as well.

This finding supports the contention voiced earlier in this report that high levels of attachment create a major employment disincentive. In addition, given that 70% of orders are not satisfied as it stands according to the authors, the position of creditors is unlikely to substantially deteriorate and could actually improve with a lower attachment rate. The final conclusion is that debtor release (involving write off) is definitely non-advantageous to creditors, although the benefits to the debtor are obvious. Equally, the State stands to benefit in the potential savings on public welfare and other costs to society.

Norway

Attachment in Norway takes place under the Creditors Security Act 1991. In common with the Swiss system, a protected earnings rate is arrived at on a case by case basis as there is no set minimum income figure.

The amount is calculated according to the reasonable expenses of the debtor that are incurred in maintaining him/herself and household, and this again includes housing costs.

9. 3 Specific comparative analysis

9.3.1 Introduction

This section has two aims. Firstly to demonstrate how attachment of earnings, using set deduction tables, operates. For this purpose two European jurisdictions, Luxembourg and Germany have been selected. Both have specific but differing methods for calculating attachments in relation to civil debt (separate methods of calculation often exist for alimony/child support creditors). A demonstration of how the system works in each country is provided, followed by a comparison to illustrate the differences between them. Secondly, these systems where protected earnings are arrived at by set formulae (referred to in this report as **'fixed deduction'** systems) will be contrasted with systems where it is at the discretion of a court or court official to arrive at the protected earnings figure (referred to in this report as **'court deduction'** systems) based on the needs/expenses of the household, such as in England and Wales. This will involve a brief reprise of the English and Welsh model in order to provide a comparison between it and the fixed deduction models selected.

9.3.2 Luxembourg

To illustrate how attachment works in Luxembourg, an example of an employee with a net income of 71,000 Luxembourg Francs (approx € 1760) per month will be used.

Firstly, note that the number of dependants of the debtor is **not** taken into account when setting the amount to be attached. Presumably, this also means that the income of any spouse or partner is not included in setting attachments.

The Protected Earnings Rate (P.E.R) in Luxembourg as of June, 1997 was 18,000LF (€ 450 approx). Any income earned by the debtor in excess of this is attached by the use of rising percentages of deduction within bands of income. Any amount earned above 57,000LF (€ 1415) is attached at 100%. The following table illustrates how this works.

Table 1 - Demonstration of Attachment of Earnings in Luxembourg

Net Income of Debtor = 71,000LF (1760 Euro)			Deductions
1st portion of income -	0 - 18,000	=	18,000 x 0% = 0
2nd portion of income -	18,000 - 28,000	=	10,000 x 10% = 1,000
3rd portion of income -	28,000 - 35,000	=	7,000 x 20% = 1,400
4th portion of income -	35,000 - 57,000	=	22,000 x 25% = 5,500
5th portion of income -	57,000 - 71,000	=	14,000 x 100% = 14,000
Total deduction =			21,900 (€ 541)
Net income (71,000 - 21,900) =			49,100 (€ 1220)

From this example, it can be seen that 49,100 (approx € 1220) of the employee's income is retained by use of the gradual attachment system. This corresponds to 69% of net income. The remaining 31% is available for creditors for attachment. In Luxembourg, all creditors rank equally, regardless of the date of the AEO. Multiple attachments are allowed and creditors are paid on a pro-rata basis according to the size of the debt owed to them.

To take this illustration a little further, let us assume that the judgement debtor has **three** creditors who have obtained AEO's and are owed the following sums

Table 2 - Totals owed to each creditor in Luxembourg example

Amount owed to each creditor		Percentage Deduction	Deducted Monthly
Creditor A	200,000 (€ 4960)	26.66% x 21,900 =	5,840(€ 145)
Creditor B	250,000 (€ 6200)	33.33% x 21,900 =	7,300 (€ 182)
Creditor C	300,000 (€ 7440)	40.00% x 21,900 =	8,760(€ 217)
Total owed:	750,000 (€ 18600)	100% Total =	21,900 (€ 541)

21,900LF is available for attachment using the specific tables. Each of the creditors is given a pro-rata monthly attachment varying according to the size of their debt. In this example, it would take the debtor approx **34 months** to pay off the total owed (750,000LF) to the respective creditors through attachment.

The above example uses a net figure of **71,000LF (€ 1760).** If the net income of the debtor is halved to **35,500 Lux francs (€ 880)** and the tables are applied, only **2,525LF (€ 62)** would be attached.

This corresponds to a protected earnings rate of **93%** of net income with only **7%** available for attachment as opposed to **69%** and **31%** respectively with double the income. This demonstrates how the use of the rising percentage deduction system can achieve a reasonably equitable result relative to the means of the debtor.

9.3.3 Germany

The German system differs from the Luxembourg one in that the attachments are already set out in specific tables. To calculate the relevant attachment, it is necessary to identify the band of income within which the debtor's net wages fall, identify the number of dependants the debtor has (dependants **are** taken into account in the German system) and read off the appropriate deduction from the tables without the need for further calculations.

With the same net income **(€ 1760 or 3442DM)** as the Luxembourg example **(€ 1760 or 71,000 Lux Francs)**, this yields the following results:

Table 3 - Demonstration of Attachment of Earnings in Germany

Number of Dependants	Net Income	Relevant Attachment	Income Retained
0	3442DM (€ 1760)	1561.7DM (796)	1880.3DM (961)
1	3442DM (€ 1760)	881.5DM (451)	2560.5DM (1309)
2	3442DM (€ 1760)	564.8DM (288)	2877.2DM (1472)
3	3442DM (€ 1760)	318.3DM (163)	3123.7DM (1598)
4	3442DM (€ 1760)	142.0DM (72)	3300.0DM (1688)
5 or more	3442DM (€ 1760)	35.9DM (18)	3406.1DM (1742)

Multiple attachments for non-payment of debt are not allowed in Germany, so the entire attachment will go to the one creditor until that debt is paid off.

As with the Luxembourg example, if the net earnings of the debtor are halved (from € 1760 to € 880 monthly) the attachment is considerably reduced or there is no attachment at all as the following table illustrates:

Table 4 - Operation of attachment in Germany where income is halved

Number of Dependants	Net Income	Relevant Attachment	Income Retained
0	1721DM (€ 880)	357.7DM (€ 183)	1363.3DM (€ 697)
1	1721DM (€ 880)	21.5DM (€ 11)	1699.5DM (€ 868)
2	1721DM (€ 880)	_____	1721.0DM (€ 880)
3	1721DM (€ 880)	_____	1721.0DM (€ 880)
4	1721DM (€ 880)	_____	1721.0DM (€ 880)
5 or more	1721DM (€ 880)	_____	1721.0DM (€ 880)

9.3.4 Comparison between Luxembourg and Germany

In order to demonstrate the different outcomes that can result from two systems that use the fixed deduction system, a comparison is made in the following table between how Luxembourg and Germany would treat the same monthly income in terms of attachment.

Table 5 - Comparison between Luxembourg and German system on monthly net income of 1760 €.

	Luxembourg	Germany
Net Income	€ 1760	€ 1760
	Deduction	Deduction
0 Dependants	€ 541	€ 796
1 Dependant	€ 541	€ 451
2 Dependants	€ 541	€ 288
3 Dependants	€ 541	€ 163
4 Dependants	€ 541	€ 72
5 + Dependants	€ 541	€ 18

Although both systems operate on what amounts to a progressive deduction basis, Table 5 illustrates the dramatic difference that can result between a system which takes dependants into account (Germany) and one which does not (Luxembourg). A much larger attachment – **€ 796 (45%)** as opposed to **€ 541 (31%)** applies in Germany if the debtor has **no** dependants. However, with one dependant the attachment is far smaller in Germany – **€ 451 (26%)** as opposed to the unchanging **€ 541 (31%**) in Luxembourg. As the number of dependants rises, the attachment becomes smaller still until, with 5 or more dependants, the attachment is only **€ 18 (1%),** even though the net income figure (**€ 1760** monthly) is relatively high. In Luxembourg, regardless of the number of dependants, the attachment remains the same.

This example demonstrates the necessity to take dependants into account in setting a realistic protected earnings rate (PER). In the case of Luxembourg, a single person with a net income of € 1760 retains the same minimum income as a person with one or more dependants, although clearly their outgoings are likely to be considerably less. It is submitted that the welfare of children and adult dependants requires the prevention of the kind of poverty traps and injustice that will inevitably follow from a system that fails to acknowledge the greater expenses of such households.

Table 6 - Comparison of Luxembourg and German systems where monthly net income is halved

	Luxembourg	Germany
Net Monthly Income	€ 880	€ 880
	Deduction	Deduction
0 Dependants	€ 62	€ 183
1 Dependant	€ 62	€ 11
2 Dependant	€ 62	——
3 Dependant	€ 62	——
4 Dependants	€ 62	——
5+ Dependants	€ 62	——

Again, this table illustrates how the differing treatment of dependants leads to a dramatically different result. Where there are no dependants, a larger attachment of € 183 per month (21%) takes place in Germany (in passing it could be argued that this is an unduly harsh attachment at this low level of

income for a person with no dependants) as opposed to € 62 (9%) in Luxembourg. Thereafter, with one dependant only, € 11 (1.3%) is available for attachment in Germany and with 2 dependants or more, no attachment takes place whilst the figure in Luxembourg remains unchanged.

It is the view of this report that the cumulative effect of these figures conclusively demonstrates the necessity to take dependants into account in calculating protected earnings if attachment of earnings is to be in any way equitable.

9.3.5 Comparison of Fixed Deduction models with Court Deduction models

The models in Germany and Luxembourg enable us to predict accurately, using definite tables, what level of income a debtor whose income is being attached for non-payment of civil debt will be allowed to retain. In Germany this figure will vary according to the number of dependants. In Luxembourg, where dependants are not taken into account, the figure remains the same in all cases.

However, it is also clear that many jurisdictions allow a court, court official or other enforcement authority some discretion or leeway in arriving at the protected earnings rate (PER). For example, we have already analysed the English and Welsh system of AOE in some detail in this report[167]. Whereas we can predict the amount of income a debtor with monthly net earnings of € 1760 will retain in Germany or Luxembourg, it would be much more difficult to do so with a comparable debtor in England and Wales. What can be demonstrated is that by use of the protected earnings calculator (as used by court officials) the following considerations would apply:

- Part (a) of the calculator would allow personal allowances to be calculated. These would include the appropriate benefit rates for the individual and his or her household. To this can be added rent or mortgage payments, and payments in respect of community charge and water rates.

- The second part of the calculator would allow the court official to add any premiums the debtor might be entitled to including the family, lone parent, disabled child or pensioner premiums.

- The calculator then allows other liabilities of the debtor to be taken into account. These would include essential expenses around employment - i.e. travel to and from work and child minding expenses. Also included here would be any court orders the debtor is obliged to pay.

- The items listed under these three categories are added together to set out the debtor's total needs.

- The protected earnings calculator then calculates resources other than the debtor's earnings. Any earnings of a spouse over £5 per week, child benefit and income from other sources are then deducted from the total needs to give the PER.

- This figure (the PER) is then subtracted from the debtor's average net income to give the total disposable income (if any) for attachment purposes.

The calculator then suggests that the court official strike a normal deduction rate that should be not less than half (50%) and not more than two-thirds (66%) of this figure. This means that up to 34% of this disposable income can be left to the debtor, in addition to the PER as calculated by the court official. However, it should be borne in mind that any creditor can seek to appeal the court official's decision to

167 See Section 9 - Page 71

the District Judge. In addition, it appears that in a situation where more than one AEO exists that the residue of income - i.e. the 34% of disposable income - may be taken up by another attachment or by a consolidated attachment.

The situation is further complicated in the UK by the fact that community charge and council tax attachments operate on a separate basis and a PER is not required as such. The amount deducted under these orders is calculated as a flat percentage of the debtor's income. It is also significant that income support levels in the UK are lower than in the Republic of Ireland. Finally, it must be stressed again that in the UK system, the debtor's housing costs are taken into account before calculating the PER. The income retained, therefore, in the PER goes to meet the subsistence but not the accommodation costs of the household.

9.3.6 Conclusion

From the survey of European jurisdictions outlined, AOE models appear to fall generally into two camps.

1. Fixed Deduction Systems
Those that set down a defined rate of protected earnings calculated by reference to tables that operate on a progressive deduction basis - i.e. Germany, Luxembourg, France, Finland, Belgium, Scotland and Austria. Once the PER is calculated, the debtor will generally have to meet the costs of their housing as well as their subsistence needs from this sum.

2. Court Deduction Systems
Those that allow a court, court official or some other enforcement authority to decide upon the minimum income with a certain amount of discretion built into the assessment - e.g. England and Wales, Northern Ireland, Norway, Switzerland, Italy, the Netherlands and Portugal. With these systems generally, the costs of the debtor's housing needs will be expressly included in the calculation of protected earnings.

Advantages/ Disadvantages of the respective systems
The principal advantage with the fixed income models is that the level of protected earnings can be predicted with some certainty and is not open to subjective considerations such as the view that might be taken by a judge or court official on a particular day. In general dependants are taken into account and deductions rise on a percentage basis as the income of the individual rises so that those who are better off pay a larger portion of their income. Therefore, some notion of equity is built into the system.

However, the principal disadvantage is that the amount to be deducted is usually set in stone with too little flexibility allowed to take account of special circumstances where appropriate. Equally, the protected earnings rates in some jurisdictions are very low, leaving debtors in serious risk of sustained poverty for the duration of the attachment, especially as housing costs usually have to be met from protected income.

Where a court, court official or other form of enforcement authority decides on protected income, housing costs are generally taken into account in arriving at the relevant sum. In reality, this may bring the level of protected earnings up to or beyond many of their fixed income counterparts, where housing costs generally have to be met from what may appear to be a higher protected income. It is interesting in this respect to note that the Money Advice Association (MAA), the umbrella body for money advisors in England and Wales, has recently objected to proposals (arising from the Debt Enforcement Review carried out by the Lord Chancellor's Department) suggesting the replacement of the court deduction system with a fixed deduction system, on the grounds that it may lead to the setting of lower protected earnings rates.

However, research enquiries also revealed that some fixed income jurisdictions (for example, Finland) provide housing subsidies to alleviate this problem. Further comparative research into this general area and specifically into the extent to which welfare services intervene where attachment of earnings orders prove to be unduly punitive would be welcome.

Mixed Systems

Some systems do not fall neatly into either of these categories. The principal example here is **Sweden**, which appears to take elements from both systems into account. In Sweden, protected earnings are set for an individual taking dependants into account and then the costs of accommodation, transport to and from work and medical expenses are **added** to this sum. This would seem to be the optimal system in that it is realistic and sustainable. A guaranteed protected income is available to meet the domestic needs of the particular household. This will vary according to the number and age of the household's dependants but is not at the discretion of any court to alter. In addition, the debtor does not have to rely upon meeting their housing costs from this figure, as with other models that calculate set protected earnings such as Germany or Luxembourg.

In relation to potential attachment of earnings legislation for the Republic of Ireland, it is vital that this feature is taken on board, given the high rate of house ownership in this country and the reality that monthly mortgage or rent payments often form a large proportion of the monthly expenditure of both low and middle income households. In theory, attachment of earnings orders are intended to facilitate the total repayment of the debt to the creditor whilst the debtor continues to work, albeit with a reduced but sustainable income. It is crucial, therefore, that attachment does not force the debtor and his/her family into a housing crisis whereby they will be unable to meet their mortgage repayments or rental obligations, either in private rented accommodation or local authority accommodation. **The protected income that the household retains for the purpose of food, clothing and other domestic expenses must be separated from income that is needed to maintain current accommodation needs.**

9.4 Further research issues

9.4.1 Multiple Attachment

The Collection Watch Report notes that of the surveyed countries that permit attachment of earnings, only Germany and Denmark do not permit multiple attachment. However, the relevant section in the Collection Watch Report on attachment is not very detailed, as it is only one aspect amongst many questions of credit and debt that are considered. Nonetheless, further research questions flagged by the report are whether multiple attachments are problematic and what the potential consequences are for debtors and creditors. The Van Heukelen report does not address the issue of multiple attachment specifically either, though it has proved extremely helpful in clarifying the protected earnings rate in any particular system.

The key question with multiple attachments for non-payment of civil debt is whether it leads to a larger portion of the debtor's available income being attached or whether the same amount is attached regardless and divided *pro rata* amongst creditors. With systems such as England and Wales, a court or court official determines the P.E.R and the percentage of the residual attachable income to be deducted. It is more likely, where this discretion exists, that multiple attachment will result in a larger portion of the debtor's income being taken. The consequences of this for households in terms of quality of life during the attachment period are obvious and there may be the added danger that such households may need to resort to high cost credit (such as moneylending) to make ends meet during this time.

On the other hand the existence of a protected earnings rate set by fixed deductions means that the

debtor retains the same protected earnings, regardless of the number of attachments that may exist, assuming that multiple attachments are permitted. Of course, this can also mean that a debtor with several creditors lining up with their attachments could have his/her income attached for a very long period of time and may be tempted to cease their employment. As already discussed in this report, this is where over-indebtedness, that may be managed by phased repayments over a reasonable period of time, crosses over into chronic over-indebtedness, where there is no realistic possibility of repayment within such a timeframe. In the latter situation, debt settlement legislation with inbuilt debtor release after a defined period seems to be the only realistic option.

It is for this reason that this report has already recommended that a drastic overhaul of the current debt enforcement system in the Republic of Ireland should take place and that this overhaul should include the introduction of a debt settlement option. Attachment of earnings introduced in isolation may bring imprisonment for non-payment of debt to a virtual end but it will solve very few debt problems and could conceivably create new ones.

Further research on a Europe-wide basis into the area of multiple attachments is suggested. The information gleaned would be of benefit in enquiring to what extent attachment of earnings is a direct cause of poverty in Europe. In this respect, the Collection Watch report raises the issue of possible harmonisation of all Member States systems for the attachment of earnings. It further recommends that research projects should be established to address this and other debt issues and to make recommendations to be included in an EU Directive[168].

9.4.2 Relationship between Maintenance and Civil Debt Attachment

A further complex issue is the relationship between attachment for non-payment of alimony/child support and non-payment of civil debt. Generally, orders for the support of a person (whether adult or child) take precedence over attachments for non-payment of debt regardless of the date of issue. In other words, if an order for maintenance or child support is obtained after an AEO for non-payment of civil debt, it will overtake it and the judgement creditor may have to wait until there is an increased pool of income or arrears of maintenance are discharged. This makes the question of whether a fixed PER exists or not all the more crucial. If the court has the ultimate discretion in deciding how to set the amount of the P.E.R, the possibility of multiple attachment (including maintenance, child support and several judgement debts) may bring the protected earnings rate down to such a low level that deprivation and poverty inevitably result.

Finally, where further research would again be necessary is to analyse how the financial calculations work in terms of protected earnings where attachments for both non-payment of civil debt and for non-payment of alimony/child support are simultaneously sought. Most European jurisdictions afford the alimony debtor far less financial leeway than a civil debtor and have lower thresholds of protected earnings in this case. Assuming that alimony/maintenance is an ongoing obligation, where does this leave the creditor seeking to recover the amount of a judgement through atttachment of earnings?

9.5 The Recommendations of the Van Heukelen report.

The critical review at the close of this report[169] provides a framework of principles that Van Heukelen believes should go some way to establishing a fair AOE system.

9.5.1 Resolving conflicting interests

Beginning with the assertion that in a constitutional State the interests of both debtor and creditor have

168 Debt Collection Practices across Europe, Page 4
169 Pages 21-24

to be taken into account, Van Heukelen argues that if the legal protection afforded to the debtor's earnings is too generous, a creditor may be tempted to resort to alternative methods for collecting the debt, with the excesses this implies. On the other hand, the debtor has to be assured a 'decent existence' in the prevailing economic and social context, and if earnings are not sufficiently protected the debtor will be discouraged from continuing to work and this will defeat the purpose of attachment in the first place.

9.5.2 Who should set the protected earnings rate?

Consideration is then given to who should determine what a 'decent existence' is in the prevailing economic and social context. Van Heukelen asserts that a system in which it is always up to a judge to determine the attachable portion of income is not ideal. He argues that there is a danger that two debtors in identical situations would be treated differently and that this places an excessive burden on the judicial system and slows down the enforcement process.

Certainly, the evidence gathered by Ward (1990)[170] indicates that the protected earnings rates set by District Court Judges in relation to maintenance attachment tended in the period under examination to be very low. To reiterate these findings, 54% of AEO's specified a rate less than the husband would receive on Unemployment Assistance and 76% specified a rate less than the husband would receive on Unemployment Benefit. It may be argued that these figures relate to maintenance payments specifically and that considerations in relation to non-payment of civil debt might be treated differently, in that a judge might be inclined to set a higher PER where the creditor is a credit institution as opposed to a spouse or child. However, on balance, the certainty of a legislative benchmark on protected earnings with the flexibility to take individual hardship into account appears to make more sense. Above all it is designed to ensure consistency, something that cannot be guaranteed when a judge decides upon the appropriate attachment.

Van Heukelen goes on to suggest that it would be preferable if the relevant legislature were to set out what may or may not be attached, with the parties concerned having the option to seek a judicial opinion in the event of a dispute or difficulties. He argues that any State introducing an attachment system should take responsibility for specifying the protected earnings that a debtor is entitled to retain in respect of him or her, adult dependants and child dependants. This figure should be fixed by regulation, with provision for annual increases in the rate according to the Consumer Price Index.

Finally, Van Heukelen suggests that the fairness of attaching **any portion of low salaries** is debatable as there is an immediate need to protect human dignity. He argues that in a constitutional State, the threshold of this dignity has to be established in the same way for everyone. He goes on to suggest the following AEO model as being worthy of consideration, differentiating between rules in relation to alimony creditors and other creditors.

9.5.3 Rules for Creditors (except Alimony/Child Support Creditors)

- A legally guaranteed protected earnings rate should exist which cannot be attached in any respect. This minimum threshold should be capable of being raised for certain categories of debtors with special needs or expenses - e.g. persons with a disability or persons who have dependants with a disability.

- Any amount above the minimum income should be subject to attachment, with the amounts being withheld rising progressively within income bands. For example, rising from 10% that can be withheld within the first band, through 20%, 30%, etc, to a 100% withholding of the amount earned over a defined figure (as demonstrated in the Luxembourg model[171]). He

170 See Section 6 - Page 54
171 See Page 95

suggests that the threshold above which all income can be attached should be relatively high. The figure suggested is 10,000 French francs, approx € 1600 per month or € 370 approximately per week for a single person with appropriate allowances for dependants. However, this figure is based on **1997** levels of income so it is arguable that it should now be higher. (For example, if a cost of living factor of 4% per year in the years from 1997 to 2002 is applied, the monthly threshold would now be of the order of € 1950) The amounts deducted in each band can then be added together to calculate the total amount that can be attached.

- Van Heukelen suggests that the income of spouses or partners be equally considered part of the equation - i.e. that the calculation should be based on the total income of the household. However, in light of this, the amount permitted by law as protected earnings should increase for each member of the household. Obviously this would include a spouse or partner working outside the home who might not be economically dependent. Similarly, the number of child dependants must be taken into account in calculating the minimum income. Van Heukelen notes that the Swedish system further breaks down household members into different categories - i.e. spouse, children over seven and children under seven - and the amount added to protected earnings varies according to which dependants are referred to. Clearly, the rationale behind this is that some dependants may involve the household incurring more expense than others.

- Finally, Van Heukelen suggests that protected earnings levels, and the thresholds at which the fixed percentages are set, ought to be adjusted at regular intervals in accordance with the movement of the consumer price index.

9.5.4 Rules for Alimony Creditors

Given that alimony/child support payments are designed to meet a person's living expenses, the proposals in this area are different from those in relation to civil debt. Van Heukelen again suggests that a legally guaranteed protected income that cannot be attached should exist. However, he suggests that **any amount** in excess of this figure can be attached, including an amount in respect of arrears of alimony. In the case of more than one alimony creditor (for example where a person had two divorces), it would be up to an individual judge to decide what portion of the debtor's income is paid to each alimony creditor.

As previously noted, Van Heukelen's report does not consider the potential inter-relationship between attachment for non-payment of alimony/child support and non-payment of civil debt, in particular to what extent such attachments can exist simultaneously and the effect of this on the debtor's ability to meet basic living expenses. However, it is clear that if it is necessary to attach all income above the alimony protected earnings rate in order to meet obligations to an alimony creditor (and presumably this will depend on the personal circumstances of that spouse and dependants) then there will be no residual income to pay a civil debt creditor. On the other hand, if the alimony attachment is relatively low, there may be some residual income though this would depend on whether a higher protected earnings rate was set for civil debt attachments. When debts to the State – non-payment of fines, taxation, local authority charges – are added into the mix, the question of the determination of priorities and the effect that this can have on protected income becomes a very complicated one.

9.5.5 Conclusion

Van Heukelen's suggestions for a fair and reasonable attachment of earnings model should be examined carefully. As President of the Belgian Bailiff's Association, the author has direct experience of the administration of a debt enforcement system through the courts. If attachment of earnings for non-payment of civil debt were to be introduced in Ireland, we should be careful not to repeat the mistakes identified in other systems. In particular, Van Heukelen notes that the Belgian system which he helps to

administer does not take into account the number of child dependants when setting protected income. This is surely unjust given that children have to be fed, clothed and sheltered and therefore are a significant material cost factor in any household.

Equally, his suggestion that setting a protected earnings rate should not be left to the judiciary but should be a decision shouldered by the State is rational and appropriate. After all, if the State wishes to legislate in this area, it is its responsibility to set out what a reasonable income should amount to. What Van Heukelen does not address is the level at which the protected earnings rate should be set and this is clearly a fundamental question both in terms of civil justice and the potential effectiveness of a system to achieve its aims.

Essentially, Van Heukelen advocates the fixed deduction system – progressive percentage deductions rising according to each tier of income within which the judgement debtor's earnings falls. This is designed, as Van Heukelen admits, to provide some kind of incentive for the judgement debtor to remain in employment so that attachment can continue to take place. Knowing that an increase in income due to a promotion, for example, may not result in the entire amount being attached may also motivate the debtor and will also serve to clear the debt/s quicker.

However, a fixed deduction system whilst having the distinct advantage of consistent treatment must not be too rigid so that it treats different situations similarly. In this respect, there must be room for extra amounts to be added to the protected earnings rate where there are legitimate expenses associated with matters such as disability, special education or dependent relatives. Equally, where housing costs are considerable, it would not be practical to expect a debtor to meet these from his/her protected earnings alone.

The recommendations section of this report will include proposals for an attachment of earnings system for the Republic of Ireland. Some of the suggestions made by Van Heukelen will be incorporated into it.

SECTION 10

ATTACHMENT OF EARNINGS IN THE UNITED STATES

10.1 Introduction

10.1.1 Background

The legal system in the United States (US) consists of both Federal and State law. Federal law has application throughout the States of the Union and the District of Columbia, as well as other US territories. State law, on the other hand, is applicable only to the individual State in question, California or Texas, for example. Attachment of Earnings is described in the USA as wage garnishment and is governed by the Consumer Credit Protection Act, 1968[172]. The relevant sections came into force on 1 July 1970 as an attempt by the Government to regulate inter-state commerce.

The rules on attachment set out in the Consumer Credit Protection Act operate as a bottom line protecting the interests of the employed debtor. Should an individual State wish to introduce more favourable protection, for example, to provide a greater minimum income for the debtor to retain, they are perfectly free to do so. However, no State can introduce wage garnishment rules that result in the debtor in question receiving less than s/he would receive as a minimum income under Federal wage garnishment rules.

10.1.2 Historical Basis for Federal Wage Attachment

Total consumer credit in the USA grew from $7.2 billion in 1939 to over $95 billion in 1967. The effect of this massive growth in consumer credit was a corresponding rise in consumer over-indebtedness. As a result, personal insolvency declarations (so called Chapter 13 bankruptcies) rose from 18,000 per year in 1950, to over 208,000 per year by 1967. The House Report conducted for the US Congress in advance of the passage of the Consumer Credit Protection Act investigated the cause of the increase in bankruptcies and concluded that a close connection existed between unrestricted State garnishment laws and declarations of personal bankruptcy. This conclusion was based on a statistical comparison made between States where attachment of earnings was prohibited and States where relatively harsh attachment laws existed. The bankruptcy rates in the former were between **5 and 9** persons per hundred thousand of population per year, whereas the rates in the latter ranged from **200 to 300** per hundred thousand of population per year[173].

Congress found that unrestricted attachment had the following disadvantages[174]:

- It encouraged creditors to make predatory extensions of credit - i.e. to make credit freely available on the basis that it could be recovered from an employee's wages if there was a default. This had the effect of diverting money into excessive credit payments and thereby hindered commerce.
- The application of harsh attachment laws often resulted in loss of employment for the debtor, leading to reduced production and consumption. Essentially, this was another commercial motive for changing the law in that the indebted person's spending power was considerably reduced with the knock on effect this had on the market.
- The existence of differing attachment laws in different States had led to a non-uniformity of bankruptcy laws and this was equally undesirable.

As a result of these findings, Congress determined that Sections 301-307 as described above needed to be introduced to regulate commerce and to establish uniform bankruptcy laws.

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172 Sections 301-307 (15 USCS 1671 to 1675)
173 HR (Banking and Currency Committee) No 1040, Dec 13, 1967
174 May 29, 1968 P.L 90- 321, Title 111, 301, 82 Stat. 163.

10.2 Attachment of Earnings in The United States - Principal Provisions

10.2.1 Introduction

The principal rules in relation to wage garnishment in the U.S. will be analysed under the following headings:

1) The maximum amount that can be deducted and the relationship between State and Federal law in this respect;

2) To whom the Act applies and to what categories of earnings;

3) Rules in relation to child support/alimony attachments and priorities between these attachments and attachments for non-payment of civil debt;

4) To what extent employees whose earnings are being attached are protected from discriminatory action by their employer.

10.2.2 Maximum deductions in the U.S. system and the relationship between Federal and State law.

Maximum Federal deductions

Employees are protected by the setting of a statutory limit as to the amount of their earnings that can be attached in any work week or pay period. A court may order that the **lesser** of 25% of disposable earnings or the amount by which disposable earnings exceeds thirty times the Federal minimum hourly wage may be attached. The purpose of the latter portion of the rule - 30 times the minimum wage rule - is to protect employees on very low earnings from having 25% of their disposable income deducted.

The exceptions to this general formula are as follows:

- Orders for the support of persons (child support or alimony) for which the Consumer Credit Protection Act provides a different formula;
- Orders made by US courts in relation to bankruptcy cases under the so-called Chapter 13 provision (personal insolvency chapter);
- Any debts due in relation to State or Federal taxes;
- Voluntary wage assignments - i.e. where employees voluntarily agree that their employers may pay a portion of their earnings directly to a creditor.

The 25% formula set out above is designed to ensure that wage earners receive at least 75% of their take home pay in any one pay period. This is the U.S. equivalent of the Protected Earnings Rate (PER) so that civil debtors should have enough income to meet basic needs. It was also hoped that this protection of a debtor's wages would cause a decrease in the number of debtors filing for bankruptcy, a figure that had dramatically increased as a result of the credit boom in the 1960s.

The relationship between Federal and State law

The connection between Federal and State law in relation to attachment is straightforward. The Federal law sets down a bottom line in terms of protected income for a debtor - i.e. the 25% formula - that cannot be disregarded by any particular State. However, there is nothing to prevent a particular State introducing its own legislation that provides a higher level of protected earnings for the debtor than is provided by Federal law. Some States follow the Federal model to the letter, whereas others have introduced more favourable provisions.

A case in point is the State of **Illinois**[175], which specifies that the amount attached cannot exceed the lesser of 15% of the gross wages for each week, or the amount by which disposable earnings per week exceeds **45** times the Federal minimum hourly wage.

It is probable that 15% of **gross** wages for each week under the Illinois tax code would be a lesser sum than 25% of **disposable** earnings under the U.S. tax code. Otherwise, the Illinois rule would contravene the Federal one. Equally, the rule that only the portion of disposable earnings that exceeds **45** times the Federal hourly minimum wage can be attached is clearly a better arrangement for a low paid employee.

For example, if a person had a disposable income of $260 per week under the Federal system, the attachment would be 25% of disposable income ($65). Under the Illinois system, the attachment would be the amount by which disposable income exceeded 45 times the hourly minimum wage - $260 - $231.75($5.15[176] x 45) = $28.25, a significantly lower amount.

10.2.3 The meaning of earnings and to whom the Act applies

The above formulae refer to the debtor's disposable earnings. The term 'earnings' is given a fairly wide interpretation in the Consumer Credit Protection Act and has been held to include pension benefits and income tax refunds as well as wages and salary. The debtor must have the status of an employee, although courts are not concerned with labels given to earnings such as wages, salary or commission, but are more concerned that the sums it is proposed to attach represent compensation for personal services. As with European models, the essential difference remains that the self-employed debtor running a business on their own account will not be subject to the wage attachment rules, whereas the debtor who has an employer, to whom the order can be directed, will.

Disposable earnings are considered to be the amount of income left after legally required deductions have been made for Federal and State taxes, for social security and unemployment assurance and State retirement systems. Deductions that are not required by law, such as union dues or subscriptions, are not subtracted from gross earnings when calculating the amount of disposable earnings.

10.2.4 Rules in relation to Child Support/Alimony and priorities between attachments

The Consumer Credit Protection Act sets out different rules in relation to attachments allowed for child support or alimony as opposed to non-payment of civil debt. These are as follows:

- Where the debtor is currently supporting another spouse or dependent child - i.e. in another relationship - a maximum of 50% can be attached from their disposable earnings for the support of a former spouse or child. This can be raised to 55% where there are alimony or child support arrears of over 12 weeks.
- Where the debtor has no other dependants currently, a maximum of 60% of their disposable earnings can be attached to support a former spouse or child from that relationship, again rising to a maximum of 65% where there are over 12 weeks arrears.

Priority between different attachments

As can be seen, the Consumer Credit Protection Act allows for a larger proportion of the debtor's income to be garnished in respect of child support/alimony payments than in respect of judgements obtained for non-payment of civil debt. The rationale for this is clear; orders for the support of a person may be considered of greater significance in law than orders for the payment of a debt to an institution or supplier of goods or services and this confirms the trend already noted in relation to European models.

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175 735 ICLS 5/12 – 803 (West 1992)

176 $5.15 was the minimum federal wage at the time this information was sourced. By this stage it is a larger figure.

Although there is no provision in Federal law - i.e. the Consumer Credit Protection Act - allowing child support or alimony orders to overtake existing attachment orders for non-payment of civil debt, there is nothing to prevent an individual State introducing laws to this effect. It appears that some States have introduced such legislation. For example, **Arizona** provides for the following rules around priority between attachments[177].

- As a general principle, attachments rank according to priority in time of service.
- However, attachments that are not for the support of a person are inferior to attachments for the support of a person.
- The result is that an existing order for attachment of a judgement debt will be overtaken by a subsequent child support or alimony attachment. For example, an individual debtor with a judgement debt to a credit institution may have up to 25% of his/her income deducted by way of attachment. However, should his or her marriage subsequently come to an end and it becomes necessary to order an attachment made for the support of a child or a spouse, up to between 50% and 65% of his/her income can be potentially attached. The effect here may be that no income will be available for attachment in respect of the judgement debt, as over 25% of the judgement debtor's income may have already been attached in respect of child support/alimony.

Arizona State confirms the practice in many European jurisdictions already cited[178]. Clearly, it is preferable that an existing order for the repayment of money to a credit institution would be overtaken by a subsequent order that provides for the essential day-to-day needs of a person.

10.2.5 Employment Protection

The effect of an AOE order on the employment prospects or indeed the continuation of the employment of a judgement debtor has already been discussed in previous sections[179]. There is some anecdotal evidence of discrimination against employees whose employers have become aware through attachment orders that there are judgement debts against them. This principally revolves around suspicions in relation to the trustworthiness of an employee subject to an attachment, particularly those employees who routinely handle money in the course of their work. There may also be a reluctance on the part of some employers to go to the administrative trouble of making the deductions and paying them over to a particular court or court official. It has also been noted that in England and Wales, a court has the option of making a suspended order, thereby allowing the employee to make payment voluntarily without the necessity to inform his/her employer. Should s/he fail to do so, an AOE order automatically comes into effect and the employer is informed accordingly.

U.S Federal legislation tackles this issue head on, albeit not in an entirely satisfactory manner. Essentially, the Consumer Credit Protection Act protects employees from being dismissed because of attachment for any **one** debt[180]. This protection is enforced not just by civil relief for the aggrieved employee but also by potential criminal sanctions against the employer concerned[181]. However, the question that inevitably follows is whether the existence of **two or more** attachments allows an employer to dismiss an employee. Although there is obviously no specific provision to this effect, this would appear to be the case, unless such dismissal would infringe some other legislative right or congressional policy. For example, in **Johnson and Pike Corporation of America**[182] the court restricted an employer's right to dismiss an employee whose wages were subject to multiple garnishment. Although it was agreed that the dismissal of this particular employee was not intentionally based on racial grounds, the court felt that the dismissal was indirectly discriminatory, as multiple garnishments occurred more frequently

177 From A.L.I.S (Arizona Legislative Information Service) Online
178 See in general Section 8 on the U.K and Section 9 on Europe.
179 See Section 6 (Pages 52-53) and Section 8 (Pages 74-75)
180 Section 304 (a)
181 Enforcement is by the Employment Standards Administration Wage and Hour Division. This office is attached to the Department of Labour.
182 (1971 DC Cal) 332 F supp 490

amongst members of minority groups. However, in the absence of any such indirect discrimination, the decision may have been different in this case. Thus, it would appear that if two or more attachments exist, the Consumer Credit Protection Act **does not prevent** an employer dismissing an employee on these grounds.

Brennan and Kroger Co[183] provides an interesting perspective on multiple attachments. Here the court held that individuals were only "subject to garnishment" when their employer was actually bound to physically withhold wages. Accordingly, the employee in this case was found to have been unfairly dismissed when his wages were subject to actual attachment for only one judgement debt, even though the employer had been served with two distinct attachment orders. Since the maximum amount permitted by law was being withheld under the first order, no actual withholding of wages was made in relation to the second one.

Finally, it is important to stress again that this is Federal law and does not prevent any State introducing enhanced protection for the debtor. In **Washington** State, for example, '*no employer may discharge, discipline, or refuse to hire an employee because of the entry or service of a wage assignment order executed under this chapter. A person who violates this subsection may be found by the court to be in contempt of court and may be punished as provided by law*'[184]

Nonetheless, the comparative lack of protection offered by the Federal provision is unsatisfactory and it can be argued that it defeats the purpose of the attachment in the first place, the repayment on a phased basis of money owed to a creditor whilst allowing the debtor to retain a reasonable income in order to meet their basic needs. **The protection of the judgement debtor's employment and employment prospects should be a key feature of any prospective attachment of earnings legislation.** Accordingly, any dismissal or discriminatory treatment by an employer having to comply with a court order should be made unlawful. For example, dismissal of an employee because s/he is the subject of one or more Attachment orders could be added to the list of automatically unfair reasons for dismissal in the Unfair Dismissal Acts 1977-1993[185].

10.3 Conclusion

There are some clear lessons to be learned from this overview of attachment of earnings (or wage garnishment) in the United States. It is interesting to note that the principal reason for the passage of the relevant part of the Consumer Credit Protection Act, apart from the protection of the judgement debtor's employment discussed above, was to prevent the trend of increasing personal bankruptcies as a result of unrestricted extensions of credit and resulting attachments.

The Congress report, prior to the passage of the legislation, found that States with restrictive attachment laws that protected the income of judgement debtors had a much lower average of personal bankruptcy applications. On the other hand, Congress found that unrestricted attachment encouraged the making of predatory extensions of credit. In effect, this appears to indicate that the existence of a reasonable protected earnings rate and other forms of protection within attachment rules, discouraged creditors from making risky loans in the first place, on the basis that if a default occurred, they would find it difficult to recover the money loaned quickly.

There is a delicate balance to be struck between the necessity to provide access to credit in a market economy and the necessity to protect consumers from finding themselves in positions of chronic over-indebtedness due in part, at least, to the making of irresponsible loans by creditors. If attachment of earnings legislation is to be introduced in Ireland, a reasonable protected earnings rate must be enshrined in the process, not just to help cover the basic needs of the individual or family involved, but also to discourage imprudent extensions of credit.

183 (CA 7 IND) 513 F2 d 961
184 RCW (Revised Code of Washington) 9. 94A. 2005 Subsection 7
185 See Section 6 (2)

SECTION 11

CONCLUSION AND RECOMMENDATIONS

11.1 Conclusion

This study was initially undertaken with a relatively narrow focus; to examine attachment of earnings systems for non-payment of civil debt in operation in other jurisdictions, with a view to suggesting a model for implementation in the Republic of Ireland. This work was carried out directly in response to a Government proposal to end (in most cases) committal to prison for non-payment of debt or fines and was underpinned by concerns that an unduly punitive attachment system would adversely affect the fundamental living standards of low and middle income consumers and their dependants.

It now appears that such proposed legislation has been abandoned or, more correctly, never commenced in the case of non-payment of civil debt. In the case of non-payment of fines, it has been put on hold, due to an ongoing investigation by the Public Accounts Committee of the Oireachtas into the efficacy of the fines collection system and the lack of an existing system for the payment of fines by instalments. These delays may prove to be somewhat of a blessing in disguise, in view of the lack of awareness of both the plight of the over-indebted and the outdated and flawed legislation in operation in the area of debt enforcement, illustrated by the debate that took place in relation to the proposed Private Members Bill.[186]

Indeed, having broadened the focus of this report to look at the appropriateness of current debt enforcement procedures in Ireland and the variety of consumer debt settlement codes in other jurisdictions that operate in tandem with attachment of earnings systems**, it is the overwhelming conclusion of this report that a root and branch review of how the legal system deals with cases of uncontested consumer debt and unpaid fines is urgently required in the Republic of Ireland.**

For this purpose, this report calls for the immediate setting up of a review group to examine reform of these procedures, a group that would be given sufficient expert status to make concrete recommendations, both short term and long term, that will lead to informed and practical legislative change. This group should be composed of representatives of the money advice sector and the credit industry, together with political representatives with a particular interest in these issues on a cross party basis and officials from the Courts Service, as well senior civil servants from relevant government departments, in particular the Department of Justice, Equality and Law Reform which shoulders responsibility for law reform in this area and the Department of Social and Family Affairs which funds the Money Advice and Budgeting Service.

We need look no further than our near neighbours, Scotland, to see what can potentially be achieved by a determined effort to modernise outdated approaches to the enforcement of debt in a legal system. Following legislation to progressively dismantle poinding and warrant sale (the equivalent of execution orders in this jurisdiction) passed in December 2000, a representative working group was established by the Minister for Justice, Jim Wallace, to examine viable alternatives that would result in a modern system of debt management and enforcement for the 21st century. The working group analysed the problems within the existing system, looked at the options available and recommended changes to be proposed to the Minister. Already, the implementation of these changes has begun and the Scottish Executive has recently announced that £3 million annually would be made available to local authorities to provide access to quality money advice for debtors.

> *"The Executive has stated that their fundamental concern is to strike a fair balance between protecting debtors, safeguarding the legitimate interests of creditors and upholding the law. These recommendations reflect that concern and represent an amazing leap forward for Scotland and will, I believe, place us in the forefront of modern society in relation to how society and the law treats vulnerable people coping with the trauma of over-indebtedness"*[187].

186 See Section 5 – Pages 47-49

187 From ' Striking the Balance – a new approach to debt management' by Joan Conlin-Ramsey, Chair of Money Advice Scotland, Paper delivered at the MABS Annual Conference, Kilkenny, March 2002 summarising the report and consultation document published by the Scottish Executive.

With a view towards setting an agenda for consideration by a similar review group in Ireland, the following sets of recommendations for changes to the current system of debt enforcement in Ireland are proposed for discussion.

11.2 Recommendations

11.2.1 Introduction

These recommendations are divided into 4 principal areas examined in the course of this report. These are:

- Proposals for immediate changes to the current system of debt enforcement in Ireland that would improve the position of the indebted person (and in many instances his/her creditors) in the short term, pending a more long term examination of alternative options (11.2.2);
- Proposals for the kind of safeguards that need to be included in any prospective Attachment of Earnings legislation in Ireland, both to prevent such legislation contributing to a rise in levels of poverty for indebted people and to have a realistic chance of working effectively (11.2.3);
- Proposals concerning the need for Debt Settlement legislation to accompany legislation on attachment, to deal with cases of chronic over-indebtedness where there is no realistic chance of the debtor being capable of paying off debts within a reasonable time frame (11.2.4);
- Proposals in relation to the further development of the Money Advice and Budgeting Service (MABS) needed to accompany these changes (11.2.5)

11.2.2 Proposed immediate changes to the current system of debt enforcement

Introduction

The changes recommended here will be presented in the order in which they might arise for an indebted person, beginning with an initial claim by a creditor when a consumer is unable to meet their obligations under a credit agreement or incurs a debt in some other manner which they are unable to pay.

i) Enforcement of Judgements Office

Creditors bring legal proceedings in an attempt to recover outstanding monies. However, they have to spend money in order to do this and there is a risk that very little will be recovered, especially if the debtor in question has many other debts that may also be at the stage of service of legal proceedings or enforcement. In Northern Ireland, an Enforcement of Judgements Office is at the heart of the debt enforcement process and for a nominal fee, a search can be carried out to ascertain the extent of current legal proceedings against the debtor[188]. In the U.K, money advisors have long called for a similar service to be set up[189]. Such an office could serve a variety of functions including the prevention of fruitless and costly legal proceedings for creditors, unnecessary trauma for debtors and cost to the State in terms of court and court officials time.

A fundamental review of debt enforcement procedures in the Republic of Ireland should examine the establishment of an Enforcement of Judgements Office, in order to ensure that the courts and court offices are used appropriately and effectively in the area of debt enforcement.

ii) Legal Documentation

A Civil Summons (District Court) or Civil Bill (Circuit Court) will be served on the indebted person to begin the process. These summonses are formal and off-putting and vital information tends to be lost in the body of them. The covering letter from the creditor's solicitor will often recommend seeking legal

188 See Section 8 - Pages 82-83.
189 See Page 79-80.

advice. However, the debtor may have other debts and other correspondence and have no access to legal advice and may be unaware of the Money Advice and Budgeting Service (MABS).

If there has to be a formal legal document to initiate the claim, it should be accompanied by a booklet written in plain intelligible language informing the indebted person in straightforward terms of the procedures and steps involved and the potential consequences and outcomes. It should also include a list of addresses from which the person could seek assistance[190].

iii) Uncontested claims – Instalment Offers

The booklet should explain what the debtor needs to do to defend the claim, if they wish to contest either the fact or the amount of the debt. However, in the vast majority of cases where the debtor has no legal defence but has an inability to pay within their present means, this will not be an issue. In the current system in Ireland, failure to defend usually excludes the debtor from the rest of the process. The next contact with the debtor will be the service of the decree and subsequent enforcement, where s/he is arguably more likely to panic and hope that the matter will go away rather than engage with the creditor and the courts. A more proactive system that estimated the debtor's ability to pay at an early stage and facilitated such payment would make a vital difference.

The current system in Ireland for dealing with uncontested consumer debt should be replaced by a model similar to the one in operation in England and Wales[191]. Briefly, it involves the debtor being served with a claim form. S/he can admit all or part of the debt and make a proposal for payment by instalments based on a submitted statement of means. The creditor can accept or reject this offer. If it is accepted, judgement is entered on those terms and the offer of payment becomes an Instalment Order. If it is rejected, the creditor must file their rejection of the offer and the statement of means it was based upon with a court officer. The court officer will then decide whether the offer is reasonable in the circumstances and what Instalment Order should be made. This decision can be appealed by either side to a judge. The booklet referred to above should explain this procedure.

This recommendation will clearly have implications for staffing and training in the Courts Service.

iv) Examination of the debtor's means

Without detailed knowledge of the debtor's financial circumstances, it is difficult for any party – creditors, judges or money advisors – to assess appropriate instalment payments. Accordingly, an agreed statement of means should be the basis for the resolution of all cases of uncontested debt whether legal proceedings are contemplated or are in train. Clearly, there will be disputes on means and an adjudication will be required from time to time. This could be provided by a court official and by a District Court judge on appeal.

No decisions should be made on instalment payments without an agreed statement of means and if necessary, the examination of means should be enforceable by warrant. Thus, unrealistic and punitive orders that are likely to lead to default are less likely to be made, ensuring that court time is used appropriately and effectively[192].

v) Cases of more than one debt

Consumer debtors often have more than one debt and in many cases several. This is usually the reason that they find themselves sued in the first place. The setting up of an Enforcement of Judgements Office should ensure that creditors have the necessary information at their disposal to make informed decisions about bringing legal action. Equally, there is no need for a debtor with more than one debt who is not capable of paying off debts except by limited instalments, to find themselves repeatedly the subject of legal action from creditors. A pro-active system whereby an early intervention can take place leading to *pro rata* payments to creditors could save time and money for all concerned.

190 See Section 3 – Pages 21
191 See Section 8 – Pages 69-71
192 For fuller discussion, See Section 3, Pages 24-27

A similar procedure to the Administration Order procedure in England and Wales should be introduced, taking into account many of the disadvantages identified by money advisors in the U.K with their current procedure.[193] This would enable a court or court official to identify, on the basis of an agreed statement of means, the true financial position of the debtor who would then be able to make one instalment payment through the court to be distributed *pro rata* to creditors. Variations could be made up or down as financial circumstances change. If the debts under consideration could not, in the view of the court, be paid within a reasonable period of time, for example 3 years, a proportion of the debts could be written off by way of a composition order.

vi) Debt Enforcement in public

At present, debt enforcement proceedings are dealt with in open District court sessions as a result of a general constitutional 'hearing in public' rule[194]. Some exceptions to this general rule are set out in the Courts (Supplemental Provisions) Act, 1961, the best known of which is matrimonial (or family law) proceedings. There is an understandable and well documented stigma attached to over-indebtedness in general and particularly to appearing in public in relation to an uncontested debt case, especially in a local District Court setting. This may contribute to a debtor's decision not to respond to documents such as the Examination Summons[195]. The creation of an alternative forum to the courts for dealing with **debt enforcement** in order to minimise the embarrassment to the debtor and to encourage his/her participation in the process should be seriously examined.

There is a strong case, particularly in consumer indebtedness situations, for the introduction of a tribunal with statutory powers to deal with debt enforcement cases in order to improve the participation of the debtor in the enforcement process.

vii) Variation of Instalment Orders

Although a debtor can apply for a variation within the current system at any time, this information is not necessarily common knowledge. Some debtors default on Instalment Orders and find themselves subject to committal proceedings when their circumstances deteriorate without being aware that they can seek a variation.

The suggested booklet to accompany the summons should make it very clear that a variation can be sought (by either party) at any time. Equally, if attendance for examination with a view to making an Instalment Order was compulsory, the right to seek a variation could be made plain to the debtor at the point when the Instalment Order is made.

viii) Imprisonment for non-payment of civil debt (The Committal Order Procedure)

Fundamentally, imprisonment for non-payment of civil debt is an anachronism and should be replaced by a civil enforcement remedy as soon as possible. In the interim, it is imperative that no person should be committed to prison for failure to meet the terms of an Instalment Order in their absence[196]. At present, failure to appear at the Committal Order hearing to explain non-payment can result in a committal warrant. It is often assumed in these circumstances that the debtor is trying to evade the matter. Whilst this may be true in some cases, this ignores the fear and shame factor involved for the majority who are at a loss as to what to do at this stage.

Imprisonment of civil debtors costs the State money both in the short and long term and appears to benefit no one. It should be eradicated. In the interim, attendance at any committal hearing should be compulsory, whether it relates to non-payment of civil debt or fines so that the true reason for non-payment be ascertained before any committal is ordered.

193 See Section 8 - Pages 80-82.
194 Article 34.1
195 A Good Practice Manual for Money Advisors (Comhairle), Section 1, Page 4
196 See the situation in Northern Ireland – Page 82.

ix) Imprisonment for non-payment of fines

Similar arguments apply in relation to imprisonment for non-payment of fines and this issue has been discussed in greater detail in this report[197]. In particular, the absence of a system of payment of fines by instalment and the lack of proportionality in the levying of fines has been pointed out. This is especially pertinent when it is arguable that, in many cases, the prosecution itself resulted from the inadequate resources of the defendant, for example, failure to pay for a T.V licence, or motor tax or insurance.

The State should, at the very least, allow the defendant to pay off the fine by affordable instalments before any question of committal would arise, given the immediate expenditure of resources that this inevitably involves quite apart from the long term costs to the State. The establishment of a fine by instalment system would, of course, entail a considerable initial commitment of resources to establish a suitable system but the long term savings to the State, quite apart from considerations of civil liberties should more than compensate.

Finally, given that the plan is to replace committal with attachment as a method of enforcing a fine in the case of employed persons, an instalment system must surely be introduced in order to give the person the option to pay themselves before an attachment could be allowed to take place.

Persons on low incomes or in financial difficulty should have the option to pay off fines in affordable instalments and the amount of the fine levied should vary according to the means of the convicted person. Committal for non payment of fines should be abolished in the case of employed persons and social welfare recipients and replaced with attachment. Any attachment in the case of social welfare recipients should be absolutely minimal. Community Service should be examined as an alternative to attachment in the case of social welfare recipients.

x) Status of money advisors in relation to legal proceedings

The potential for a money advisor to act as a McKenzie friend to indebted clients has already been discussed in this report[198]. Because of the lack of legal aid in debt cases and given the hugely important role that the Money Advice and Budgeting Service (MABS) plays in assisting persons in debt to resolve their financial problems, a role for money advisors in outlining their client's circumstances to a court should be considered. This would assist a court to clarify important issues such as the circumstances surrounding the granting of the loan and the ability of the debtor, based on a standard statement of means, to repay on a phased basis. In some cases this is already happening informally and is resulting in a saving in terms of court time and unnecessary hardship.

Routine recourse to the testimony of money advisors as standard practice in debt related proceedings, in order to provide clarification of the client's circumstances and ability to pay, should be introduced.

xi) Legal Aid and Advice

According to Legal Aid Board figures in the category of debt, **legal representation** was provided in **8** cases and **legal advice** in **93** cases in the year 2000[199]. These figures take into account all law centres in the State. It is, therefore, apparent that debt issues form a very small part of the law centre's current workload. It is also clear that those in debt are likely in most cases to have little access to private solicitors, given the nature of their financial predicament. This renders the relative lack of involvement on the part of the State's designated civil legal aid and advice service all the more critical.

Where the debt is uncontested, it is arguable that representation is initially unnecessary. However, in cases where the amount or fact of the debt is in dispute or where there has been a breach by a creditor of relevant legislation such as the Consumer Credit Act, 1995, access to legal representation on a means and merit tested basis should be available.

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197 See Section 2 – Page 15-16
198 See Section 3 - Page 25
199 Legal Aid Board Annual Report, 2000 – Pages 42-44

Equally, in uncontested cases where debt enforcement proceedings are subsequently brought and are putting a debtor's liberty or ability to survive at risk, access to legal representation from the State should be provided with an examination of the merits of the debtor's case a secondary consideration. In all cases, access to legal **advice** upon the receipt of legal proceedings should be automatic and immediate where the debtor has insufficient means. In this sense, the law centres could complement the work of MABS. However, the fact that there is invariably a waiting list for advice as well as representation is a key deficiency in the legal aid system.

The extremely minor role played by the Legal Aid Board law centres in providing legal advice and representation to debtors in both contested and uncontested cases should be investigated with a view to improving such access as a matter of immediate priority.

xii) Credit Register

It is often argued by money advisors that credit is supplied far too easily to consumers whose ability to service their current level of borrowings is already questionable. On the other hand, it is also the case that a balance needs to be struck between so called 'irresponsible lending' and a right of access to credit in a credit dominated society, especially for persons on low incomes who generally pay more for credit. Many creditors also make the point that the decision to loan money to a client is to some extent based on information supplied by that client and this is sometimes misleading or untrue. If creditors with an appropriate licence had access to details about the applicant's current borrowings, it is arguable that a more informed decision could be made and this would certainly place a greater onus on a creditor to justify making the loan. A note of caution needs to be sounded here in relation to the subject's rights to privacy and choice as well as data protection safeguards. Practice in other jurisdictions should be investigated in this respect.

Mindful of privacy and data protection concerns, the possibility of the State facilitating the creation of an industry funded credit register should be investigated as a means of preventing consumer over-indebtedness. Practice in other countries should be researched in order to determine the appropriateness of such a development.

xiii) Execution Orders

Execution Orders are stressful and invasive. In the view of this report, it is hard to justify, especially in consumer debt situations, allowing a creditor as a first enforcement step to be responsible for complete strangers entering into a person's home in order to confiscate goods to satisfy a judgement. If the debtor is employed, and attachment of earnings is introduced to back up the Instalment Order procedure, the creditor has a relatively secure method of recovering the debt through staged payments and should have no need to resort to the execution procedure. Where the debtor is a sole trader or self employed and the instalment and attachment options are not available, different considerations may need to apply.

Execution orders against employed debtors should only be available where the creditor can show that an application for an instalment and/or attachment order has proved fruitless and that the debtor has significant valuable assets to seize.

xiv) Debt collection agencies

Many creditors, as a method of avoiding legal proceedings, will instruct a debt collector to attempt to recover the debt. There is anecdotal evidence that some of the tactics employed by some debt collectors are dubious, in terms of the pressure that is put on the debtor to agree unaffordable instalments and the representations that are sometimes insinuated, if not directly stated, that the debt collector acts in some official capacity. At present, the practices of debt collectors are unregulated and only Section 11 of the Non-Fatal Offences against the Person Act 1997 appears to curb any excesses in that it provides that persistent harassment of a debtor will constitute an offence. There is certainly a case for a licensing and monitoring system to establish that persons proposing to act as debt collectors are reputable and act in a bona fide manner.

Debt collectors should be regulated by legislation. Given that the Consumer Credit Act 1995 currently regulates moneylenders, credit intermediaries and mortgage intermediaries as well as dealing with formal requirements in relation to default on agreements, it would seem the appropriate vehicle by amendment to license debt collection.

11.2.3 Proposals for a workable Attachment of Earnings model

Introduction

This report does not recommend the introduction of attachment of earnings legislation as such, though it concedes 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 will need to be put in place.

The point has already been made that a court is an inappropriate place for the resolution of uncontested debt cases, and in the long term an alternative forum should be put in place with an alternative approach to traditional notions of contract and enforcement. In the meantime, attachment is the standard approach in most European jurisdictions that this report has examined. Thus, this set of recommendations focuses upon the dual need for adequate safeguards to be put in place to protect the debtor's interests should attachment of earnings legislation be introduced and a realistic approach if attachment is to be workable. Again, the recommendations are loosely placed in the order in which they might be expected to occur for the debtor.

i) Assignment of wages

In some of the European jurisdictions surveyed, assignment of wages as part of the credit contract is allowed if a default takes place[200]. This effectively allows the creditor to levy a portion of the employee's wages without the need to get an official court sanction to do so. This is a draconian power and open to potential abuse and serious ramifications for the debtor's continued employment. The Collection Watch Report (1999:4) suggests that "*assignment of wages without reference to a court or other enforcement authority should be banned*".

Any potential legislation on attachment of earnings should prohibit automatic assignment of wages as part of a credit contract.

ii) Variation in lieu of Attachment

In maintenance cases, attachment is potentially available at the point at which the maintenance order is made even before a default has been shown to have occurred. However, in relation to civil debt, attachment is usually a final enforcement option, available only when a debtor has defaulted on the payment of an Instalment Order without just cause. Prior to this, more accessible information should be available on the right of a debtor to look for a variation of the instalment at any time, in particular where their circumstances have deteriorated. There is no reason either why a variation of the Instalment Order should not be made in lieu of an attachment, if failure to pay resulted from a material change in circumstances.

Attachment should only be available where a default in the payment of an Instalment Order has taken place and at any such application for an attachment order, a variation of the Instalment Order should be substituted where it is justified.

iii) Suspended attachments

Even if a default has taken place in the payment of an Instalment Order, the debtor should be given a final chance to make payment before an attachment is notified to his/her employer. There is evidence, discussed earlier in this report, that the making of an attachment order can have a detrimental effect

200 See Section 8, Page 88.

upon the continuation of the debtor's employment[201] and, in the U.K, a suspended attachment of earnings order can be made to give the debtor a final chance to comply before his/her employer becomes obliged to deduct earnings at source. If a default then takes place, the attachment order automatically comes into operation.

A court or court official or other enforcement authority should, on the application of the debtor or at the creditor's application, have the option to make a suspended attachment of earnings order in lieu of an actual attachment.

iv) Who should calculate the protected earnings rate?

The income that the debtor is entitled to retain after the attachment has taken place is the most crucial issue with regard to attachment of earnings. As this report has demonstrated[202], AOE systems vary from jurisdiction to jurisdiction, some setting out the appropriate deductions in tables with the amount of the deduction rising according to levels of income (so called **'fixed deduction'** systems) and others allowing a court or a court official to determine the appropriate deduction (so called **'court deduction'** systems).

Some countries draw on elements of both types of systems. It is not proposed to rehash the relative advantages and disadvantages of these models here. However, the fixed deduction system appears to carry greater certainty and equity of outcome, provided, and it is a very important proviso, that there is sufficient flexibility built into it to allow for special circumstances and that it does not put the debtor's accommodation in jeopardy.

However, given that Instalment Orders are currently made by the District Court in Ireland, and that attachment is being proposed as a way of enforcing an Instalment Order, it would be critical that the method of calculating the appropriate attachment would closely mirror that of the instalment. It would seem logical, therefore, within the current system that either a court or court official does both jobs. This could be achieved by designating the task of setting instalments (in the event of a dispute) to court staff, based on the debtor's offer and statement of means with guidelines available such as the 'determination of means' calculator used in the U.K. If attachment becomes necessary to enforce the instalment, either fixed tables or guidance along the lines of the 'protected earnings' calculator in operation in the U.K should be provided.[203]

Given that most debt enforcement currently takes place at District Court level in Ireland, the task of deciding both instalments and attachments should be devolved to court officials (with a right of appeal to a judge) and detailed guidelines should be provided to allow them to determine the appropriate protected earnings rate. These guidelines should provide sufficient consistency to allow for certainty of outcome but also allow for flexibility to take special circumstances into account. This recommendation will have implications for staffing levels in the Courts Service and in District Court offices throughout the country. The longer term alternative would be to devolve this task to a specific debt enforcement authority or tribunal outside the courts system.

v) What should the protected earnings rate consist of?

It is the view of this report that it is not morally justifiable to allow punitive attachments, that will put families at risk of extreme poverty by leaving inadequate income upon which to live on a day to day basis. Financial institutions operate in the main at high profit levels and must shoulder their share of the responsibility in societal terms for the extension of credit especially where over-indebtedness occurs due to an unforeseen change in the debtor's circumstances. The extent to which the creditor concerned exercised due care to check the debtor's credit rating and financial circumstances prior to making the loan is also very relevant in this equation.

Quite apart, however, from the moral argument, there are pressing pragmatic reasons why an attachment

201 See Section 6 (Pages 52-53) and Section 8 (Pages 74-75)
202 See Section 9.3 – Pages 89-100
203 See Pages 75-76 for further details

should leave a debtor with sufficient income to live adequately. Evidence has been presented in this report and logic would dictate that a punitive attachment constitutes a strong employment disincentive[204]. It is human nature to feel immense frustration if the bulk of the fruits of your labour at work is being redirected to a credit institution against your will and the temptation to resign from that job and attempt to leave the attachment behind may be considerable.

In summary, therefore, there are strong moral and practical reasons why Protected Earnings Rates (PER's) should be set at a level fair to the debtor and his/her dependants. Mention has already been made of the Debt Settlement Pilot programme agreed between the Money Advice and Budgeting Service (MABS) (assisted by FLAC) and the Irish Bankers Federation (IBF), and some detail has been provided of how protected earnings are calculated under that programme[205]. The parameters set out in the pilot document form a useful basis for calculating protected earnings if a court deduction type system is to be used. As has been demonstrated, a court deduction system will take each case on its merits but with the guidance of calculation criteria such as the 'protected earnings calculator' in England and Wales.

Court deduction system

If opting for a court deduction system, a protected earnings calculator should specify that the following be added together and subtracted from the net income of the debtor (including that of the spouse/partner where applicable) to determine the surplus income available for attachment:

- **The debtors accommodation costs (mortgage or rent payments);**
- **Payments in respect of any existing court orders;**
- **Social security rates that would apply to the family or individual involved if they were not working;**
- **Legitimate work expenses;**
- **Special expenses such as recurring healthcare costs;**
- **A sum that would allow some leeway for a social life.**

Only if there is no surplus should the situation be reviewed to decide whether a minimal attachment could be imposed. Factors such as the responsibility of the creditor and the debtor in making or taking out the loan should also be relevant in deciding on appropriate attachments.

On the other hand, a fixed deduction system would give more specific instructions on protected earnings via tables, that set out a baseline below which no earnings can be attached (varying according to the number of dependants), followed by income bands that provide for rising percentage deductions culminating in a 100% attachment above a certain level of income. Some of these fixed deduction systems have an extra flexibility involving the addition of accommodation costs and recurring special needs expenses to the protected earnings figure where appropriate.

Fixed deduction system

If opting for a fixed deduction system, the figure at or below which no attachment whatsoever should take place should be set at the relevant social security rates for the family, couple or individual involved. Thereafter, carefully constructed tables could allow for rising percentage deductions that would serve to add to the protected earnings rate sums in respect of work and special expenses. The apparent rigidity of the fixed deduction system would need to be softened in an Irish context, given the high rate of house ownership and the high cost of accommodation in the private rented sector. Sufficient flexibility would need to accompany the tables to ensure that an attachment of earnings order/s would not put the debtor's habitation at risk.

204 See Pages 52-53
205 See Section 7 - Pages 66-67

vi) Priority between attachments

It is clear from the vast majority of jurisdictions surveyed in this report that attachments for the support of a spouse or children (alimony or maintenance payments) overtake attachments for non-payment of civil debt even if the latter precedes the former. The rationale for this is evident; a person's domestic needs should come before those of a creditor. This basic rule would need to be repeated in an Irish context.

Should attachment for non payment of fines also be introduced, a rule would be needed to determine its priority in relation to other types of attachments. Given that the fine is imposed as a result of a criminal prosecution and is a debt to the State, it is the view of this report that it is a greater priority than a civil debt attachment and should take preference to it regardless of date. However, it is also argued that it should not supersede a maintenance order and should indeed lapse in favour of a maintenance order where necessary. A possible suggestion here is that in lieu of a fine for a minor criminal offence, a person could opt to perform some community service or at the point of attachment assuming that instalments had not been paid, community service could be substituted for the attachment.

Legislation should set out clear rules in relation to priorities between the different forms of attachment. Maintenance attachments should take priority to the extent of overtaking other existing attachments. Debts to the State, for example, fines, should come next and attachments for non-payment of civil debt should be last in line and should be overtaken by the other attachments where appropriate.

vii) Consolidated Attachments / Administration Orders

If the debtor is to have a reasonable level of protected earnings, it is clear that multiple attachments cannot be allowed to take place as the effect of each attachment would generally serve to further reduce an already low income. Indeed, the current position whereby a debtor can be the subject of two or more Instalment Orders which do not take account of each other, is an example of the chaos can ensue from a poorly thought out debt enforcement procedure.

On the other hand, many debtors will have other debts in respect of which legal proceedings may be in train or threatened or where a default in payment is imminent or has occurred. It is not fair or reasonable that the first to sue and enforce with an Instalment Order followed by an attachment grabs the entire amount of the debtor's attachable income whilst other creditors wait in the wings for their turn. The alternative to this is the consolidated attachment whereby proven creditors receive *pro rata* amounts from one payment into a court or other authority, such as an Enforcement of Judgements Office and where the debtor him/herself can seek the consolidation[206]. It has already been recommended that this option be made available at the point at which the debtor is first sued by the first creditor[207]. Equally, it should be available at the point of attachment so that each creditor will receive some form of limited payment.

The downside of the consolidated attachment is that it may take a very long time depending on the amount of debts involved and the available income for the sums to be paid off. The longer it takes, the more likely it would be that the debtor will lose heart and default. Again, it has already been recommended in this report that if the debts cannot be paid in their entirety within a timeframe such as three years, a composition or partial write off be incorporated into the process. Ultimately, a formal debt settlement code will also be necessary in this respect and this avenue will be explored in more detail in the third set of recommendations.

Where an attachment is sought by a creditor, the court or other enforcement authority hearing the application, either on its own initiative or on the application of the creditor, can look at the entirety of proven debts involved and order a consolidated attachment, with an option to make a composition where these debts cannot be paid within a reasonable time frame such as three years.

206 See Section 8, Page 78

207 See Page 80-82, Administration Order procedure

viii) Employment Protection

An attachment of earnings order is directed at an employer, so that employer becomes aware that their employee has a debt or debts which, it appears, the employee was unable to pay. Some evidence has been presented in the course of this report that this can affect the employee's prospects at work in terms of issues such as access to promotion or training or even threaten the continuation of their employment[208]. Some employers may feel that the attachment has implications for the employee's trustworthiness especially when the employee handles cash in the course of their job. It has already been recommended that an option to suspend the attachment be allowed so that the debtor can make the payments on a last chance basis without his/her employer becoming aware. However, in the event of an attachment or consolidated attachment order coming into operation, protection in terms of employment legislation should be put in place to prevent any discriminatory treatment, in particular as the ability to make the payments depends upon continued employment.

The Unfair Dismissals Acts 1977-1993 should have dismissal on grounds of being subject to one or more attachments added to the list of unfair reasons to dismiss with the proviso that the normal requirement to have one year's service to make a claim in the event of dismissal would not apply.

ix) Attachment of Social Welfare payments

It is the view of this report that, in principle, 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. Nonetheless, people on social welfare payments do get into debt as people who have borrowings become unemployed. It is the view of this report that this is one of the risks in the extension of credit and if the debtor is a social welfare recipient, a creditor should have to wait until the debtor's situation improves to enforce that debt.

Attachment of earnings should not be permitted in relation to Social Welfare payments.

x) Variation or discharge of the attachment

Just as with Instalment Orders, there is a need to ensure that there is flexibility in the procedure to take account of changes in income. It should be made abundantly clear in user friendly documentation and at the time the order is made, that the debtor (and indeed the creditor) can apply to the relevant court or authority at any time to have the order varied (or where necessary discharged) to more accurately reflect their changed circumstances. For example, if an employee has his/her hours of work decreased as a result of cutbacks in a workplace, it is unlikely that there will be any surplus income to meet the terms of the attachment order especially where there are dependants to support. In this situation, the order should lapse until circumstances improve.

Variation or, in particular circumstances, suspension of the order must be permitted where the debtor's financial circumstances deteriorate.

xi) Duties of employers

Given that it is the employer of the debtor who will be the person responsible for the deduction and the remission of the payment to the court, it is necessary that legislation would set out in brief the duties and rights of employers. The U.K legislation is a useful benchmark in this respect and its provisions are explained in an earlier section of this report[209]. These include the obligation to issue a receipt to the employee in respect of each attachment, and the obligation to inform the court if the employee leaves his/her employment following service of the order or during the course of the attachment period, as well as the right to deduct a nominal sum in respect of administrative expenses.

The specific duties and rights of employers in relation to the mechanics of attachment need to be enumerated in any prospective legislation.

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208 See, for example, Pages 52 and Pages 74.

209 See Section 8, Page 78

11.2.4 Proposals for the introduction of Debt Settlement legislation

Introduction

A section of this report has already been devoted to a discussion of the basic principles of debt settlement[210]. It has been firmly stated that attachment of earnings on its own will not deal with the problems of chronic over-indebtedness. Rather, attachment is more appropriate where the level of indebtedness is finite and it can be envisaged that the debt or debts, using the attachment method of enforcement, will be paid off within a reasonable timeframe whilst allowing the debtor a reasonable quality of life. For many consumers, however, the level of debt is far more extensive than this and the level of disposable income available to begin to pay off that debt is quite moderate or negligible.

In this type of situation, whilst the debtor may have no judgement marked against him/her, there may be legal action pending or widespread default on many other borrowings. Attachment or consolidated attachment in these circumstances would be likely to take a lifetime and neither the debtor and his/her dependants nor the State and society in general should have to bear the considerable social and economic consequences.

In cases of chronic over-indebtedness, a different kind of solution is needed. This problem has been recognised in all but 5 of the Member States of the European Union (Italy, Spain, Greece, Portugal and Ireland). The remainder have introduced a variety of legislative solutions in the past 20 years to cope with chronic over-indebtedness.

With dramatic growth in the extension of consumer credit in recent years[211] and increasing evidence of clients presenting to the Money Advice and Budgeting Service (MABS) with high levels of debt [212], it is imperative that Ireland put its own legislation in place. Drawing on debt settlement legislation in operation in other jurisdictions and the recommendations of the Leyden Report and the European Consumer Law Group[213], the following principles are suggested for discussion and incorporation in any domestic legislation.

i) Chronic over-indebtedness

The situation of the person in debt must be relatively hopeless in that the total amount owed comes to a figure that, on the basis of current income and assets, makes it unlikely that the debts will be paid off in full within a reasonable time frame. This will need to be viewed on a case by case basis and it is difficult to lay down any specific time period. The Norwegian debt settlement legislation states that the debtor must be 'permanently incapable' of paying their debts and this may serve as a useful definition.[214]

ii) Voluntary Settlement

The debtor must not have acted in bad faith, for example, by attempting to sell or conceal property/assets to defeat his/her creditors and must have attempted to reach a voluntary accommodation with his/her creditors prior to any settlement being imposed by a third party.

iii) Out of court settlement

The settlement should be facilitated by an independent body or enforcement authority set up by the State operating outside of the courts system that should be required to adjudicate in the event of failure to agree a settlement. This body could be set up by statute and could, therefore, exercise 'limited functions and powers of a judicial nature[215]. Given the constitutional imperative that justice can only be administered by duly appointed judges[216], an appeal should lie to the civil courts where the decision of the third party is unacceptable to any given creditor.

210 See Section 7, Pages 58-67
211 See Page 59-60
212 Of the active case load of MABS, 22% of clients had **6 or more debts in arrears**. 30% of clients had debts in **arrears** of £1000 or more – From MABS Evaluation, Phase Two, Eustace and Clarke, August 2000 – Page 151
213 See Pages 62-65
214 Sections 1-3, Debt Settlement Act – No. 99, July 1992, Norway
215 Bunreacht na hEireann (Irish Constitution) Article 37.1
216 Ditto - Article 34.1

iv. Consumer debt only

The Debt Settlement option applies in general to persons acting in their capacity as over-indebted consumers only and this principle should also apply in relation to any Irish legislation too. However, in the particular case of small business debt incurred by sole traders, it is often the case that the business debts are mixed in with consumer debts or it is unclear whether the loan was taken out in a business or consumer capacity. In addition, security provided in respect of commercial borrowings sometimes involves family property and this could affect the rights of residence of spouses/partners and dependants. It is, therefore, suggested that situations of small business/ consumer debt be examined on a case by case basis to determine whether a debt settlement might be appropriate.

v. Length of the repayment period

How long should the debtor be required to put his/her income at the disposal of creditors before a write off occurs? Debt settlement codes in Europe vary in length from 3 to 7 years but much will and should depend upon the individual circumstances of the debtor, in particular the amount of indebtedness, the disposable income and domestic circumstances of the debtor and dependants, and the availability of assets to reduce the amount owed before the repayment schedule begins. However, it is important to bear in mind that an unduly long repayment period increases the risk of the debtor losing heart and defaulting. For this reason, this report recommends the adoption of a three year period in line with the Administration Order procedure in the U.K, unless circumstances dictate otherwise.

vi. Irresponsible Lending

In a debt settlement, creditors are paid on a *pro rata* basis according to the extent of the indebtedness outstanding to them, subject to the proviso that secured loans sometimes are paid on an interest only basis until the repayment period ends when the debtor may be free to begin repaying the principal. However, it is arguable that not all unsecured loans should be treated similarly in that the judgement of a creditor in offering credit in the first place should be investigated before any given creditor is allowed to receive *pro rata* payments. This should apply, in particular, if a credit register to which creditors have general access is set up as speculated already in these recommendations[217]. There is anecdotal evidence, for example, of people on moderate incomes being in possession of several credit cards simultaneously with substantial credit limits. It is arguable that a company providing a credit card where a person already has one or more, is acting recklessly (in addition to the borrower) where income is moderate and that such a creditor should not be entitled to the same pro rata treatment as more responsible creditors.

vii. Sale of assets

As well as designating a significant portion of future income to be distributed *pro rata* to creditors over the appropriate repayment period, it may be that the debtor has assets that it would not be reasonable to retain, given his/her application for settlement. For example, though standard household items and appliances would not come under this heading, a car that could be replaced by a less expensive model could. Equally, second homes, shares, life assurance policies with an encashment value would all be examples of items that might be potentially realised in order to reduce overall indebtedness before the repayment period begins.

viii. Preventing the sale of the debtor's family home / place of residence

Any credible debt settlement code must aim to prevent of the loss of the debtor's habitation whether owner occupied or rented, especially where the debtor has dependants relying upon him/her to maintain that home. Loss of the family home would, in any case, either oblige the debtor to seek private rented accommodation at a generally prohibitive cost, arguably compromising the availability of income during the repayment period, or to look for public housing, thus placing the burden on the State to rehouse the debtor and dependants at a time when demand for public housing far exceeds supply. The costs of accommodation should, therefore, be considered to be a priority payment under any potential legislation, in particular given the unique housing situation in Ireland.

217 See Page 117

There may be situations where the debtor may, because of a considerable level of equity and the high value of the family home, be obliged to sell and purchase a less expensive dwelling and use the cash realised as part of the debt settlement.

In relation to mortgages, the Norwegian option of paying **interest** only and suspending payment on the **principal** during the repayment period could be explored. This would allow a larger pool of income for distribution to unsecured creditors during the repayment period. However, once the residue of unpaid unsecured debt is written off at the end of that period, the debtor should be able to recommence paying the principal with a lesser burden on his/her income.

ix. Freezing of interest / Suspension of legal proceedings

A debt settlement programme cannot hope to succeed where the debtor is still under threat of legal action or where interest is mounting on the debts during the repayment period. Provided the debtor does not default on his/her obligations, interest must be frozen on any unsecured loans and the debtor must also be protected from any legal action from any creditor during the repayment period.

x. A reasonable protected earnings rate

The debtor will be required for a finite period to put the bulk of his/her income at their creditor's disposal with the prospect of a write off of residual debt at the end of the repayment period. It is less likely that the debtor will stay the course of the repayment period if the level of earnings s/he is allowed to retain is too low and places the household in danger of poverty. This is especially the case where the debtor will be continuing to work during repayment. The Debt Settlement pilot described in an earlier section contains specific guidelines on the calculation of protected earnings and it is submitted that these constitute a good basis for potential legislation.[218]

xi. Variations in income / Changes in circumstances

During the repayment period, it is possible that the debtor's income may disimprove and this will affect his/her ability to service the agreed repayments. Reviews in this type of situation will be essential. Similarly, circumstances may improve, for example, a change of job involving an increase in income or a bequest in a will. In this situation, a portion of the improved income or once off payment might be distributed to creditors at the discretion of the enforcement authority. This way, all parties benefit from the improved position.

xii. Write off of residual debt

A core principle in any debt settlement code must be the write off of residual unsecured debt, the so called ' fresh start ' whereby the slate is wiped clean and the debtor recovers control of his/her finances and ability to access credit. However, it is clear that this principle will not apply to secured loans of long duration, the most obvious example being the annuity mortgage. The status of other secured loans is more problematic. For example, how should short term borrowings such as personal loans that are secured by the deposit of title deeds be treated?

Two options appear to exist here. Firstly, interest only might be charged for the duration of the repayment period and with residual unsecured debt cleared, the debtor might then resume paying the principal. However, if there is an existing mortgage **and** other secured short term loans, this will represent sizeable obligations even when the repayment period under the debt settlement has ended. Taking the example of Norway again, loans secured on the family home (including the first mortgage) up to 110% of its market value have payments on the principal suspended and agreed interest is imposed. Other secured creditors have to line up with unsecured creditors for pro rata payments during the repayment period and their security is annulled and the loan written off when the repayment period ends[219]. Secondly, the secured loan could be treated as a priority debt to be paid before distribution of

218 See Section 7 - Pages 66-67

219 Section 4 (8) – Debt Settlement Act – No 99, 17 July 1992 - Norway

the debtor's disposable income but this would entail a smaller pool of income for distribution to unsecured creditors during the repayment period.

xiii. Access to credit during the repayment period

Given the restrictions on the income available to the debtor during the repayment period, it is unlikely that s/he would be facilitated in borrowing more money during this time. However, the need to do so could not be ruled out especially in circumstances where there is a short term need for cash to pay for particular emergencies or events. In this type of situation, the debtor could be required to seek consent from the enforcement authority to borrow or alternatively, a temporary variation in the amount of the repayment under the settlement could be allowed.

xiv. Access to credit following the end of the repayment period

A fresh start is not really a fresh start if the debtor is burdened with an adverse credit rating following the conclusion of the repayment period, which might prevent access to future credit lines. However, it is also important from the creditor perspective that the fact that a settlement (as opposed to full payment) has occurred is noted. The IBF/MABS Debt Settlement Pilot[220] will attempt to deal with this problem by having "debt settled to the satisfaction of the creditor" noted on the customers credit record. It remains to be seen what effect this will have on future access to credit for participants in the pilot. Research enquiries have indicated that this is a significant problem in other jurisdictions where debt settlement legislation exists.

xv. One settlement only

In the Scandinavian model of debt settlement, there is a strong emphasis on the rehabilitation of the debtor, with the object of the exercise being not just the settlement of the debtor's existing debts but the prevention of a future recurrence of over-indebtedness. Hence, only one settlement per individual is allowed and this basic rule should be repeated in the Irish context, although it is arguable that a further settlement should be considered where the debtor can show that s/he had not used credit irresponsibly and over-indebtedness had occurred due to circumstances beyond the debtor's control. Such cases are likely, in any case, to be few and far between but a measure of flexibility with debt settlement legislation is desirable.

11.2.5 Provision of comprehensive money advice – recommendations in relation to the development of MABS

The twin objectives of rehabilitating the debtor following his/her involvement with the legal system and the prevention of his/her future over-indebtedness cannot be achieved without the provision of rights-based, independent, funding assured, money advice. Indeed, at all stages of the debt enforcement process covered by the foregoing recommendations, the over-indebted person should have immediate access to advice and information from trained professional money advisors (and legal assistance where it is becomes necessary).

It is the view of this report that to facilitate this, MABS money advisors in turn must have access to a greater range of services to assist them in their work, including a comprehensive statistical recording system, a designated social policy and research unit, test case strategy and specific community education posts. Although MABS has come a long way since its inception in 1992 and a large amount of State funding has been put into establishing and professionalizing the service, it is still primarily preoccupied with a form of crisis management which, although critical in the short term, does little to alter the bigger picture. The longer term aim of debt prevention (through community education, the promotion

220 See Pages 66-67

of budgeting skills, responsible use of credit, social policy initiatives and law reform) must be properly resourced to complement the remedial work and to fully meet the objectives set for MABS by the government[221].

Needless to say, any such restructuring will require increased funds at a time when it is apparent that public spending has become a significant problem. Nonetheless, it is the view of this report that no price can be put upon the quality provision of what is an essential service.

11.3 GENERAL CONCLUSION

The challenge in the years to come can be summarised as twofold:

- Reform of the legal system to achieve a humane and workable approach to debt, over-indebtedness, and chronic over-indebtedness.
- The prevention of over-indebtedness through a multi-layered approach that promotes responsible practice by credit providers, user friendly information for consumers of credit, and financial services available to all, backed up by a rights based independent money advice service.

Analysing experiences elsewhere, identifying weaknesses that exist here and in other jurisdictions and suggesting possible solutions that might best suit the Irish context is this report's contribution to meeting these challenges.

Many thanks for taking the time to read this material.

Paul Joyce, Free Legal Advice Centres, May, 2003.

221 For further discussion of the current and future role of MABS, see Section 4, Pages 29-32

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