



TO NO ONE'S CREDIT

THE DEBTOR'S EXPERIENCE OF INSTALMENT AND
COMMITTAL ORDERS IN THE IRISH LEGAL SYSTEM

EXECUTIVE SUMMARY

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*A study of the debtor's experience of Instalment and
Committal Orders in the Irish legal system*

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© FLAC, June 2009

ISBN 1 873532164

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Free Legal Advice Centres (FLAC) would like to acknowledge the financial support provided by the Combat Poverty Agency (CPA) and Money Advice and Budgeting Service National Development Ltd (MABSndl) to carry out this research. The views expressed in this report do not, however, necessarily represent those of either organisation.

Photography: Derek Speirs

Cover: Printwell Co-op

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The Path to Imprisonment in a Debt Case



1. Introduction

■ Context for this report

FLAC's report, "*An End based on Means?*" (May 2003), provided a critical analysis of the Irish legal system in relation to debt enforcement, examined alternatives in other countries and made a number of proposals for reform. The report concluded that the Irish legal system was poorly adapted to meet the realities of what was then a rapidly expanding consumer credit market. In response to a specific Government proposal that attachment of earnings might be introduced as a new method of debt enforcement, the 2003 report also examined how attachment of earnings systems worked in other jurisdictions.¹ The Government's proposal never materialised in the form of proposed legislation.

In the intervening years, increases in the provision of consumer credit continued unabated up until the current international and domestic economic and credit crisis. However, the method of obtaining a court judgment for a sum of money and the principal method of collecting debts from persons of limited means remains substantially unchanged since the Second World War.² Instead, the principal State response to increasing over-indebtedness during this period has been to continue to fund the Money Advice and Budgeting Service (MABS), whilst refusing to grapple with the underlying unsuitability of the country's legal system in this arena.

There is still no sign that there are plans to change the laws. In August 2005, in the course of correspondence with FLAC, it was stated on behalf of then Minister for Justice, Equality and Law Reform, Michael McDowell T.D., that "there are no current plans to bring forward a legislative initiative on civil debt management issues" and that "[n]onetheless, the Department is supportive of any efforts to find alternative non-judicial approaches to the resolution of debt problems and of the critical contribution of the MABS in helping people to address problems of over-indebtedness". In 2008, the Minister for Justice, Equality and Law Reform, Dermot Ahern, T.D. stated that:

¹ In brief, an Attachment of Earnings Order is a court order directed to an employer to deduct money from an employee's wages and pay that money either into a court for the benefit of a creditor or directly to that creditor to satisfy a judgment debt. In the end, no legislation to implement this proposal was ever published and this initiative now seems to have been removed from the Government agenda.

² Enforcement of Court Orders Acts 1926-1940.

(t)here are no immediate proposals to amend the law in relation to recovery of a civil debt, the procedure under which persons may be examined as to their means in the District Court, the system under which the Court may order payment to be made in full or by way of instalment, or the procedure regarding refusal of a court order to pay a civil debt.³

There is substantial anecdotal evidence that consumers sued in debt cases do not respond to legal proceedings. Many do not attend hearings in open court in relation to the enforcement of those debts by the Instalment Order procedure. In a number of cases, this culminates in the imprisonment of the debtor concerned and in many other cases, imprisonment is only avoided after an eleventh-hour intervention by MABS or a solicitor or through financial assistance from a relative.

Between 2001 and 2007, approximately 200 persons per year were imprisoned in connection with debt.⁴ In 2008, a total of 276 persons were so imprisoned, an increase of 37% on the previous year.⁵ The State has always insisted, albeit without providing any firm data, that sentences are short and many debtors make payment on committal or shortly afterwards.⁶ It is therefore instructive that it was disclosed for the first time that, in 2008, the average length of prison sentence imposed was 27 days, with debtors serving an average of 20 days in jail.⁷ In many cases, those imprisoned because of debt are simply unable – as opposed to unwilling – to meet their financial obligations. In terms of the cost to the taxpayer, the average annual cost of keeping a prisoner in custody during 2007 was €97,700.⁸ This figure does not include the financial costs of processing the events leading to the incarceration. The further effects of this criminalisation of debtors on partners, family and child dependants, the costs to society in general of short and long term stress, illness and healthcare, and the damage in terms of relationship breakdown are matters for speculation.

■ The typical path to Imprisonment in a Debt Case

While the path to prison may vary from debtor to debtor, the process described below is a simplified version of the legal sequence of events that may take place before a debtor ends up in jail.

³ Part of a response to Parliamentary Question No 292 from Aengus O'Snodaigh, T.D. for Written Answer, 29 October 2008.

⁴ From figures provided to FLAC by the Irish Prison Service and from a response by the Minister for Justice, Equality and Law Reform to Parliamentary Question No 290 by Joe Costello, T.D. for Written Answer, 29 October 2008.

⁵ 276 persons in total for 306 offences, suggesting that 30 were imprisoned twice in the same year – from a response by Minister for Justice, Equality and Law Reform Parliamentary Question No 608 by Caoimhghin O'Caolain, T.D. for Written Answer, 27 January 2009.

⁶ Department of Foreign Affairs, *Ireland's State Reports on the measures adopted to give effect to the provisions of the International Covenant on Civil and Political Rights*: 1993 (CCPR/C/SR Ireland, 20/7/1993) 1998 (CCPR/C/IRL/98/2) and 2007 (CCPR/C/IRL/3).

⁷ Also in response to Parliamentary Question No.608. See footnote 5 above.

⁸ From the Irish Prison Service *Annual Report 2007*, p30.

■ The debt enforcement procedure and the law

At the same time as this report went to print, judgment was delivered in the *McCann* case, where the High Court has found Section 6 of the Enforcement of Court Orders Act 1940 to be unconstitutional.⁹ In this case, the applicant (represented by Northside Community Law Centre) was sentenced to a jail term of one month for failure to comply with the terms of an Instalment Order granted to Monaghan Credit Union. The judgment of Laffoy J. delivered on 18 June, 2008 found that legislation:

- where the onus of proof was on the debtor to establish that failure to pay court-ordered instalments on a debt was not due to her ‘wilful refusal’ or ‘culpable neglect’, and
- which then allowed for the imprisonment of the debtor in her absence, and
- where legal aid was not provided by the State to assist her to defend her position, was in breach of the constitutional guarantee of fair procedures.

Concerns about the debt enforcement process have also been regularly raised at international human rights forums. In its examination of Ireland’s human rights record in July 2008, the Human Rights Committee of the United Nations questioned for the third time the compliance of debt-related imprisonment with international human rights standards. The State has consistently countered criticism by maintaining that prison arises from the debtor’s contempt of court in failing to meet the terms of the Instalment Order, rather than inability to pay a debt. The response to a parliamentary question in 1997 by John O’Donoghue T.D., then Minister for Justice, is typical of the State response when he said:

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 refusal 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.¹⁰

What was omitted here is that these hearings frequently take place in the absence of the debtor.¹¹ Thus, Instalment Orders are often made for amounts beyond the debtor’s capacity to repay, using out-of-date financial information because the debtor’s financial circumstances have deteriorated. In turn, the debtor frequently does not appear at the committal hearing after the inevitable default in payment of the instalment occurs. However, absence does not mean wilful refusal or culpable

⁹ *McCann (Applicant) and Judge of Monaghan District Court, The Commissioner of An Garda Síochána, The Chief Executive of the Irish Prison Service, The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (Respondents) and the Human Rights Commission, Monaghan Credit Union (Notice Parties)*

¹⁰ Parliamentary Question Number 365, November 1997.

¹¹ In correspondence with FLAC in October 2008, the Courts Service, while not able to provide any definite figures, estimated that about 20%, i.e. one in five, attend their local District Court to have their means examined with a view to making an Instalment Order and the same percentage attend in response to a Committal Summons to determine whether they should be imprisoned. In FLAC’s view, this may even be an over-estimate.

neglect, If a judge decides to impose a prison sentence, how can anyone be certain that the debtor had the means to pay but chose not to do so? Imprisonment without an assessment of ability to pay renders the process fundamentally flawed.

The public nature of the debt enforcement system is a major barrier to participation. The Instalment and Committal Order procedures take place in open court. The prospect of appearing in public to be questioned about his/her finances, especially when this occurs in a small community, fills many debtors with dread. It is hard to see what purpose is served by public hearings. The Irish Constitution provides that justice must be administered in courts established by law by duly appointed judges and must be administered in public.¹² However, the administration of justice has already taken place when a judgment is granted against the debtor. The irony is that judgments are usually granted in a court office without any hearing because the debtor does not defend the claim against him or her. It is the enforcement that follows which must, by law, take place in open court even though it is only an administrative arrangement for phased repayment of the debt. This occurs in circumstances where it is clear that the debtor is unlikely to have the means to pay in one lump sum.

The Irish Constitution allows other bodies that are not courts to exercise what are described as “limited functions and powers of a judicial nature” (except in criminal matters) provided they are duly authorised by law.¹³ If the setting of an Instalment Order following a judgment is the exercise of limited powers and functions of a judicial nature, then the State could legislate to set up an alternative debt repayment scheme or tribunal that would carry on its business in an office rather than an open court environment. A right of appeal to a court would satisfy any doubts about constitutional requirements. This, together with simplified documents, the promotion of comprehensive money advice and legal advice services and user-friendly guides to procedures, would greatly improve the participation of debtors and therefore the resolution of debt cases generally.

Concerns about the debt enforcement procedure are not confined to those who advise people in debt. FLAC, MABS and others working on behalf of people who are over-indebted have engaged in detailed discussions with the credit and debt collection industries in recent years and there is general agreement that a more user-friendly system is both desirable and workable.¹⁴ Some of these discussions have led to practical developments that demonstrate what can be achieved. For

¹² Bunreacht na hÉireann, Article 34.1

¹³ Bunreacht na hÉireann, Article 37.1

¹⁴ For example, Felix O'Regan, Information Manager of the Irish Banking Federation (IBF), speaking at FLAC's conference on 'Consumer Debt - the Need for Law Reform' in Croke Park, Dublin in May 2004, said that the IBF supports "an overhaul of the debt enforcement system, a workable alternative to imprisonment for non-payment of civil debt and fines and an attachment of earnings system to facilitate non-payment of debt/fines".

example, the Debt Settlement Pilot Scheme was a joint initiative between the Irish Banking Federation (IBF) and MABS (assisted by FLAC), which operated between 2002 and 2005. This scheme provided for a non-judicial, alternative means of resolving cases of multiple consumer debt that were likely to prove intractable and otherwise end up in court (and possible imprisonment for the debtor). In June 2009, MABS and the IBF launched an 'Operational Protocol on Working together to Manage Debt'. This protocol sets out the ground rules that will be used in cases of debt arrears. It applies from the time that a bank customer who is in arrears approaches MABS for assistance. At the launch of the protocol, the Chief Executive of the IBF, Pat Farrell, took the opportunity to echo consistent calls made by FLAC for reform of the debt enforcement system, describing imprisonment relating to debt as "an anachronism".

■ Research method: The questionnaire

In order to test the anecdotal evidence of non-attendance at hearings and to focus specifically on the experience of debtors when debt enforcement procedures are invoked, FLAC conducted the current research-based study. A detailed questionnaire was designed by FLAC and 38 interviews were carried out by MABS staff directly with debtor clients throughout 2006. Key aspects of the debtor's experience were explored in the course of these sessions. These ranged from family and financial circumstances and experience of debt, through to the understanding and participation in legal proceedings and, in a limited number of cases, the experience of imprisonment for non-payment of orders. The efficiency of the system was tested by means of this sample of cases.

The research gives a voice to the views and experiences of people about whom assumptions are sometimes made that often have little foundation in fact.

2. General summary of research findings

This section of the report presents and analyses the data from the questionnaires together with a number of findings, as well describing the legal procedures involved and commenting upon their perceived flaws.

■ Overall experience and feelings of debtors about the system

Three out of every four debtors surveyed claimed not to have understood in overall terms the legal documentation served upon them. One said that **"(I) did not understand the legal jargon and was afraid to tell anybody about the debt."** Another said that **"letters are hard to understand and could be written in a way that everyone can understand them. Letters/legal documents make a person in debt feel helpless and frightened."**

In turn, the overwhelming majority did not generally understand the consequences of the proceedings and their options, with 35 of the 38 confirming this. **"I could not make head or tail of the whole thing"** said one. Illness was also a factor in some cases with one debtor reporting **"[I] was ill and in hospital at various stages of the process and therefore unable to respond. My wife did not understand the documents or the seriousness of the situation and did not communicate much of the information – I suppose she did not want to upset me."**

Many reported that they understood very little until they contacted the Money Advice and Budgeting Service or another form of advisor, but that the situation improved once they received assistance. In general terms, it would seem that the debtors' perceptions of debt enforcement proceedings were that there were few viable options left, despite the fact that this procedure is designed in theory to assess the debtor's financial capacity to repay by instalments.

When asked whether the court officials (clerk, judge etc) were helpful, only 14 of 38 felt the question to be applicable to their case. It is surprising how many debtors had no interaction with court staff of any kind. It might have been expected that there would have been more requests for information

and even assistance from court officials. Either debtors did not feel comfortable contacting court offices or did not feel it was appropriate to do so in the circumstances.

Thirty-two of the 38 described how going through this process affected them. The overwhelming theme of these responses was to describe the stress, anxiety, guilt and shame of the situation from the debtor's perspective, spilling over into physical and mental ill-health. One debtor mentioned **"nightmares, flashbacks, worry, stress, illness, unable to sleep"**. Another described her **"stress and loss of self-esteem, medical consequences, having to resort to medication. Terrified of the postman calling with another letter."**

One debtor, whose committal to prison was averted as a result of a last minute intervention, provided a vivid snapshot of the turmoil she experienced as follows:

Terrified – had never been in such a predicament previously. Imprisonment would have meant child being taken into care, father was unable to look after the child as, at the time, he was receiving treatment for addiction. His attendance at treatment was mandatory through a court order. Felt lonely, isolated, (and) sick with fear. (I) was also dealing with marriage breakdown at the time without family support.

Twenty-eight of the 38 responded to questions about how the process affected other household members. A number said that they attempted to ensure that their children and/or partners did not find out about the proceedings in order to shield them from the effects of it. One said that **"(I) did not tell anyone and to date they do not know about it. I am embarrassed to tell them"** and another commented that **"they would ask me what was wrong with me when I got distracted, no concentration. I guess my wife suspected something, but I didn't want to worry her."**

The remainder described the tension that existed in the family unit, the arguments and separation that followed and the effects on children including feelings of insecurity and betrayal. One simply described the **"stress passing through the family."** Another described **"loss of security, i.e. home, spouse extremely stressed, not sleeping, constant worry about the future. Family rows, blame and guilt. Very close to separating."**

The impact of the actual arrest and subsequent imprisonment was described by another as having **"traumatised the whole family. They were very worried about me being inside [in prison]. The Gardaí took**

me away from the house on a Sunday morning at 7.30 a.m.” Another debtor, who spent over two weeks in prison and is a lone parent, explained **“yes it affected my children. My son felt that I abandoned him as I never previously was separated from my children.”**

Thirty-one of the 38 answered a question on the debtor’s general views on the process of debt enforcement. As might be expected from people on whom this form of debt enforcement had impacted adversely, the responses were generally critical of the procedures and their impact. One debtor succinctly described debt enforcement as **“too laborious, too costly, too stressful, and ridiculous to still owe money after imprisonment.”** Fear of appearing in public in the local District Court emerged as a major disincentive to participating in the proceedings. One debtor commented that **“I felt that I was a victim of circumstances. I don’t think cases should be held in a public court. It is very embarrassing especially in a small town where everybody knows each other. The court scene is very frightening.”** A number of debtors complained that their creditors resorted to legal action too easily with one commenting that **“I think the creditors should do more to contact the debtor and make an appointment to meet them to try to resolve things before running to the court.”**

The assistance that MABS provided was highlighted in a number of instances with one debtor remarking, **“certainly going the MABS route for someone like me, in bad health, was a far better option. Being dragged through the courts for someone with anxiety and depression causes all kinds of stress and panic.”** Others emphasised the lack of assistance they had, with one saying, **“I didn’t have power, money or support to fight the case. [I] didn’t have any back-up or advice till it was too late. ‘Closing the stable door after the horse has bolted.’”**

Thirty-three of the 38 questioned had suggestions for improvements to the system. Four broad themes emerged:

- that more should be done to direct debtors as to where they could obtain assistance and that legal documentation should be simplified;
- that a court and especially a public hearing was not the appropriate forum for such matters to be resolved;
- that creditors should be obliged to take more exhaustive steps to investigate the debtor’s situation before legal proceedings; and
- that imprisonment was not appropriate in debt cases.

On the question of access to assistance, comments included that a **“mediation facility such as MABS should be recommended as standard when people get into trouble”**, that debtors **“be referred for help sooner – once I spoke to MABS, the fear was not so great”** and **“a help package should be given out to customers by creditor, prior to going legal. In it should be a list of services that would assist the customer.”** Another debtor suggested that **“[a] legal team should be available, for instance through MABS, to represent people or just advise on process that will take place. A debtor cannot afford representation even if it is just to speak on ability to pay - not necessarily defending the debt”** and another quite simply that **“there should be free legal aid for anyone in my situation.”**

A number of debtors asked for documentation to be more understandable. One said that **“the legal language is difficult to read and understand and [I] would like to see all legal documents accompanied by a ‘layman’s guide’.”** Another felt that there was a need to **“educate court clerks in dealing with participants on how to deal with court, how to address the judge, etc and educate the public on how to act in court, where to go, etc.”**

Many suggested that hearings should be in private and others that a court was an inappropriate place to deal with debt enforcement cases at all. One debtor suggested that **“these cases should be held in private so that a person can speak and not be intimidated by all the others that are in court.”** Another suggested that **“there should be a separate kind of debt court not part of the criminal court/justice systems which would help people deal with debt problems and help people who are owed money to get their money, kind of like MABS but more enforcement.”**

In relation to creditors taking more exhaustive steps, one debtor offered the view that **“before creditors are allowed to issue court proceedings, they should have to advise debtors of where to seek help and the consequences of not doing so. It is only after the debtor fails to co-operate with this that court proceedings can be taken.”** Another said that a **“proper investigation should be done by the creditor as to the person’s circumstances prior to issuing proceedings”** and yet another that **“every creditor should examine income and expenditure of its debtors so realistic repayment plans could be put in place.”**

On the question of imprisonment, one debtor said that **“[j]ail should never be part of the process but seizure of assets should be an option if you have them”** and another that **“[n]on-payment of debts should not result in prison.”** Finally, this debtor offered a damning indictment of imprisonment for

debt as follows:

People who have broken the law and have drug offences, for example, will get parole. With debt imprisonment, there is no parole. I could hardly walk because of my medical condition, but there was no allowance for my disability in prison. I had to walk many flights of stairs with two crutches. I think it would be much better if people had to do some community service rather than imprisonment. At least then you keep your dignity and it is not as humiliating.

■ **Background information about the debtors, their dependents and debts at the time of legal proceedings**

The debtors lived in a wide span of locations throughout Ireland. A very high number had dependent children (30 out of 38 or 79%) and the vast majority was of Irish nationality (35 out of 38 or 92%). Most were male (22 out of 38 or 58%) and the average age of those interviewed was 43 years old. A significant majority of debtors (two out of three) were unemployed and/or in receipt of some form of social welfare payment at the time the legal proceedings and subsequent debt enforcement proceedings in question were taken against them. Their average net household income was low and in nearly half the cases it was less than €300 per week. The majority (27 or 71%) did not own or were not in the course of buying their own homes. Over three-quarters reported that they were in multiple arrears at the time legal proceedings were taken against them, in that they had two or more agreements in arrears.

A significant majority of debtors said that they suffered a change in their financial circumstances beyond their control that affected their ability to repay. A total of 34 of the 38 cited one or more of the common triggers of debt – namely illness, unemployment, separation or business failure – as the reason for their arrears occurring. A quarter (9 out of 38) believed their own ongoing low income to be one of the triggers for the cause of their arrears. A significant minority cited over-extension of credit (8 out of 38) or over-borrowing (14 out of 38) as reasons for the occurrence of arrears.

There was no dispute on the part of debtors about the fact of debt in the vast majority of cases and generally little argument about the amount of debt owed. In terms of attitude towards repayment, 24 described their situation as ‘can’t pay’ and 14 as ‘could pay but needed more time’. Not one described their situation as that of ‘won’t pay’. A leading academic study by Dominy and Kempson argues that there is general agreement that it is quite inappropriate to initiate court proceedings

against a person who has every intention of paying but is unable to do so and that:

Responsibility for ensuring that inappropriate cases do not come to court must rest with the creditor. At the same time, it is important to acknowledge customers' responsibility to pay the money they owe when they have the money to do so and the important role that independent money advisors can play.¹⁵

A variety of agencies were responsible for the referral of the client for money advice, with only one in three attending MABS on their own initiative or at the suggestion of someone in their circle. Many contacted MABS very late in the process. For example, a significant proportion of debtors (11 or 39%) did not make contact until they became aware that a Committal Order (or order for arrest and imprisonment) had been obtained by the creditor. A further four only made contact after a term of imprisonment had been served. By far the largest specific reason given for delay in seeking assistance was a lack of awareness of the services that were there to help. As one debtor put it:

I couldn't see a way out. We were not aware that we had entitlements that would have helped us maximise our income until we contacted MABS. I could have put an offer to the creditor if I was aware of the 'Farm Assist' payment. My wife also went on a Back to Education course and was paid for same. Again if we were aware of this scheme she could have gone years ago and alleviated the overall financial pressure.

A significant number also cited fear of being judged with one commenting that “[I] was too afraid to discuss the matter. Felt too ashamed.” Others said respectively: “I denied the seriousness of the situation”, “I thought nothing could be done” and “I was overwhelmed with debt.”

Finally, another debtor emphasised that it should not be assumed that a person in serious debt is in complete control of their actions:

I feel it makes no sense to expect someone in such financial difficulties to act rationally. Through ignorance and fear of the power the system wields it is easier to pretend it is not happening.

■ **Debtor’s experience of legal proceedings**

The following table provides a summary of the outcome of the 38 cases in the survey.

Number of judgments obtained – 38	Yes	No	Total
Number of cases defended at initial proceedings	0	38	38
Number of cases settled prior to enforcement	2	36	38
Number of these settled with MABS assistance	2		

Number of cases proceeding to enforcement – 36	Yes	No	Total
Number of cases settled during examination of means	9	27	36
Number of cases settled with MABS assistance	9		

Number of Instalment Orders made – 27	Yes	No	Total
Number of Instalment Orders paid in full	1	26	27
Number of cases settled through part-payment of order	4		
Number of these settled with MABS assistance	4		

Number of Summonses for committal issued – 22	Yes	No	Total
Number of cases settled during committal proceedings	6	16	22
Number of cases settled through full payment	1		
Number of cases settled by MABS through part-payment	5		

Number of Committal Orders made – 16			
Number of (successful) Circuit Court appeals	3		
Number of cases settled through full payment	2		
Number of cases settled by MABS through part-payment	6		
Number of cases where term of imprisonment served	5		

Judgment stage

None of the 38 debtors in the survey defended the claim against him/her. A minority of debtors made contact with the creditor when first sued and made offers of instalment payment. These were almost all rejected. Just over one-third reported that they did not subsequently receive any notification that a judgment had been obtained against them. Where offers were made to creditors or their solicitors by debtors at this point, they were also overwhelmingly rejected.

Examination of debtor's means to make an Instalment Order

In two cases, agreement was reached on affordable payments post-judgment before any formal debt enforcement action was taken by the creditor. In both of these cases, the debtor had accessed a money advisor who assisted with the negotiations. Of the remaining 36 debtors, 11 claimed not to have received the summons to examine their means. Of the 25 who did receive it, 12 did not send in their financial details to the court or attend the hearing. Thus, 23 neither provided financial information nor were present in court but Instalment Orders were made in all these cases. None of these debtors was a MABS client at the time.

This left a further 13 debtors. Two were not MABS clients but they sent in financial information and attended at hearing. Instalment Orders were made in both cases. The remaining 11 accessed money advice. In eight of these cases, informal arrangements were reached without the need for a court hearing. In the remaining three, hearings took place; two resulted in Instalment Orders and one in an informal arrangement following an adjournment.

Payment of Instalment Orders

Although the creditor is obliged to serve an Instalment Order by registered post, nine of the 27 did not recall receiving a copy of the order. Of the remaining 18, 12 claimed not to know what to do at this stage. Only one of the 27 Instalment Orders made by the court was paid. In 15 cases, no payments were made at all. In 11 cases, part-payment was made and in four of these, the creditor accepted part-payment once a money advisor provided evidence of the debtor's financial situation.

Variation of Instalment Orders

Few knew that an Instalment Order could be varied. Of the 22 debtors who responded to this question, only one claimed to know independently that a variation of the Instalment Order could be sought at any time.

Summons for debtor's arrest and imprisonment (Committal Summons)

Four of the 22 issued with a Committal Summons claimed not to have received it. Of those who agreed that they had received the summons, 6 out of 18 claimed not to have understood that they could go to prison as a result of it, and 12 not to understand what their options were. Four cases settled with the assistance of a money advisor and in two further cases, the debtor attended the hearing. One paid the arrears and the other case was adjourned because the debtor was already in prison in connection with another debt. In total therefore, 16 orders to imprison debtors were made. None of these 16 debtors was present in court to explain why s/he had not paid the Instalment Order but a jail term was ordered nonetheless.

Committal Order outcomes

Of the 16 against whom Committal Orders were made, two claimed not to have received the order. Only half of the remainder (7 of 14) claimed to understand it fully and nine said that they did not understand their options from there.

Only one of the 14 knew that there was a right to appeal the Committal Order to the Circuit Court. Two said that they were subsequently informed by their money advisor of their right to appeal. These three clients successfully appealed to the Circuit Court against the Committal Order, with two of these cases settling in advance of the Circuit Court hearing.

Eight cases settled without the order being executed, two through payment or an agreement to pay and the remaining six by an acceptance by the creditor of a lesser instalment amount. This is concrete evidence of a desire on the part of creditors to pull back from the brink and recognise that there is no point in prison where there is an incapacity to pay. Implicit in this is a recognition that the current system does not work to the satisfaction of either debtor or creditor, where the stark reality of inability to pay finally surfaces with the last throw of the enforcement dice. In a number of instances the Gardaí were reluctant to enforce the warrant and were directly responsible for referring the client to MABS in an attempt to find a solution before the warrant had to be executed.

Imprisonment

Five debtors in the study ultimately served a term of imprisonment for non-compliance with the terms of an Instalment Order. All five of these debtors were on a social welfare payment at the time of the committal, and with all five the triggers of indebtedness generally thought to be beyond the

control of the debtor were very prominent. Only one was an existing MABS client at the time the committal took place, with the remaining four contacting MABS after their release.

■ Debtor's participation at court hearings (Part Seven)

Of the 38 debtors interviewed in the study, 28 were summoned to one or more enforcement hearings. Seventeen attended no hearings whatsoever, 10 respondents attended one hearing and only one debtor attended all relevant hearings. The main finding of the study in this regard is that people do not attend debt hearings because they fear the embarrassment and shame of having their personal financial difficulties discussed in a public forum and that there is a lack of awareness that attendance is necessary.

Of the 27 who did not attend any or some of the hearings, 16 said that they were too embarrassed or frightened to attend, 13 that did not wish to go to a hearing in open court and 14 that they were not aware that they should attend.

One debtor expressed the "[f]ear and embarrassment of going to open court and no answer to give as no money available." Another quite simply said that "I didn't understand it. So broken at the time, it meant nothing to me." A money advisor explained on behalf of another debtor that "there is no way the client would appear in a local court in a rural area as she would have been too ashamed and too afraid. She felt people would know her and that her name would appear in local paper."

The reluctance of debtors to attend alone and the positive assistance that money advice can provide was again summed up by the following: "I don't think that debt cases should be heard in a public court. It is a very frightening experience. I only went to court to have the order varied because the money advisor came with me."

Of the 11 debtors who attended at court hearings, only four had legal representation at any point. Many who did attend hearings said they were daunted by the process and did not know what to do, where to sit or what to say unless they had sought help. For those who do muster the courage to attend enforcement hearings, there is little meaningful assistance provided by the State to help them to present their case. One debtor explained that "[n]o-one explained the process and everything happened very quickly. It would have made the experience less frightening if someone had explained the

procedure of the court.” Another said that “[I] found the whole atmosphere very unnerving and couldn’t wait to get out of there. The whole experience came as a big shock to me.”

■ Debtor’s experience of arrest and imprisonment

Of 16 committal orders granted, 12 were followed up by the issue of warrants to arrest and imprison the debtor. Only one of these 12 borrowed money to clear the debt. The debtor was contacted in advance of carrying out an arrest by the Gardaí in eight cases and only one of these resulted in imprisonment. In the other four cases there was no contact in advance by the Gardaí and it is notable that each of these cases resulted in a term of imprisonment. The attitude of the Gardaí in carrying out these arrests might generally be described as reluctant and many did whatever they could to avoid the outcome of imprisonment.

Each the five debtors in this sample who were imprisoned served the full term ordered by the court. One served the maximum sentence of 90 days in jail, one served three weeks and the remaining three served two weeks each.

One debtor described it as **“a horrible experience. I stayed in the cell for 11 days, day and night. I couldn’t eat or sleep. I felt very degraded when I was stripped and showered by female prison officers and I was given two changes of underwear for 16 days.”** Another described how he was **“very frightened initially, claustrophobic and scary. I was mixed in with a junkie armed robber and a drug dealer.”**

Another debtor described it as **“the worst stage of my life. Even a little leniency and support would have made a big difference. I feel my imprisonment had a negative impact on family members and relatives. I have been affected very deeply. My in-laws don’t speak to me now – I am the same as a complete criminal”.** He added that **“[I] sought release 12 hours early to attend a 30th wedding anniversary surprise party but warden would not release [me]. [I was] released at dinner time the next day. It meant all guests including guests from the UK had to be told I was in prison. This I believe resulted in a further serious depression and hospitalisation for 3 weeks. [I am] still on a high dose of antidepressants.”**

The futility of the process from the taxpayer’s perspective was summed up by the following contribution: **“(I) cannot understand that the system would allow creditors who have vast profits pursue**

a Committal Order for debts of between €300 and €3000 when the debtor has already lost everything. Cost to state of putting me in prison far higher and cannot raise money while in a prison cell. No one benefits from these situations.

The effects of serving imprisonment endure for the debtor long after the sentence ends. One explained that “[a]s a result of my stay in prison, I am on medication, e.g. anti-depressants and sleeping tablets. I have a skin disorder due to the trauma of my experience.” Another said “After returning home, when I went to the pub for a pint, there was either silence or a group whispering in the corner. When trying for work later, it was impossible to get any in the local area. Three years later, I have still not got over it. It will always be with me.”

Finally, the traumatic effect on family members summed up in the following quote needs no elaboration: “I think my partner suffered most and she continues to suffer from severe depression to this day. The children thought I was gone away to work, but they were not long finding out the truth at school.”

3. Debt-related imprisonment and international human rights law

The purpose of this section of the report was to examine the debt enforcement by instalment procedure described in Section Two in terms of Ireland's obligations as a signatory to two International Treaties, the United Nations International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms.

■ International Covenant on Civil and Political Rights (ICCPR)

Article 11 of the ICCPR provides that "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." Given the numbers of people in Ireland who go to prison on an annual basis for debt-related offences,¹⁶ in the course of its State Reports under the ICCPR, the Irish State has been asked by the Human Rights Committee of the UN to demonstrate its compliance with this article on three separate occasions, in 1993, 2000 and 2008.

In 1993, the then Attorney General informed the Committee that "If the question of enforcement of a debt arose, the District Court conducted a thorough examination of the person's means, to establish whether or not that person was in a position to pay." Yet, it is apparent in this study that in the 27 instances where Instalment Orders were granted by District Courts, only four debtors (15%) sent in details of their financial circumstances in advance and appeared at the hearing to be examined as to their means. In 23 of these 27 cases therefore, the examination could not have been thorough and capacity to pay could not have been established.

In 2000, the Irish delegation explained that "Irish law does not authorize the imprisonment of a person for mere failure to pay a civil debt. A person may be committed to prison, however, for failure to comply with a court order to make certain payments in discharge of a debt." It went on to say that imprisonment might result from a debtor's culpable neglect "where the court is satisfied that complying with the court order was within the means of the debtor, but insufficient efforts were made by him to do so, in circumstances where blame could be attributed to the debtor." How a court

¹⁶ 276 in 2008, for example.

could be satisfied that complying with the order was within the debtor's means without ever hearing from the debtor is not explained. The State's report further suggested that "many debtors make payment either on committal or shortly afterwards, so that the average amount of time spent in prison by individual debtors is quite short." No data was provided to the Committee to back up these assertions. In fact, the five debtors in this study served the full length of their sentences: one a sentence of three months, another of three weeks and the remaining three of two weeks each. It is instructive that in 2009, for the first time to FLAC's knowledge, the Department of Justice, Equality & Law Reform produced a figure for length of sentence in debt related cases for the year 2008 – 27 days average sentence, 20 days average served.

At the 2008 UN Human Rights Committee report hearing, the State said that "The judge may not order an arrest and imprisonment unless satisfied that the failure to pay was due to wilful refusal or culpable neglect." This statement constitutes a critical misunderstanding of the onus of proof under the legislation. The law clearly provides that the debtor must show the court that failure to pay was neither due to his/her wilful refusal nor culpable neglect, an onus that cannot be met if the debtor is not present in court. A Shadow Report produced by FLAC in partnership with other human rights NGOs¹⁷ presented an alternative view of this issue and stated that "Imprisonment can be ordered without a judge hearing from the debtor in relation to either the debt that gives rise to the original judgment, the financial ability of the debtor to pay that judgment or the reason why the debt or regular instalments were not paid."

In supplementary information provided to the Committee, the State delegation offered the view that "A person can only be imprisoned if it is proved beyond a reasonable doubt that the person concerned is able to pay, but is refusing to do so." This is an even more fundamental misunderstanding of the onus of proof under the legislation. In any case, quite how it can be shown beyond a reasonable doubt that a person who is not even present in the court and in all likelihood did not attend the hearing to set the instalment in the first place, is able to pay but is refusing to do so is not explained.

Despite these various attempts at justifying this procedure, the conclusion of the UN Human Rights Committee of 24 July 2008 is very telling. It recommends simply that "The State party should ensure that its laws are not used to imprison a person for the inability to fulfil a contractual obligation." It

is clear that through this outdated system the State is prepared to send those who cannot pay to prison, in order to encourage repayment by others who can pay. This is completely unacceptable and untenable from a human rights perspective.

■ **European Convention on Human Rights and Fundamental Freedoms**

In similar terms to Article 11 of the ICCPR, Article 1 of the Fourth Protocol to the European Convention on Human Rights provides that “[n]o one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.” The Convention also sets out a number of procedural guarantees that apply not just in criminal cases but also to matters such as contempt of court.

These guarantees include guarantees to personal liberty and to a fair hearing under Articles 5 and 6 of the Convention. Although Article 5(1) permits deprivation of liberty for non-compliance with a lawful order of a court, the procedural fairness shown (in this case) to the debtor in the lead-up to his/her imprisonment is critical. This then calls into play the rights to a fair hearing which are guaranteed under Article 6. In the case of Ireland’s debt enforcement procedure where the debtor may never have appeared before the courts, there is a real risk that the rights to liberty and to a fair hearing guaranteed by the European Convention on Human Rights, and incorporated into Irish law by the European Convention on Human Rights Act 2003, will not be protected for some vulnerable people. The right to privacy under Article 8 is also undermined by the hearing of these cases in open court, when the effective management of resolving problems of indebtedness suggests that such enforcement should and could take place in private.

Under Article 6 (3) (b) of the Convention, a person charged with a criminal offence has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” Although a debtor is not charged with a criminal offence, the potential outcome is a term of imprisonment. Expecting that an often frightened and ill-informed person will appear to defend him or herself properly at this stage may simply be unrealistic. To allow committal proceedings to continue in the debtor’s absence when legal representation is generally not available from the State, either in the form of civil or criminal legal aid, curtails the debtor’s right to present an effective defence and is not in the interests of justice.

4. Debt enforcement proceedings – statistical gaps

This section examined the statistics published by the Courts Service in relation to the debt enforcement procedures examined in the report and comments upon the extent and the effectiveness of the information they provide.

■ Correspondence with the Courts Service

In the course of correspondence with the Courts Service in both 2006 and 2008 and through examining their annual reports, the following has become clear in relation to the figures published on the Instalment and Committal Order procedure:

- The figure recorded as Committal Orders in these reports is in fact the number of applications for these orders, not the number of orders granted.
- From 2001 to 2005, the number of Instalment Orders granted appeared to exceed the number of applications for such orders (i.e. Examination Orders, also known as a Debtor's Summons). In 2006, no figure was provided for such applications at all. By 2007, the number of applications exceeded the number of orders granted, which makes far more sense. No explanation is available for this at present.
- Firm data is not available from the Courts Service but informal estimates from the experience of court officials working in this area are that about 20% of debtors respond to the examination of means summons and attend the court hearing where an Instalment Order is made. It is estimated that a similar percentage attend Committal hearings and that approximately half of those who do attend have legal representation.
- The proportion of applications for Committal Orders relative to the number of Instalment Orders granted is very high. For example the percentage in 2007 was 59% (or three in every five). This indicates that compliance with the terms of Instalment Orders is low.

■ Gaps in the data

The information contained within the Courts Service Annual Reports on the various stages of the Instalment Order process is inadequate and it is very difficult to draw any conclusions from it. There is no information, for example, on the rates of appearance of debtors at hearings or the numbers of debtors who were legally represented when they did appear. There are no figures for how many orders for arrest and imprisonment were in fact granted on foot of committal summonses in any of the years from 2001 to 2007 and how many orders resulted in actual terms of imprisonment being served. This lack of detailed data undermines an informed debate out of which any policy initiative and proposals might emerge.

5. Conclusion and Recommendations

■ Conclusion

Some may feel that the debtors featured in this study were the authors of their own misfortune, having failed to confront their financial problems in a timely manner or having borrowed what they were not sure they could afford to repay. There is of course evidence in the responses to the questionnaires of human failure and many over-indebted people will choose not to confront or will delay in confronting the problem, until the consequences become potentially disastrous. However, the critical question that the State and Irish society in general must consider is whether this is conduct that should be punished in an essentially adversarial legal system or considered in the wider context of the role that credit plays in our society.

It is widely accepted that the provision and consumption of credit helps to fuel economic growth in a market economy by stimulating purchasing power and creating employment. Indeed, it is clear that the detrimental effects of a lack of availability of credit to lubricate commercial activity are currently being felt in Ireland and elsewhere as a result of the global credit crisis. FLAC believes that there will inevitably be over-indebted casualties in any credit market.

The State has a responsibility to ensure, through its legal and other regulatory systems, that incapacity to repay due to unforeseen events is detected early and resolved in a non-recriminatory and practical environment. Instead, current legal procedures in relation to consumer debt carry a pronounced inequality of arms. The debtor invariably cannot afford private legal advice/representation and legal aid in debt cases has been practically non-existent to date. In any case, the defendant is often without a recognisable legal defence where default in payment is caused by deteriorating financial circumstances. When it comes to enforcement, an examination of the Instalment Order procedure would also suggest that lack of participation by the debtor is almost a given. Large numbers of cases are listed in each District Court with little time allocated to each. Indeed, it is tempting to suggest that the current Instalment Order procedure might collapse under

pressure of time if every debtor sent in details of their income and appeared at each subsequent hearing designed to assess repayments, which is the purpose of the procedure in the first place.

A system that does not actively seek to resolve problems of over-indebtedness at an early stage (and may even by default facilitate the failure to confront such issues) leads to disproportionate sanctions such as imprisonment. It is also economically questionable from the perspective of the taxpayer, when the costs of these processes and their long-term effects are taken into account. Where the existence of a debt is not contested, an alternative process should be put in place which facilitates a practical restructuring of the debtor's finances at the earliest possible juncture. What is not needed is an adversarial system where the debtor feels that the odds are stacked against him/her and is tempted to disengage; a syndrome that has been amply demonstrated by the interviews in this report. The emphasis must be placed firmly on ensuring that information on the debtor's financial circumstances is complete and verifiable and that realistic repayments based on the totality of the debtor's finances are made. The focus should be on practical resolution rather than punishment.

It is clear that the law on debt enforcement in Ireland is now attracting wider attention and concern. Unless it is appealed, the McCann case referred to in the introduction will oblige the State to take action sooner rather than later to remedy the defects in Section 6 of the Enforcement of Court Orders Act 1940 and to ensure that debtors have proper access to advice and assistance to defend themselves. The Law Reform Commission, the body charged by Government with identifying and researching areas where law reform may be warranted, has included 'debt enforcement and securing interests over personal property' as an area for examination under the 'Legal System and Public Law' strand of its *Third Programme of Law Reform, 2008-2014*. Work under that strand is well under way, with a consultation paper expected in the autumn of 2009.

FLAC therefore urges the Irish State to formally recognise that the existing system is out-of-date and to commit itself as a matter of policy to an immediate review of the effectiveness of current legislation and court procedures on debt enforcement in Ireland. In this regard, the opportunity presented by the Law Reform Commission's current examination of this area should be grasped. Following the publication of the Commission's consultation paper due in the autumn, the consultation period that will follow should act as a vehicle to ensure that all interested parties are consulted by the State, with a view to the speedy publication of legislation implementing the necessary reforms.

■ Recommendations

As with *An End based on Means?* in 2003, FLAC proposes a number of recommendations to conclude the report arising principally from the findings of the questionnaires outlined in Section Two. These are intended to provide a submission from FLAC's perspective to feed into the urgent review of debt enforcement procedures called for in the conclusion to the report.

Some of these recommendations do not necessarily require immediate reform of the law but rather focus on getting the existing system to work in a more user-friendly and effective manner. For example, it is clear from the responses in the survey that many debtors felt it would be helpful if court documents were reviewed so that they would be more comprehensible and that this should be complemented by explanatory booklets that clearly outline the processes involved and their consequences. Allied to this, some debtors also stated that they were unaware of where they could seek assistance to help with their financial and legal difficulties. Thus, improving access to assistance at the earliest opportunity from both the state-funded schemes of civil legal aid and advice and money advice for those in debt is also considered.

Some of these recommendations will involve adjustments to current practice and procedure and, in some cases, the amendment of existing legislation. At the point at which they receive legal proceedings, many persons in debt are in a position to make offers of repayment that reflect their current ability to repay. However, the existing system is slow to capitalise on this possibility and enforcement action, often in the form of an application for an Instalment Order, follows. Once involved in the Instalment Order process, it is clear that there are a number of obvious deficiencies in that procedure, the most blatant being the power to make decisions on capacity and willingness to pay in the absence of the debtor and details of his/her financial circumstances and, related to this, the requirement that such hearings take place in open court. These deficiencies could be quickly remedied by changes to the Enforcement of Court Orders Acts.

The question of imprisonment related to debt has been discussed in detail in this report in the context of breaches of human rights standards. The imposition of a term of imprisonment to attempt to enforce a private contract debt is entirely inappropriate in 2009, quite apart from being of very questionable use to creditors seeking repayment of debts and an expensive waste of the State and taxpayer's resources.

It is also evident from some of the questionnaires and from experience generally that in some cases enforcement applications are brought against a person who is already the subject of an existing order of the same type. Having a database of existing enforcement proceedings which creditors could pay to access might prevent the bringing of time consuming and pointless applications.

Ultimately, FLAC believes that the State must urgently examine the options for taking uncontested consumer debt and debt enforcement matters out of the courts and adapting an alternative approach to resolving these issues in a less confrontational and intimidating environment for debtors. Putting in place a specialist service that would place the emphasis on up-to-date financial information and that would have jurisdiction to deal with settling debts may be the way forward and the core elements of a potential model are proposed.

Finally, it is evident that we simply do not have enough detailed information on over-indebtedness and debt-related proceedings in Ireland nor, in the course of the recent rapid consumer credit growth, have we attempted to examine the potential long-term costs to society of over-indebtedness, particularly in relation to ill-health.

The recommendations arising from this report are therefore considered under the following broad headings:

- 1 Improving access to information for debtors in legal proceedings;
- 2 Improving access to advice and assistance for persons in debt;
- 3 Facilitating initial offers of payment in debt cases;
- 4 Service of legal documents and reform of the debt enforcement by Instalment Order system;
- 5 The removal of imprisonment as an option in debt cases;
- 6 Improving access for creditors to information on existing debt enforcement proceedings;
- 7 Improving information gathered by the State on debt-related legal proceedings and research on the long term costs of over-indebtedness;
- 8 Adopting an alternative approach to resolving problems of over-indebtedness.

6. Recommendations

1. Improving access to information for debtors in legal proceedings

- 1.1 The State should ensure that all court documents connected with debt and debt enforcement procedures in use by the Courts Service are simplified and written in clear understandable language. All documentation should clearly spell out the debtor's options.
- 1.2 An explanatory booklet in plain language and printed in a prominent font size should be sent by the creditor or its solicitor with the legal proceedings initiating the claim. This booklet should explain the nature and purpose of the proceedings and how the debtor can respond to them. It should explain the potential consequences of not responding at all. It should set out what further legal steps in terms of enforcement may be brought later if the debtor does not respond. An explanation of the role of and contact details for MABS and civil legal aid services should also be included in such a booklet. It should be indicated that MABS can negotiate with creditors on the client's behalf to make affordable repayments and that legal advice is available from the Legal Aid Board on the enforceability of debts and the consequences of legal proceedings. The booklet should also be accessible on the website of the Courts Service, the Legal Aid Board and MABS and should be available in a number of languages.

2. Improving access to advice and assistance for persons in debt

■ Money advice services

- 2.1 MABS and money advice should be promoted and advertised nationally as an avenue of assistance for people with debt problems in order to ensure that help is sought at the earliest opportunity.

- 2.2** The money advice process should be promoted as the alternative to court proceedings in consumer debt cases. To this end, the adoption of protocols with bodies with which the work of MABS overlaps, such as the Financial Regulator, the Courts Service and the Legal Aid Board, should be agreed. These should reflect the critical role that money advisors play in assembling verifiable financial information that can assist courts and other forums in resolving debt problems.
- 2.3** If debt enforcement is to remain within the jurisdiction of the courts,¹⁸ comprehensive briefings should also be made available to members of the judiciary on the work of MABS, including regular data updates on numbers of clients and amounts and types of debt experienced. An enhanced understanding of the difficulties faced by over-indebted people would be useful for members of the judiciary in determining questions of repayment.
- 2.4** In order to promote a user-friendly, solution-based approach to resolving problems of over-indebtedness, the State should through legally enforceable codes ensure that those with debt arrears are referred for money advice at the earliest possible opportunity. Where an indebted person in turn becomes a MABS client, such codes should set out agreed procedures for dealing with his/her case.
- 2.5** At a time of cuts in public spending, a co-ordinated approach to the provision of services amongst agencies whose work is complementary to MABS, such as legal aid and advice, citizen's information, family support and community and social welfare services is more vital than ever.
- 2.6** Some MABS have developed waiting lists in 2008 and 2009 as the demand for services grows. Even in a climate of spending cut backs, timely assistance for those with problems of over-indebtedness must be a priority. Funding for MABS nationally must increase to reflect the increased public demand for its services.
- 2.7** The prevention of debt problems in the future must be a key priority for the State. Increased resources to enable a community education team to provide extensive programmes at local level that would focus on the use, cost and availability of credit options should be put in place. This would also in turn serve to raise the profile of MABS and the services it provides.

■ Civil legal aid services

- 2.8** There is a need for increased public awareness that civil legal aid is available, not just in family law cases, but for a wider range of legal matters including debt. Both Legal Aid Board Law Centre staff members and information providers generally should encourage those who are over-indebted and facing legal proceedings to make applications for legal services.
- 2.9** As the offices of Legal Aid Board Law Centres and MABS are often located close to one another, they might usefully co-operate and co-ordinate their services locally and nationally to assist people with financial problems as well as the associated legal difficulties.
- 2.10** Thorough legal advice from the Legal Aid Board Law Centres should be available to check that any alleged debt/s are due and owing rather than simply assuming that the money is owed.
- 2.11** Where an indebted person is sued by a creditor and disputes either the fact or the amount of the debt, the Legal Aid Board should assess applications for legal aid on their merits in these kinds of cases and defend the applicant where appropriate.
- 2.12** If it is established that money is owed, the Legal Aid Board's Law Centres should provide legal advice to the debtor on the range of debt enforcement options that are available to the creditor post-judgment and the necessity for the debtor to engage in the process of enforcement to vindicate his/her position.
- 2.13** The Legal Aid Board's Law Centres should also act as a source of early referral to MABS so that negotiations on affordable repayments can take place and financial information can be presented to courts (or other adjudicating bodies) in a cogent manner as required.
- 2.14** A debtor may require civil legal aid in order to ensure a fair hearing at the instalment stage of the debt enforcement process or to help to negotiate a fair settlement. The Legal Aid Board should represent debtors at such hearings, especially where despite engagement with creditors, agreement cannot be reached on an affordable instalment informally.
- 2.15** If a debtor is trying to address his/her financial problems and keep him/herself out of prison, legal aid should be granted to facilitate his/her appearance at a committal hearing. If such representation is not to be supplied by the Legal Aid Board in the form of civil legal aid, it should be available from the State as part of the criminal legal aid scheme.

3. Facilitating initial offers of payment in debt cases

- 3.1** A debtor should, with the assistance of a legal advisor or money advisor be entitled to consent to judgment and make a proposal on repayments. The proposal should be based on a comprehensive financial statement of the kind already used by money advisors. If the creditor accepts the instalment offer, the consent and instalment should be recorded. If the creditor wishes to reject this offer on the basis that it is insufficient or that the debtor has assets or property that can be sold to pay the debt, the matter should be referred to a third party for adjudication. In Ireland, this role could be assigned to court officials (or an alternative body sitting in private). The creditor (or debtor) should have a right to appeal the assessment into the courts, for example to the Circuit Court.
- 3.2** Where it is apparent that the debtor has other debts in arrears that are likely to lead to legal proceedings being initiated, other creditors should be informed that proposals to deal with the debtor's current indebtedness will be made through a legal or money advisor to the court official (or alternative body sitting in private). Any creditor unhappy with the adjudication would also have a right of appeal to the Circuit Court.

4. Service of legal documents and reform of the debt enforcement by Instalment Order system

■ Service of legal documents

- 4.1** The practice of using draft summonses should be discontinued. At the very least, such documents must make it abundantly clear that the summons is a draft only and does not amount to legal action.
- 4.2** A debtor should be allowed to apply to set aside a judgment or an order where that debtor can prove in Court that there was no actual service of the relevant court document upon him/her and where there is no evidence of a deliberate attempt to evade service. Proceedings can be reissued by creditors in such cases where appropriate.

4.3 It should be compulsory to notify the debtor of a judgment. This notice should include the amount of the judgment and should outline the debtor's options from there. It should also draw the debtor's attention to the prospect of debt enforcement taking place at a later stage if the matter is not resolved and it should suggest where to get assistance.

■ **Reform of the debt enforcement by Instalment Order procedure**

4.4 Debtors should be encouraged again at the enforcement stage to consult a money advisor and a legal advisor.

4.5 The decision on the appropriate instalment repayment should be made in private rather than in open court and debtors should be entitled to have advisors attend with them to put forward proposals on repayments.

4.6 The attendance of the debtor at the Instalment Order application should be obligatory. In turn, Instalment Orders should not be made in the absence of the debtor and without sufficient details of the debtor's complete financial circumstances. Every effort should be made through clear information and documentation to ensure that the debtor attends the hearing. If the debtor does not appear at the hearing, the matter should be adjourned and a firm reminder sent.

4.7 A clear statement that a failure to pay the terms of the Instalment Order gives the creditor the right to make a further application to the court for the debtor's arrest and imprisonment should accompany every Instalment Order. Details of where the debtor can access assistance should be repeated at this and at every stage of the procedure.

4.8 The Instalment Order should also carry a much more prominent notice advising the debtor of the right to apply at any time for a variation of the instalment. This notice should also state that a debtor is entitled to apply for legal aid and advice to assist with such an application and that further assistance in terms of the presentation of financial information can also be obtained from MABS.

4.9 Creditors and their legal representatives should also promote awareness of the variation option when sending out further correspondence warning of the consequences of arrears on the Instalment Order and reminding the debtor again of the availability of money advice and legal assistance where appropriate.

- 4.10** The Committal Summons should make it crystal clear to the debtor that imprisonment is not inevitable; that by turning up and giving an account of the position acceptable to the court, the debtor can avoid this outcome. Alerting the debtor to the fact that the amount of the instalment can be reduced at the hearing can only help to increase participation by debtors. The power of the judge to vary the instalment and the necessity for the debtor to be present to make out the case for this should therefore be prominently advertised on the Committal Summons.
- 4.11** Where there is no appearance from the debtor at the committal hearing and in particular where it is apparent that the debtor has not responded at any stage of the various stages of this procedure, the law should be changed to require the judge to adjourn the hearing at this point. A firm reminder should then be sent to the debtor that an order for his/her imprisonment is likely if s/he does not turn up at the resumed hearing and show inability to pay.
- 4.12** The law should be amended to provide that if the debtor does not appear on the reconvened date of the committal hearing, a bench warrant for the person's arrest to enforce his/her appearance to give an account of his/her circumstances should be issued.
- 4.13** As with the Instalment Order application, there is no constitutional necessity for Committal Summons hearings to take place in public and the findings in this study indicate that it is a substantial deterrent to the debtor's appearance. The Enforcement of Court Orders Acts should be amended to allow for such hearings in private.
- 4.14** It should be obligatory to serve the Committal Order upon the debtor at the earliest possible opportunity following the committal hearing. The fact that full payment even at this late stage will prevent imprisonment should be stated prominently and separate from the rest of the document with a statement of the sum required.
- 4.15** The Committal Order should make it absolutely clear that the debtor has the right to appeal an order for arrest and imprisonment to the Circuit Court. It should also explain that until such an appeal is decided, no arrest and imprisonment of the debtor can take place.
- 4.16** The fourteen-day period to appeal should only begin to run from the date that the Committal Order is served on the debtor, rather than from the date that the decision is made to grant the order in the first place.

- 4.17 All those at risk of having unfair or unrealistic orders made against them, or at risk of imprisonment for their inability to pay a contract debt should be entitled to State funded legal advice and representation where it is required to get a fair hearing.
- 4.18 The Courts Service should provide basic assistance for unrepresented debtors in District Court offices and in each District Court on days when Instalment Order and Committal Summons applications are being heard so that those who do attend are properly informed of their right to address the court and facilitated to do so.

5. The removal of imprisonment as an option in debt cases

- 5.1 The sanction of imprisonment should be removed immediately from the Instalment Order procedure for those who are unable to pay their debts.
- 5.2 The State should examine how effective, non-penal remedies should be employed in order to enforce compliance with civil debt judgments. Amongst the solutions considered should be attachment of earnings legislation. However, any such measure must be regarded as a last resort. It must also be practical and workable and must ensure that debtors are protected from adverse outcomes such as excessive deductions, multiple orders and loss of employment.

6. Improving access for creditors to information on existing debt enforcement proceedings

- 6.1 The State should examine the option of setting up a database containing information on existing debt enforcement proceedings in order to ensure that the courts and court offices are used appropriately in the area of debt enforcement.
- 6.2 The enforcement of court orders legislation should also be amended to allow a District Court judge the power to adjourn an Instalment Order application where there is evidence that judgments have been obtained or are being sought by other creditors. The debtor should be referred to MABS or other advisor for assistance. At a resumed hearing, the Court should consider putting in place a Consolidated Instalment Order involving one payment being made and distributed to judgment creditors on a *pro rata* basis.¹⁹

¹⁹ That is, on a percentage basis according to the amount owed.

7. The removal of imprisonment as an option in debt cases

- 7.1 The statistics published in the Courts Service Annual Reports should further break down Examination of Means applications made and Instalment Orders obtained as follows:
- The profile of the creditors bringing applications and obtaining orders respectively.
 - The number of examinations and subsequent orders that specifically involve consumer debt cases.
 - The percentage of debtors who attend and fail to attend at the examination of means stage.
 - Of those who attend, the percentage that have legal representation and the percentage who attend alone.
 - The number of orders granted, and of these orders, the profile of creditors and the number of debtors who were legally represented.
 - The profile of the creditors issuing Committal Summonses.
 - The number of such applications that specifically involve consumer debt cases.
- 7.2 By the admission of the Courts Service itself, its Annual Reports do not include a figure for the number of Committal Orders granted, as the figure quoted under Committal Orders actually reflects the number of applications, i.e. Committal Summonses. This is a serious omission and should be remedied immediately. The following information under this heading would also be desirable:
- The percentage of debtors who attend and who fail to attend at the committal hearing.
 - Of those who attend, the percentage who have legal representation and the percentage who attend alone.
 - The number of Committal Orders granted, and of these orders, the profile of creditors and the number of debtors who were legally represented.
- 7.3 The State should record, compile and publish statistics on the number of debtors against whom Committal Orders are made in any calendar year, the number of Committal Orders that subsequently result in imprisonment, the length of sentences and the length of their ultimate

stay in prison, as well as the reasons why the remainder of Committal Orders do not subsequently result in imprisonment.

- 7.4 A State-funded research study in Ireland to investigate the potential links between over-indebtedness and ill-health would be timely and might help to inform policy and strategy for dealing with over-indebtedness into the future.

8. Adopting an alternative approach to resolving problems of over-indebtedness

A potential model: Debt Rescheduling and Mediation Service

A brief description of a potential model that might be considered in the course of a review of debt enforcement legislation and procedures in Ireland follows. It is clear that the principles set out below require a properly funded and resourced money advice service to succeed.

Settlements prior to legal proceedings

A Debt Rescheduling and Mediation Service sitting in private could be established by legislation. Its initial function would be to act as a conciliator and mediator in consumer debt cases with a view to facilitating agreement on affordable repayments where liability for debts is accepted. It might also have a debt settlement role in cases of consumer bankruptcy where the debt situation is chronic and unlikely to be otherwise resolved in the long term.

Creditors should be obliged to refer personal customers who are in arrears with loans or other debts to the state-funded Money Advice and Budgeting Service (MABS), with a view to reaching sustainable agreements on voluntary repayments.

Access to legal advice from the Legal Aid Board to establish that debts are due should also be assured. This should be a pre-requisite before any legal proceedings can be taken. It is emphasised here that the creditor need only refer the customer and have evidence to this effect. Whether the customer chooses to avail of the MABS service is clearly beyond the creditor's control.

Any existing legal proceedings should be stayed pending discussions on affordable repayments. Where agreements are reached on repayment between indebted clients and creditors through money advisors (or other advisors) or where persons in debt negotiate their own repayments, such agreements may be registered with and overseen by the Rescheduling Service.

Where agreements cannot be reached voluntarily, any indebted person should be entitled to apply to the Service for their debts to be rescheduled. S/he may again be referred to MABS for advice on putting forward a repayment plan and creditors should be entitled to object to rescheduling or proposed repayments at an oral hearing if required.

A creditor who believes that the indebted person is not acting in good faith should also have the right to apply to the Rescheduling Service for consent to bring legal proceedings against that person.

The Rescheduling Service should also have powers to investigate whether the debtor has assets above and beyond what is necessary to ensure a minimum standard of living that might be sold with a view to providing initial lump sum cash payments to assist in reducing the initial amount of indebtedness.

Where consumer debt and business debts are intertwined, as is sometimes the case with self-employed persons, the Rescheduling Service should have discretion on a case-by-case basis to reschedule that person's debts.

In the event of default in repayments agreed by the debtor, the Rescheduling Service can investigate the reason/s for default and where it is satisfied that the debtor has not acted in good faith may authorise legal proceedings to be brought against that debtor. Either the debtor or creditors should also have the right to seek to revise payments in the event of an increase or decrease in income as the case may be.

Settlements after legal proceedings are brought

In debt cases, both legal documentation and an explanatory booklet should make it clear that the defendant may accept liability and seek to make an offer of payment. Once it is clear that the defendant does not wish to contest the case and wishes to investigate offering phased repayments, the matter should be redirected from the Courts to the Rescheduling Service.

With the assistance of a money advisor and having looked at the totality of the person's finances and ascertained the full extent of their indebtedness, proposals should be made by the debtor (with the assistance of a money advisor) to the Debt Rescheduling Service for repayments. Creditor/s should have the right to seek a revision of such offers. The Debt Rescheduling Service should have a final right of adjudication where agreement cannot be reached, subject to a right of appeal into the courts.

