TO NO ONE'S CREDIT

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

flac
promoting access to justice

To No One's Credit?

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

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FLAC – 13 Lower Dorset Street, Dublin 1.

LoCall: 1890 250 350 **E:mail:** info@FLAC.ie
T: 01-874 5690 **Web:** www.FLAC.ie

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preface

For some time, it has been apparent to FLAC that not only is there a growing need for legal information and advice on credit and debt issues among the general public, but that there is need for a critical, independent voice on reform of how the legal system deals with debtors.

Acting as a legal resource, FLAC supports money advisors and members of the public and aims to provide information on rights and entitlements through research and publications. Our 2003 report *An End Based on Means?* and a follow up conference in 2004 investigated the case for reform of consumer debt law in Ireland and suggested alternative models. What was striking about the debate at that time was the level of general agreement of professionals – money advisors, creditors and lawyers – that the Irish system of debt enforcement was hopelessly outmoded and out of line with developments in Irish society.

This report concerns the same topic, but from a different perspective. It focuses on the individual, showing the confusion and inefficiencies that the current system causes and raising troubling questions about the real access to justice of people who are subjected to our debt enforcement system.

While this report was being prepared, FLAC's fellow independent law centre, Northside Community Law Centre, began acting for Caroline McCann who had been sentenced to one month in prison for her failure to pay instalments. Ms McCann challenged the legislation that allowed her to be jailed on foot of a formulaic law which purported to take her financial and other circumstances into account but which in reality failed to do so. The Irish Human Rights Commission's submissions in the case raised serious concerns about the protection of her human rights in this system. Just as this report goes to print in June 2009, High Court Judge Mary Laffoy has adjudicated on Ms McCann's case and has found section 6 of the Enforcement of Court Orders Act 1940 to be unconstitutional. Further aspects of the case are proceeding and there is of course a right of appeal to the Supreme Court against the High Court decision.

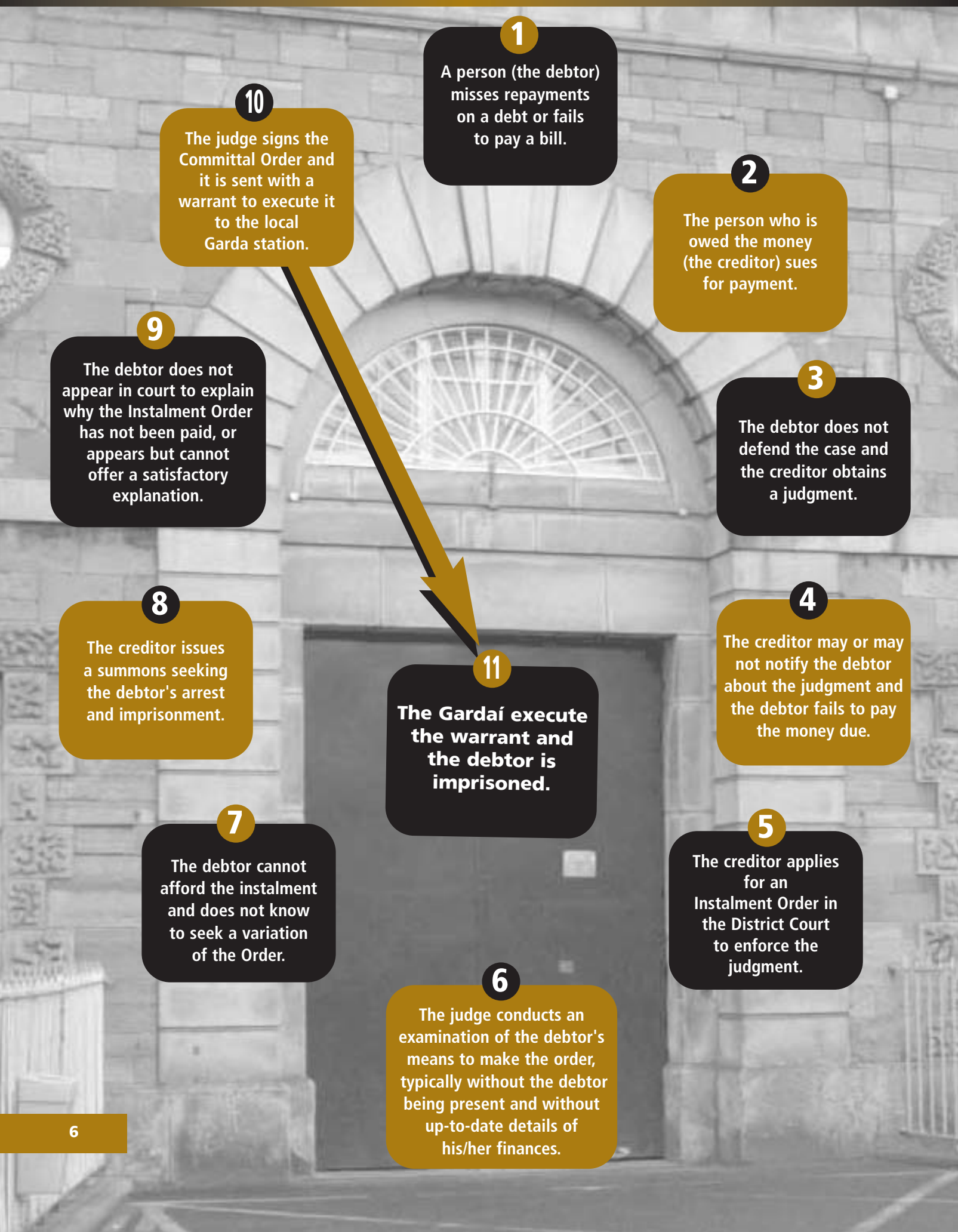
The High Court has deemed the law unconstitutional. The UN's Human Rights Committee have urged Ireland again to reform the law in this area because of its failure to comply with one of the world's basic human rights treaties. Professionals involved in the debt enforcement area are widely agreed that the system is ineffective. Debtors say clearly in this report how the system is inaccessible and often inhumane. It is also clear that there is a serious risk to the fundamental rights of debtors, particularly of poor or marginalised people in debt. What is now needed is an urgent review by the state and professional institutions which run Ireland's system of dealing with debt with an eye to modernising and reforming it and to making it more accessible and protective of human rights.

in short, the arguments for reforming the law on debt enforcement are now indisputable: it is crucial that the government stops ignoring its responsibility to legislate properly and fairly for those over-indebted people who need some help in dealing with their problems, not a jail sentence. It simply serves no purpose for debtor or creditor alike; it is truly and sadly to no one's credit.

F LAC would like to sincerely thank the clients who contributed their experiences to this work. Without their voice it would not have the same resonance for change. We are also grateful to others who assisted with the report: To the money advisors who worked with clients to provide the data for the study; to the Board and staff of MABS National Development Ltd and the Combat Poverty Agency for their financial and logistical support; and to Stuart Stamp, who gave up much time to help with analysing data.

Once again, FLAC Senior Policy Researcher Paul Joyce displayed his in-depth knowledge of Irish debt law as well as his writing skills in producing this text. FLAC wishes to thank him and other FLAC staff who gave generously of their time and expertise in the production of this report.

The Path to Imprisonment in a Debt Case



1. A person (the debtor) misses repayments on a debt or fails to pay a bill.
2. The person who is owed the money (the creditor) sues for payment.
3. The debtor does not defend the case and the creditor obtains a judgment.
4. The creditor may or may not notify the debtor about the judgment and the debtor fails to pay the money due.
5. The creditor applies for an Instalment Order in the District Court to enforce the judgment.
6. The judge conducts an examination of the debtor's means to make the order, typically without the debtor being present and without up-to-date details of his/her finances.
7. The debtor cannot afford the instalment and does not know to seek a variation of the Order.
8. The creditor issues a summons seeking the debtor's arrest and imprisonment.
9. The debtor does not appear in court to explain why the Instalment Order has not been paid, or appears but cannot offer a satisfactory explanation.
10. The judge signs the Committal Order and it is sent with a warrant to execute it to the local Garda station.
11. **The Gardaí execute the warrant and the debtor is imprisoned.**

introduction

Context for research study

FLAC's report, *An End based on Means*, published in 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 impetus for that report stemmed from FLAC's ongoing provision of legal support to the Money Advice and Budgeting Service (MABS) to assist clients with debt and consumer credit problems. It was also a response to a (then) Government proposal that attachment of earnings might be introduced as a new method of debt enforcement.[1] The report generally concluded that the Irish legal system was poorly adapted to meet the realities of what was then a rapidly expanding consumer credit market. Figures used in the course of that work illustrated that growth graphically and its extent came as a surprise to many people who had never heard of, let alone seen, a Central Bank Quarterly Bulletin.

In the intervening years, increases in the extent of consumer borrowing continued unabated to the extent that over-indebtedness became a familiar and repetitive topic of conversation and of media interest. During this time, frequent warnings were issued about the dangers of over-extension, not just by the Financial Regulator but also by financial and mainstream journalists. One hundred per cent mortgages became common, where once the very concept would have induced apoplexy in even the most adventurous banker. In addition to substantial mortgages, many borrowers simultaneously took on other heavy credit commitments.

During this period too, an increasingly diverse range of credit providers, some availing of their EU banking licence, moved into Ireland looking for a share of the available business. Hard sell telemarketing tactics, unsolicited pre-approved loans and 'daisy chain' credit card usage all became features of the credit environment. A 'sub-prime lending' market took hold with some providers claiming to specialise in loans to consumers with a poor credit history, a tell tale sign that a 'free-for-all' consumer credit environment had developed.[2] Gradually, the sub-prime crisis in the United States and the resulting credit squeeze internationally led to more sober reflection, as the dangers of such a market for hard-pressed consumers became readily apparent in the course of 2007 and 2008, with an increase in the number of repossession cases initiated by sub-prime lenders in Ireland.[3] However, the consequences of the collapse of the high volume

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 dropped off the Government agenda.

2 There is no formal definition of sub-prime lending as such, but it is generally understood to be lending where a higher rate of interest than normal market rates is charged on the loan on the basis that the applicant borrower is perceived to be a greater credit risk.

3 According to figures compiled by the Courts Service and reported in the *Irish Times,* 14 January 2008, some 465 applications were made in the High Court to repossess homes in 2007, up from 311 in 2006. No figures were quoted for Circuit Court repossession cases.

securitised sub-prime lending market continued to spiral.[4] Unemployment in Ireland rose in 2007 with the seasonally adjusted rate climbing to 4.7% in December 2007 and a prediction by the Economic and Social Research Institute (ESRI) that it would grow to 5.5% in 2008. By the beginning of September 2008 however, the rate of unemployment in Ireland had exceeded 6% and had grown to 7.8% by the end of November.[5] House prices on the other hand continue to fall from their inflated values with a 10% average drop in 2007 and further radical reductions through 2008.

Finally, in the last weeks of September 2008, the bubble well and truly burst with the U.S banking and liquidity crisis precipitating hitherto unheard of Government proposals to bail out stricken investment banks at huge cost to the taxpayer. Central Banks all over the world rushed in to maintain the 'integrity' of their banking system by pumping billions into ailing institutions considered too big to fail. In Ireland, the Government announced on 30 September 2008 that it would guarantee the deposits and some of the debts of the six main domestically owned banks for a two year period. Emergency legislation was rushed through the Houses of the Oireachtas, the purpose of which was 'not about protecting the interests of the banks – it is about safeguarding the economy and everyone who lives and works in this country'.[6] Recapitalisation of the banks did not immediately follow but was inevitable due to the stagnant nature of the property market and the extent of the banks' bad debts from construction companies in particular. Speculation that the state guaranteed banks would have to be nationalised abounded in early 2009 but so far only Anglo Irish Bank has been taken over. However, at the time of writing (June 2009), legislation to set up the National Asset Management Agency (NAMA) to take over banks' toxic loans is imminent.

In light of the crisis that has now emerged, it seems almost innocent to say that faced with an increasingly predatory market, regulation was also stepped up in the period since May 2003. The Financial Regulator issued a Consumer Protection Code (introduced on 1 August 2006) to rein in the more excessive and irresponsible aspects of credit provision.[7] The Financial Services Ombudsman's Bureau[8] opened for business and began to receive complaints in relation to the conduct of regulated financial service providers in April 2005, reflecting the need for an independent office to adjudicate upon complaints from eligible consumers. The EU Consumer Credit Directive[9] which gave rise to the Consumer Credit Act 1995 in Ireland underwent an overdue revision to take account of the myriad changes in the provision and marketing of credit since it was first agreed in 1988. Finally, faced with widespread criticism of the failure to regulate the sub-prime market, the Government finally introduced legislation to regulate sub-prime non-deposit taking lenders from February 2008,[10] albeit long after considerable damage had been wrought through their highly questionable lending practices and the reckless activities of some (though by no means all) mortgage brokers.

While each of these developments was noteworthy in itself, it is also highly significant that each concerned strengthening consumer protection either at the point at which

4 As of March 2007, there were 10,000 empty single family homes in Cleveland, Ohio. In April 2007, two million American families were reported to be facing foreclosure on their homes. There were 27,000 repossessions in the UK in 2007, the highest figure since 1999. Over 50% of these repossessions cases were brought by sub-prime lenders who hold 6% of the mortgage market in the UK.

5 From Irish National Organisation of the Unemployed (INOU) press release, 3 December 2008.

6 According to Brian Lenihan T.D., Minister for Finance, as reported in the *Irish Times*, 1 October 2008.

7 Consumer Protection Code, Financial Regulator, August 2006.

8 This body was brought into being with the passing of the Central Bank and Financial Services Authority of Ireland Act 2004.

9 Council Directive 87/102/EEC as amended by Council Directive 90/88/EEC.

10 See Section 19 of the Markets in Financial Instruments and Miscellaneous Provisions Act 2007.

money is borrowed or during the course of the credit agreement itself, but not at the point where a default in payment occurs and legal proceedings against the borrower are being considered. In the heady cocktail of economic growth and enhanced spending power that was so prevalent in Ireland over the past decade, the over-indebted casualties of the market were largely forgotten by the State, an unwanted by-product of a relentless drive to increase living standards. Now that the Irish economy is well into an economic recession or even a depression, the likelihood of further rises in debt-related legal proceedings against consumers seems inevitable, in particular given the phenomenal increases in credit provision from 1995 through to 2007.

State response to over-indebtedness

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 for its purpose in this arena. Despite vast changes in the consumer credit market, the method of obtaining a court judgment for a sum of money and the principal method of debt enforcement available in the courts for persons of limited means remains substantially unchanged since the enforcement of court orders legislation was amended before the Second World War.[11] With an out-of-date legal system, MABS is being asked to work on behalf of indebted clients with one hand tied behind its back, not to mention the plight of an unknown number of defendants in debt cases who access neither money advice nor legal advice.

There is no sign at present that the State shows any inclination to change this. In response to the last formal communication from FLAC on this issue in August 2005, 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". The letter continues 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 a written answer to a recent parliamentary question to ask 'his views on the introduction of a debt rescheduling service to take debt enforcement cases from the courts', the Minister for Justice, Equality and Law Reform, Dermot Ahern, T.D. replied:

> (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. However, the operation of the law is being kept under review in my Department. Moreover, debt enforcement forms part of the work of the Law Reform Commission. Government policy in this area is reflected in the significant funding made available to the Money Advice and Budgeting Service (MABS) which provides assistance to people on low incomes who need help to cope with debt problems.[12]

In effect, these responses consistently refuse to accept responsibility for the outdated and inefficient system that many debtors and creditors routinely face. Instead, it saddles MABS and others working with those in debt with the responsibility to find solutions.

11 Enforcement of Court Orders Acts 1926-1940.

12 In response to Parliamentary Question No 292 from Aengus O'Snodaigh, T.D. for Written Answer, 29 October 2008.

Unfortunately, this is not a case of 'if it ain't broke, don't fix it'.[13] There is already substantial anecdotal evidence from MABS and other sources that consumers (and in an increasing number of cases, small business debtors) being sued in debt cases do not respond to legal proceedings. Subsequently, a large majority do not attend hearings in open court in relation to the enforcement of those debts by the Instalment Order procedure, once judgments for sums of money have been made. 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 a relative's financial assistance.

Statistics on debt related imprisonment

According to figures provided to FLAC by the Irish Prison Service in October 2006, 994 people were imprisoned for 'offences relating to debt' between 2002 and September 2006.[14] No further breakdown of the categories of debt involved, for example, civil debt or maintenance debt[15] was available with these figures but it is reasonable to surmise that a substantial majority was due to civil debt, given that attachment of earnings is available in maintenance but not in civil debt cases. In addition, according to the Irish Prison Service Annual Report for 2006, 194 people were imprisoned in total in 2006 in connection with debt.[16] Figures released by the Department of Justice, Equality and Law Reform also indicate that 201 persons were imprisoned in 2007 as a result of failing to comply with a court order in relation to payment of a debt.[17] Finally, the Minister for Justice, Equality and Law Reform, Dermot Ahern, T.D. has recently stated that a total of 276 persons were imprisoned in 2008 for a total of 306 debt offences, with some being imprisoned on more than one occasion.[18]

The fact that this continues to routinely happen in Irish society often takes people by surprise, as it is not a matter that has received much public attention nationally, particularly given the consequences for the individuals involved. Perhaps this may be due to the often low profile of those imprisoned, people who generally face a lot of difficulties in their lives and who may tend not to challenge the system or the law. It may also be because these cases are heard at District Court level and would not be generally reported in the national media.

At the time of writing (June 2009), recent legal challenges to the enforcement of court orders legislation have raised the profile of this issue considerably. The first of these, taken by Northside Community Law Centre (NCLC) on behalf of a client of Monaghan MABS, has challenged both the constitutionality of the legislation and its compatibility with the European Convention on Human Rights and Fundamental Freedoms. In this case, the applicant 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 matter was heard over three days from 13 to 15 May 2009 before Laffoy J. Judgment has been reserved and is awaited.[19]

13 In contrast, at the time of writing (June 2009), a Fines Bill 2009 has been published that contains some useful and progressive measures. It proposes to introduce an instalment system for paying fines, to impose fines where appropriate according to the person's means and capacity to pay and to allow for a community service order instead of imprisonment for failure to pay a fine.

14 From figures provided by the Irish Prison Service, October 2006.

15 Court orders to pay money to support spouses and /or children.

16 Appendix 1 – Statistics for 2006, Page 64.

17 Response to Parliamentary Question No 290 by Joe Costello, T.D. for Written Answer, 29 October 2008.

18 Response to Parliamentary Question No 608 by Caoimhghin O'Caolain, T.D. for Written Answer, 27 January 2009.

19 *McCann (Applicant) and Judge of Monaghan District Court, The Commissioner of An Gárda Siochana, 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).*

On 20 May 2009, O'Neill J. in the High Court ordered the release of a woman who had been imprisoned, again for failure to pay an Instalment Order on a judgment debt of €1500. The debt concerned a credit card that the applicant had applied for while she was an inpatient in a psychiatric hospital.[20] On 26 May, O'Neill J. again ordered the release of a debtor, this time in relation to non-payment of an Instalment Order on a judgment of €7000 obtained by a credit union on a car loan. The applicant had made payments until he was made redundant from his employment and at the time of his incarceration, he and his family were reliant upon social welfare payments as their sole source of income.[21] It should also be noted that in its examination of Ireland's human rights record in July 2008, the Human Rights Committee of the United Nations again raised concerns about the compliance of debt-related imprisonment with international human rights standards.

In terms of the cost to the taxpayer, the average annual cost of keeping a prisoner in custody during the calendar year 2007 was €97,700 according to the Irish Prison Service.[22] It should be noted that this figure does not include the financial costs of processing the events leading up to the incarceration, such as the court applications and the Gárda time and transport costs. In many cases, as this report will demonstrate, those imprisoned because of debt were simply unable – as opposed to unwilling – to meet their financial obligations. The further effects of this criminalisation of debtors on partners, family and child dependants, the unquantified costs to society in general in terms of stress, illness and healthcare both short and long term, the damage in terms of relationship breakdown and the cost to the taxpayer in terms of court, Gárda and prison is a matter of speculation. To FLAC's knowledge, no research has ever been carried out in Ireland to attempt to gauge this.[23]

Purpose of the questionnaire

The questionnaire focused on the experience of debtors when the debt enforcement procedure designed to have money repaid by instalments is invoked against them.[24] Interviews were carried out in 2006 by way of a lengthy structured questionnaire[25] designed by FLAC and carried through by MABS[26] staff directly with clients. 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 anecdotal evidence that this system is not working effectively for creditors, debtors or the State is tested by means of a sample of cases. The views and experiences of people about whom assumptions are sometimes made that often have little foundation in fact are heard. These are people who are not guilty of criminal behaviour. At worst they have lost control of their finances and failed to face the consequences.

Ultimately, FLAC believes that where imprisonment occurs related to inability to pay a contract debt, the State has to answer fundamental questions in relation to the breach of

20 As reported by Mary Carolan, *Irish Times*, 22 May 2009.

21 As reported by Mary Carolan, *Irish Times*, 27 May 2009.

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

23 Juliet Lyon, Director of the Prison Reform Trust in the UK, speaking at a seminar in Dublin entitled 'The Cost of Prison?' on 9 November 2006, said that 18,000 children are separated from their mothers in the UK annually as a result of imprisonment and speculated about the enduring damage that this could cause to the development and well-being of children.

24 Details of the research objectives and methodology can be found at Appendix One, pages 171-174.

25 A full version of the questionnaire can be found at Appendix Two, pages 175-200.

26 An explanation of the role and development of MABS is provided at Appendix Three,pages 201-203.

international human rights standards and this report also explores this vital issue. Many of these debtors would never have appeared at any court hearing prior to their arrest and imprisonment, having buried their head in the sand and hoped the problem would 'go away' if they ignored it. Equally, many would have had no access to legal advice or representation throughout the process. It is also clear from any examination of District Court practice in this area that lack of participation by the debtor is almost taken as a given. Large numbers of cases are listed 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, the purpose of the procedure in the first place.

Is imprisonment for contempt of court or for failure to repay a debt?

In *Grimes v Wallace*,[27] in the course of a judgment that considered whether a summons to arrest and imprison a debtor following the non-payment of an Instalment Order had been legitimately served on a debtor who had left the jurisdiction, Barron J. commented as follows:

> It seems to me that the realities of this case are as follows. There has never been a hearing on the merits as to whether or not the applicant can afford to pay the debts. Secondly if he cannot afford to pay these debts then he is to be imprisoned for debt which is something which our law does not allow. Obviously if he had been evading service or if he was aware that the documents existed then, if he stayed away, he stayed away wilfully. But even in those circumstances he should not be imprisoned for a debt he cannot pay.

In the context of this report, this is a telling passage. The learned judge's clear view is that Irish law (by virtue of the Debtors (Ireland) Act 1872) does not allow a person to be imprisoned for non-payment of a debt. Why then did some 276 persons in Ireland in 2008 find themselves behind bars because they did not meet the terms of a court order to pay a debt?

How this happens is as follows:

- The person who is owed money (the creditor) takes legal proceedings against a borrower (the debtor) and gets a judgment against him/her;
- To enforce that judgment, the creditor applies in the District Court for payment of the debt by an Instalment Order;
- This involves requesting the debtor to send into the Court details of his/her financial position and to attend a subsequent court hearing to examine his/her finances with a view to making an order for payment by instalment;
- If the debtor does not meet the terms of this order, this is considered a form of statutory contempt of court potentially punishable by up to three months imprisonment;[28]
- Before this can happen, the debtor must be served with a summons to consider his/her arrest and imprisonment at a further hearing in the District Court;

27 High Court, unreported judgment, Barron J, 4 March 1994.

28 Enforcement of Court Orders Acts 1926-1940.

- If s/he appears at this hearing, the debtor gets an opportunity to show that the failure to meet the terms of the Instalment Order was neither due to his/her 'wilful refusal' nor 'culpable neglect';[29]
- If this can be shown, the debtor will not be imprisoned, as a debtor cannot be imprisoned for non-payment of a debt in itself.

It is this sequence of events that enables politicians, lawyers and other commentators alike to say with some certainty that you cannot be imprisoned for failure to pay your debts in the legal system in Ireland.[30] In response to a parliamentary question in 1997 on the numbers of such committals, John O'Donoghue T.D., then Minister for Justice said:[31]

> 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.

The Minister may have been correct when he described the procedure as extensive but what he omitted to mention is that this extensive procedure frequently takes place **in the absence of the debtor**. Absence does not necessarily mean wilful refusal or culpable neglect and without the debtor's participation and account of their financial circumstances, the process is flawed. If a debtor, and accordingly his or her financial and personal circumstances, is not before the court and 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?

Regardless of where a person may stand on the reasons for the debtor's non-appearance, imprisonment without an assessment of ability to pay does not make sense. Whether you hold the view, as do many practitioners involved in debt collection, that the debtor is a slippery eel waiting to dart away into the murky backwaters without paying a single cent (often referred to as a 'won't pay') or that the Irish legal system needs to start acknowledging the stress and trauma of consumer debt, as argued by many working with clients in debt, a compulsory assessment of means would seem to be the most sensible option. What better way of differentiating between those who can pay but choose not to and those who cannot but are willing to address the question of phased repayment?

Compulsory examination of means, however, should be a last resort. Every effort should be made by the State to ensure that a pro-active, non-judgmental and user-friendly system is put in place. This must reassure the debtor that the object of the exercise is not to punish but to offer a manageable solution to debt problems that the State recognises are inevitable in a society where credit has been (up to recently at least) widely available, albeit often at a high cost for many.

Do these matters have to be dealt with in open court?

Like the vast majority of legal proceedings, debt enforcement by instalment takes place in open court. Thus, there is no obstacle to members of the public and the media

29 Section 18 of the 1926 Act as amended by Section 6 of the 1940 Act

30 In *Small Claims Court in Ireland: A Consumer's Guide*, McHugh discusses the effect of the Debtors (Ireland) Act 1872 in prohibiting imprisonment for non–payment of debt and goes on to argue "that as a result we can say with some certainty that a person's inability to pay such a debt will never result in a prison term being imposed" (McHugh, 2003: 56).

31 Parliamentary Question Number 365, November 1997.

attending to see what is taking place. The prospect of a person having to appear in public to be questioned about his/her finances, especially in a local District Court setting, fills many debtors with dread. The question is whether this is legally necessary and ultimately practical.

The Irish Constitution (*Bunreacht na hÉireann* 1937) provides that:

> Justice shall be administered in courts established by law by judges appointed in a manner provided by this Constitution and, save in such special and limited cases as may be prescribed by law, shall be administered in public.[32]

This Article of the Constitution basically means two things:

- Only a court is empowered under the Constitution to administer justice.
- Unless legislation provides otherwise, justice must be administered in public.

A number of special and limited cases for hearings *in camera* (or in private) envisaged in this Article have been allowed by the Courts (Supplemental Provisions) Act 1961 and these include matrimonial matters (better known as family law cases), emergency applications such as in respect of bail or injunctions and certain criminal cases where the State must prevent the disclosure of the identity of the defendant or the injured party. At present, there is no provision for debt enforcement cases to be dealt with *in camera*.

The reasons for the so-called 'hearing in public' rule are fundamentally sound. In theory, justice must be seen to be done as well as actually to be done. It is important that members of the public have the opportunity to watch court proceedings in action and this has the added effect in many cases of taking some of the myth out of the law. Most crucially, history is littered with examples of what can happen to people's fundamental human rights when justice is dispensed behind closed doors.

However, it is hard to see what purpose is served by holding the debt enforcement by instalment procedure in public. Legislation could be introduced to allow for such hearings in private but FLAC does not believe that this is even necessary under the Irish Constitution. The administration of justice has already taken place when a judgment for a money (or liquidated) sum is granted against the debtor. This is a legal finding by a judge (usually in default of any legal defence by the debtor) that the money claimed is owed together with the costs of processing the claim. In a substantial majority of cases, this judgment was granted behind closed doors because the debtor did not defend the claim against him or her and so no court hearing was thought to be necessary. It is ironic therefore that the enforcement that follows is in open court, given that it is merely an administrative arrangement for repayment of the debt in circumstances where it is clear that the debtor is unlikely to have the means to pay in one lump sum. If the setting of appropriate instalments under the current system was assigned to court officials, any unhappiness with the rate set could be offset by a right of appeal to a court. In summary, this is the system that operates in the United Kingdom, where court officials hold devolved powers to set appropriate repayments and have written guidelines to assist them with this task.[33]

32 Article 34.1

33 *Determination of Means – Guidelines for Court Staff*, County Court, Her Majesty's Court Service, see website at www.hmcourts-service.gov.uk (last accessed 10 August 2008).

Do these matters have to be decided by a court at all?

Article 37.1 of the Constitution further 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. It is this important provision of the Constitution that allows legislation to be passed that creates so-called 'quasi-legal' bodies or offices with jurisdiction to deal with particular types of legal disputes. For example, the Employment Appeals Tribunal can hear unfair dismissal cases and other types of claims under employment legislation, even though it is not a court. Similarly, County Registrars attached to the Circuit Court and the Master of the High Court deal with quite an amount of procedural legal issues, even though they are not judges.

Many cases have been tried in the superior courts to determine what 'the administration of justice' is on the one hand and what are 'limited functions and powers of a judicial nature' on the other. Mainly, these have been attempts to quash decisions of bodies that are not courts on the basis that they were attempting to administer justice when the Constitution does not allow them to. However, if as has been argued above, the setting of an Instalment Order following a judgment is not the administration of justice but, rather, the exercise of limited powers and functions of a judicial nature, then the State would be free to legislate to set up an alternative debt repayment scheme or tribunal that would carry on its business behind closed doors. 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.

The creditor view

Both FLAC and MABS and others working on behalf of people who are over-indebted have engaged in detailed discussions with various strands of 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.[34] Some of these discussions have led to practical developments that demonstrate what can be achieved.

For 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 Pilot 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). As a real alternative to legal action, all efforts were focused on negotiations between the MABS Money Advisor (on behalf of the debtor) and the various creditors involved in order to identify a repayment programme – affordable for the debtor and acceptable to creditors. Where a debtor was admitted to the Pilot Scheme, s/he was entitled, out of net income, to pay housing costs and retain a minimum amount necessary to live, with some latitude for extra expenses. In turn, s/he agreed to dedicate his/her residual income to repaying debts on *a pro rata* basis (i.e. creditors receiving percentage payments according to the amount they were owed) over a defined period of time (varying according to the circumstances) with the

34 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".

prospect of being able to write off residual unsecured debt at the conclusion of the repayment period. The Pilot Scheme was modelled on more progressive consumer bankruptcy laws in operation across Europe. Over 30 personal debt cases were admitted to the Scheme and the vast majority of these are still completing or have completed the programme successfully.

At the time of writing (June 2009), the MABS/Irish Banking Federation (IBF) 'Operational Protocol on Working together to Manage Debt' has recently been launched.[35] This protocol sets out the ground rules that will be used in cases of debt arrears from the time that a bank customer 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.

Conclusion

Access to consumer credit has become an essential feature of the economy in Ireland and right across the European Union. It is generally accepted that more widespread extension of credit was one of the key catalysts in the economic growth that this country experienced over the past decade, although the recent credit crisis demonstrates just how dependent an economy can become on credit to sustain its growth. FLAC believes that there will inevitably be casualties in any credit market and 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. FLAC also believes that a balance must be struck between a general right of access to credit and the need to lend responsibly and, most crucially in the context of this report, that a person should not go to jail for his or her inability to pay a debt.

The consumer credit explosion happened quickly, the global credit crisis happened even more quickly. It is time the debt enforcement infrastructure in Ireland began to catch up.

35 Launched by the Minister for Social and Family Affairs, Mary Hanafin T.D. at the IBF offices on 3 June 2009.

questionnaire data and findings

2.1 introduction

The views of the debtor are rarely heard. Instead s/he is variously portrayed as feckless, an ostrich with his/her head in the sand, a person trying to get away without paying or a victim of an over hyped credit market. In the end the debtor ultimately becomes a statistic. Yet those who owe money and who are pursued for it are much more than that. The collector of debts does not go home in the evening sadly contemplating delinquent accounts. The Chief Executive of a credit institution may not lose too much sleep over writing off a bad debt when the bottom line may be recovered in the imposition of additional charges on other customers. However, the debtor and his/her dependants have to live and deal with the situation and its outcome; in the long run, so does society in general. Granted, many live with it for some time before dealing with it, and sometimes never do, but this may be put down to human nature. People sometimes make bad decisions and then compound them with worse ones.

There is often considerable suffering involved, with many innocent victims, as over-indebtedness spins off into many areas of a person's life. Many people who are solvent frequently worry about money and struggle to manage it.[36] Imagine the stress when that delicate balance tips over and warning letters and legal documentation start to pour in. Many would like to think they would be decisive; they would be realistic and seek help from appropriate quarters immediately; but disabled by stress, apprehension and misapprehension, would they? By hearing from the debtor and focusing on his/her experience, it may become apparent that over-indebtedness can happen to anyone and that many are not as far away from the debtor's experience as they would like to think. Recent and current events nationally and internationally have certainly reinforced and continue to reinforce this.

This section of the report sets out in considerable detail the results of some 38 interviews with persons against whom debt enforcement proceedings were brought. The majority of these interviews were conducted through the course of 2006. Comments are made in many instances on the implications of these results. Data is not presented here in respect of every question posed as the questionnaire sought out a large amount of information and it is beyond the scope of this report to provide detailed analysis of every aspect. Where it is practical and in order to avoid duplication, the findings in relation to some aspects of the questionnaire are amalgamated. The term 'debtor' is generally used throughout this report for those who were interviewed in order to be consistent and to avoid confusion. A full version of the survey form used is available in Appendix Two.
The questionnaire was divided into a number of parts seeking information in the following sequence:

36 For example, research commissioned by the Financial Regulator in January 2008 showed that 7 in 10 people have money worries on their mind at least some of the time. That situation has hardly improved since.

The order in which the results of the questionnaire are presented in this section follows as closely as possible the order of the questionnaire itself. This is, however, subject to one crucial exception. Given the importance that we wish to attach in this report to the views expressed by those in debt, who are the people principally adversely affected by these procedures on so many levels, we begin at the end (Part Nine) of the questionnaire by setting out the views of debtors about the system as a whole.

2.2 Overall experience and views of debtors about the system as a whole (incorporating Part Nine of the questionnaire)

This final part of the questionnaire was intended primarily to facilitate debtors to talk about the effect that going through these procedures had on them as individuals and on their dependants and to set out their views on debt enforcement and how it might be improved. However, it began by attempting to assess each person's general understanding of the documentation and understanding of options through the course of these procedures, together with an assessment of the helpfulness of court officials that they may have interacted with.

1. Overall, was the legal documentation understandable to you?

Three out of four debtors claimed to not have understood in overall terms the legal documentation served upon them. All 38 responded to this question. Eight (or 21%) said that they understood the legal documentation overall, 28 (or 74%) did not understand it, and two (or 5%) had no opinion on the matter.

When asked to elaborate, some debtors accepted that they did not examine the documents very closely. One remarked that **"I was mostly unaware of the legal documents. I never opened many letters."**

However, a number of others referred specifically to the difficulty they had in understanding the wording of documents and what were described by many as 'legal jargon' and not plain English. In some cases, the lack of understanding was exacerbated by a fear of confiding in someone and looking for help. For example, one debtor said that she **"did not understand the legal jargon and was afraid to tell anybody about the debt."**

Another pointed out that the documentation did not make clear what was likely to happen, saying **"no explanation was given by any creditor in user-friendly terms of what the consequences would be. Everything is written in legalistic terms even from the creditors."**

One advisor on behalf of a client stated quite simply that **"the client cannot read or write and relied on others to explain things to him."**

One debtor indicated that confusion may have stemmed from the position that he found himself in at the time rather than his general inability to understand. The money advisor who conducted the interview with him wrote on his behalf that **"at the time the proceedings began, the client did not feel he understood the language used at all. It was 'double Dutch'. It is only now (one year later) that the client is beginning to understand/make sense of letters relating to legal matters. However, he is unsure as to how much of this was confusion related to his health at the time and how much was partly to do with the total family and financial picture."**

It is easy to underestimate and even ignore the variety of pressures that come with effectively losing control of your financial situation, especially where there are others depending upon you to hold things together. Correspondence that has the effect, whether purposely or otherwise, of increasing these pressures and intimidating the recipient may make it even harder for that person to engage. As one debtor put it, **"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."**

2. Overall, were you personally aware of your options and the consequences at all stages?

The vast majority of those surveyed did not understand their options and the consequences at all stages of these procedures. If three out of four debtors did not in general understand the documentation served upon them, it follows that it is unlikely that many understood what their options were. Only three debtors out of the 38 claimed to be personally aware of their options and the consequences of the proceedings. Thirty-five (35, or 92%) claimed that they were not.

Some indicated here that they were totally confused by the procedures; one commented that **"I could not make head or tail of the whole thing".** Another claimed to have been deliberately misled by the creditor's solicitor, saying that he was told that he **"could get 12 months [in prison]."** Many reported that they understood very little until they contacted MABS or another form of advisor but that the situation improved once they got assistance.

Others understood some of the procedures but, critically, did not understand some of the options that might have prevented the situation getting worse. For example, one debtor said that **"I did not understand that I could appeal the Committal Order or prior to that [have] sought a variation of the Instalment Order."**

Some found it hard to get information from creditors or their representatives, with one remarking, **"I tried phoning each creditor but I found that they would not tell me clearly what they would settle for."**

Another debtor claimed to have been lulled into a false sense of security, saying that **"my understanding was that when I received letters about this debt that if I started paying something it was then okay so I never really looked at or understood the content of the letters. It was only when I sent a payment and they returned it and said they couldn't accept it, that it was now in the hands of the courts and the Gardaí and that it all had to be paid that I realised it was so serious."**

The illness of the debtor was also a factor in some cases in limiting the exercise of available options. One said that **"[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."**

A particularly telling comment is the following reported by a money advisor from an interview: **"At a surface level only the client was aware in general terms of options. However, he states that he did not realise that the opportunity for discussion and negotiation with the creditor (which became ongoing in conjunction with MABS) would provide the 'breathing space' which has since resulted."**

It would seem here that the debtor's perception of legal proceedings and debt enforcement proceedings was that there were few viable options left and that effectively he was cornered with no way out, despite the fact that the procedure is designed in theory to assess the debtor's financial capacity to repay by instalments. This perception – that the odds in the legal system are stacked against the ordinary person, that to argue is futile and the law will take its course regardless with no room for negotiation – is common. While this study provides only a small sample, it is nonetheless very disturbing that such a strong majority of people, under serious pressure from their creditors, did not understand the proceedings sufficiently or know what action to take to improve or deal with their situation in response to the proceedings being brought against them.

3. Were the court officials (clerk, judge, etc helpful to you)?

Only 14 out of the 38 debtors felt the question on court officials to be applicable to their case. Eight found the court officials to be helpful and four felt they had not been. Two had no specific opinion on the matter. The low number of responses here reflects the fact that only 11 debtors of 38 attended any court hearings and these were the ones most likely to reply to this question.[37]

Of the three who answered this question but had attended no court hearing, two said that court officials had been helpful in terms of providing useful information on the process whilst one said the opposite; that in response to a request for information, an official had been unhelpful.

One debtor remarked that **"(the) Judge was very fair and understanding. Solicitor for bank wanted more but Judge said no."** and a few other debtors also specifically wanted it recorded that they had found the judge courteous and helpful in his/her approach.

37 Indeed, all 11 who attended any hearing provided a reply here.

A number also praised court officials for the assistance that was provided to them. Of those who had contact with court officials, this was the general view, one describing the court clerk as **"particularly helpful"** in general and another as helpful **"especially in sorting out the variation order after MABS helped."** However, one debtor remarked that although the judge was helpful, the court clerk most certainly was not. There were also a couple of instances where the debtor was also unhappy about the stern and abrupt manner of the sitting judge.

What was surprising here is how many appeared to have had no interaction with court staff of any kind. Only one in three responded to this question and a number specifically said that the question did not apply to them as they had made no contact with the relevant court. Given that all 38 debtors were served with legal proceedings initially, 36 with an examination of means (and many others with Instalment Orders and/or Committal Summonses and Orders subsequently), 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. However, it is also worth noting that the legal documentation used in this procedure does not at any point provide a contact number for relevant court offices.

4. How did going through this process affect you?

32 of the 38 answered this question with six choosing for whatever reason not to address it. One debtor quite simply observed that **"any respect is gone and even your own self respect is gone."** Many of the responses emphasised the stress, anxiety and fear that going through this experience created. One debtor mentioned **"nightmares, flashbacks, worry, stress, illness, unable to sleep"**, despite having sorted out the matter at the Committal Summons stage. Another described her **"stress and loss of self esteem, medical consequences, having to resort to medication. Terrified of the postman calling with another 'letter'"** and yet another described how he **"couldn't think straight. Restless and sleepless nights, affected [his] eating and general health."**

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.**

Another catalogued the prolonged impact of over-indebtedness upon him and the variety of legal proceedings that followed in the following terms:

> **I had already felt compelled to sell my home to pay creditors, now living in rented accommodation in receipt of rent supplement, awaiting rehousing by the local authority. Frustrated that even after losing home, creditors would still imprison me for small debts. Constantly stressed, tried to ignore inevitable consequences. Health deteriorated, almost caused the break up of my family.**

The pressure that over-indebtedness and legal proceedings can put on a relationship is obvious. One money advisor, on behalf of a client, explained that **"the client's marriage has broken up because of debt problems and family tragedy."** Very sadly for the couple involved, their only child had died a few years previously.

Some said that they were already suffering from depression and that this experience made the situation worse. One debtor said she was **"stressed out and ended up my depression increased. (I) couldn't go outside the door and the fear of being dragged out of the house by police."** It should be emphasised that this debtor did not go to prison as she availed of money advice reasonably early, but she was still frightened by the possibility.

Another who avoided committal by successfully appealing the order of imprisonment to the Circuit Court said that she **"was very depressed as [she] had three young children and was expecting [her] fourth."**

It was pointed out on behalf of a further debtor that **"much of this remains unclear due to his health problems"** with **"the client aware the process has not been completed yet."** The implication here is that the cumulative effect of the ongoing stress and anxiety associated with legal proceedings and over-indebtedness may take some time to become apparent.

Finally, not all the responses under this heading were entirely negative. One debtor who appeared in court in response to the application for an Instalment Order by a creditor described how he would **"feel more confident to defend himself and speak up"** in future. The creditor's application for an Instalment Order was refused and the judge adjourned the hearing and suggested that the parties reach an accommodation of their own.

5. Did going through this process affect other household members and if so how?

28 of the 38 gave a response to this question. Nearly half of these, or 12 out of the 28, replied that they attempted to keep knowledge of the proceedings from their children or partners or both. This was intended to shield them from the effects of it, sometimes not too successfully. One debtor explained **"(I) did not tell anyone and to date they do not know about it. I am embarrassed to tell them."**

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."**

Another **"admitted keeping a lot of things to himself. He was embarrassed at having got into difficulties. He got a 'bit of grief' when things became public knowledge. He felt stupid and his family's reaction reinforced this."**

A further debtor reported **"health problems – worsening of depression, increased anxiety – trying to keep the problem 'secret' from the children"** with another saying that **"the children were not aware of the problems as they were too young. I am sure that they were aware of tensions and stress that this process was causing."** Another **"kept all from the children – luckily it was not reported."**

For the remainder of the debtors, financial difficulties and the consequences of them were shared amongst the family, with predictable effects. 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."** Yet another, whose husband was unwell, reported how she **"felt nervous and stressed, with her husband afraid of his wife going to prison and not being there to care for him medically."**

The potential embarrassment of the situation was clearly evident from one debtor: **"My wife found it very difficult to deal with the situation and was very worried that our families and friends would hear about the debt. We live in a small area and would be extremely embarrassed."**

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."**

Collateral effects outside the immediate family circle can also be felt. One debtor said that **"[m]y son took it terribly bad. He was very distressed that it would affect his career. It also broke up his relationship with his girlfriend."**

Another described how it had affected **"not another household member, but my father. He was guarantor of the loan and received numerous letters and summons to court. He is an old age pensioner and he was very worried over the matter overall – it led to a lot of arguments between us,"** and another how **"his mother is also suffering from severe depression because of her son's debts."**

6. Your general views on the process of debt enforcement?

Thirty-one of the 38 answered this question. As might be expected from people upon whom this form of debt enforcement had impacted adversely, the responses are broadly critical of the procedure.

One debtor succinctly described debt enforcement as **"too laborious, too costly, too stressful, and ridiculous to still owe money after imprisonment."** There may be many creditors who would echo these sentiments, apart perhaps from the last point.

The futility of sending a debtor to prison was emphasised by a number, with one saying that **"I will never understand why it solved the debt for me to be sent to prison"** and another that **"I don't see the point in sending someone to jail because you don't obey (the) judge's order. If able to obey (it) you would."**

The following candid contribution expresses well the perception that there are double

standards in the legal system that work against the interests of ordinary people who have no opportunity to limit their liability:

> **While a lot of it may have been my own fault not sticking to the agreements, I still don't agree with being put in jail for non-payment of debts, particularly as the money is still owed when you come out. It is very terrifying to be threatened by jail when you know you are not a criminal yourself. I never said I didn't owe the money, there was nothing illegal in what I was doing, it was more bad management of finances. It annoys me that my ex-employer is back working again and I can't touch him. His company went bankrupt; he owes people money and will never have to pay it.**

Another debtor described the system as **"long, not easy to understand and unfair when you have very little money. I would never have gone to court to sort this out. The creditor would always win."**

Some were particularly unhappy about the tactics employed by certain debt collectors on behalf of creditors. It was claimed on behalf of one debtor that **"the agent used by the creditor to call re arrears and eventual repossession [of a vehicle] was aggressive, abusive and threatening. The information given by him was incorrect and misleading. The client feels that if she had dealt with the company directly at this stage, they could have solved the problem without resorting to repossession."**

Difficulties understanding legal documentation and sourcing assistance were mentioned by a number of debtors. One remarked that **"understandable documentation [should be] required. It should be written in everyday language. Attached should be information on agencies that can advise in such instances and help me read it."** On behalf of another, it was explained that **"it's very difficult to tackle without support. Client can't read or write but felt that even if he could, the language used in legal documentation is scary and confusing."**

Fear of appearing in public in the local District Court emerged again as a major disincentive to participating in the proceedings. On behalf of one debtor, one advisor explained 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 be in the paper."** Another said **"the public court is very frightening with no one with you to help you or explain things."** Yet another explained, **"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."**

Quite a number of debtors complained that their creditors resorted to legal action too easily and did not sufficiently explore other options. One remarked, **"creditors went legal very quickly. I felt they could have called me in to discuss my difficulties and to reschedule the loans. They were very interested in meeting me when I was looking for the loans and things were going well for me, but not available when I ran into difficulties."** Another said 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."** Yet another commented that **"I had a good record with all my creditors up to the time of my difficulties. Even though I spoke with all my creditors, some were very aggressive and quick to take the legal route."**

In the interests of balance, it is fair to say that the creditor's view of this question would be very different. Most creditors will routinely stress that numerous attempts are made to contact a client in arrears by post and telephone to no avail. Thus, having no contact from the indebted person to discuss how arrears will be dealt with, they would argue that they have no option but to force the matter by issuing legal proceedings. One debtor acknowledged that **"creditors are mostly fair in relation to the number of chances they give clients regarding repayments, but when it gets to the court stage I feel people who owe money are treated as criminals."**

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 in dealing with their problems, 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.'"** Another **"[c]ould not afford cost of solicitor to defend me and had nobody to turn to for advice."**

Attendance at court hearings will generally improve the debtor's chances of repaying by affordable instalments but there is no guarantee that a judge will always necessarily sympathise. One debtor who attended the instalment hearing described the process of debt enforcement as **"soul destroying – humiliating – we were not listened to by the creditor – we couldn't afford the Instalment Order of €100 and they wouldn't believe our income."**

7. Your suggestions for improvements to the system?

Thirty-three of the 38 debtors replied to this question. Many of the comments here overlapped with some of the issues already raised above. A few specific themes in terms of improvements to the system were dominant.

Seventeen (roughly half) of the 33 suggested that, broadly speaking, a lot more needed to be done to direct debtors to where they could obtain assistance to deal with their situation and that the legal documentation used needed to be much clearer.

A further 11 (one in three) suggested that, generally, a court and especially a public hearing was not the appropriate forum for what were private and potentially embarrassing matters to be resolved.

Five felt that creditors should be obliged to take more exhaustive steps to investigate the debtor's situation with a view to reaching agreement, prior to being allowed to bring legal proceedings against that debtor.

Finally, four suggested that imprisonment was not appropriate in debt cases and should be ended, with one specifically suggesting community service as an alternative.

A selection of the comments made under each of these headings follows.

Sources of assistance and clearer documentation

Contributions under this heading generally referred to either the lack of access to assistance to help debtors through the process or to difficulties understanding documentation and procedures, or in some cases both.

The contrasting approach taken by creditors depending on whether the debtor had the benefit of a money advisor working with him/her was pointed out in the following contribution:

> **Mediation facility such as MABS should be recommended as standard when people get into trouble. My wife and I found that the creditors would not negotiate with us even though we both tried. MABS was able to get us a better deal. For the business failure there was no assistance available.**

The importance of access to advice and assistance at an early stage was emphasised by a number of debtors. One suggested that clients **"be referred for help sooner – once I spoke to MABS, the fear was not so great."** Another **"felt that if more information was given to creditor, it may not have got to this stage."**

Another suggested that **"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."**

Yet another felt that **"the process should make clear at an early stage what you could pay on your income, not what the creditor claims." A further comment was that "I did not receive the Summons for the attendance of the debtor, but feel that if one is being sent, it should advise the debtor to seek advice from MABS or a solicitor."**

Some felt that there should be greater involvement of the legal profession in helping debtors to resolve their difficulties. One said that **"in cases where people have an inability to pay, there should be a referral system within the legal profession to refer to outside agencies to help the client/debtor."**

Another felt 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."**

Another debtor, who served a term in prison, simply expressed the view that **"there should be free legal aid for anyone in my situation."**

The last three contributions complement each other well. The first suggests that lawyers acting for creditors might also be appropriate sources for the referral of clients to money advisors for assistance. The second suggests that money advice should be complemented by other services such as civil legal aid when it comes to informing a debtor of the various stages of legal procedures and especially to present a coherent picture of repayment capacity to a court. The final comment is perhaps the most telling of all. Free legal aid is available in Ireland for a person accused of a criminal offence that does not have the means to afford his/her own solicitor. Yet, a person served with a Committal Summons, having failed to meet the terms of an Instalment Order, is not directed to

apply for legal aid either from a solicitor who is part of the Criminal Legal Aid panel or from a Law Centre that is part of the civil legal aid system run by the Legal Aid Board. The debtor falls between two stools, frequently does not appear at vital hearings – as this study will demonstrate – and goes to jail without ever having appeared before a court.

In relation to court documentation, a number of debtors simply asked for it 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."**

Public hearing in court

The obligation to appear in open court to give an account of their situation evoked a strong reaction from a number of debtors, some suggesting that such hearings should not be in public and others that a court was an inappropriate place to deal with debt enforcement cases.

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"** and another that **"court proceedings should be in private to give a person an opportunity to outline their situation."**

Another asked for **"a more private hearing in court. The court should understand how frightening it is and how hopeless things seem when you can't pay."** Yet another stated that **"the whole court situation is too intimidating and perhaps someone like MABS could come along to the courthouse and meet in an office setting where no one would know all your business."**

Other debtors felt that an alternative type of forum would be more appropriate to resolve these issues. One commented 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."**

A further debtor observed that **"talking out and mediating a solution is a better way. A person's individual circumstances need to be considered, ideally in a non-court situation."**

Another argued for an **"Independent Arbitrator attached to the court system, but not in open court, where both creditor and debtor could put their side of the story."**

These comments generally acknowledge that money is owed which the creditor is entitled to recover and also in one case suggest that more radical forms of enforcement may be necessary in particular cases. However, they also suggest that not only may an open civil court not be the appropriate place for this to happen; it may even make the process more difficult from not just the debtor's but also from the creditor's perspective. People might just be more willing to engage in the process if they were permitted to keep their financial affairs more private than the current system allows.

Pre-legal checks by creditors

Some debtors made suggestions under this heading as to what further steps should be taken by creditors before taking legal action. One suggested that **"creditors should be more pro-active when an account is in difficulty."**

Perhaps implicit in this is the suggestion that some creditors allow too great an amount of arrears to build up without contacting or warning the borrower and then bring legal proceedings without allowing sufficient time for arrangements for repayments to be made. Again, the creditor response to this observation may well be that you are damned if you do and damned if you don't. However, there are undoubtedly many cases where more prompt reminders of the fact of default to borrowers may lead to an earlier confronting and indeed resolution of the problem, whereas the larger the amount of the arrears that has built up, the more difficult it may be to both face and deal with financial difficulties.

Another debtor was quite definite in his 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."**

In effect, this contribution calls for a compulsory referral process by creditors to a recognised service like MABS prior to any right to bring legal proceedings for recovery of debt. This is what happens in some cases anyhow where the debtor seeks and gets advice early and it is often enough to reach informal agreements without the need for legal action to be taken. However, in many others, as this study again will demonstrate, assistance is only accessed by the debtor late in the day, with the creditor having persisted with what are sometimes quite pointless and fruitless debt collection tactics that are then followed by legal proceedings.

A further debtor echoed the above, saying 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 off to the court, and take into account the recommendations of income from MABS."**

Another simply said that a **"proper investigation should be done by the creditor as to the person's circumstances prior to issuing proceedings"** and another that **"every creditor should examine income and expenditure of its debtors so realistic repayment plans could be put in place."**

Finally, one debtor simply called for a bit more compassion suggesting that creditors **"[b]e a little bit more understanding to people who genuinely cannot pay."**.

Imprisonment as a sanction

This report has already made critical comments about imprisonment as a sanction in debt cases and an expression of astonishment that this can still happen in Ireland in 2009. It is hardly surprising, therefore, that in response to a question as to how the debt enforcement system in Ireland could be improved, a few debtors took the opportunity to suggest that imprisonment be ended. One simply 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."**

One debtor said that **"[i]f a prison sentence has to be served, then the debt should be regarded as cleared."** The logic of this comment is initially hard to refute, given that it is likely to be based on the notion that if the debtor has done the time and paid, so to speak, his/her debt to society, s/he should no longer have to repay the debt to the creditor. This is certainly how the criminal law views a term of imprisonment. A person allegedly commits an offence, is prosecuted by due process and if found guilty and convicted is punished and this serves as a deterrent against future possible offences. However, this disregards the basic fact that the debt is a matter of the law of contract and is owed to the creditor. The creditor has spent more money to attempt to recover what is owed, but has still got nothing, unless it can be said that the creditor got some satisfaction in seeing the debtor go to prison.

These contrasting perceptions are another good illustration of what is fundamentally flawed in this process. Essentially, the State, through a very old piece of legislation[38], is interfering in a private contractual arrangement between a provider of credit, goods or services and a customer by ultimately sanctioning the customer's incarceration if they do not make payment. And this in a country that has steadfastly refused to cap interest rates charged to consumers in credit agreements because it would constitute 'interfering in the market'. The official State view, of course, is that imprisonment in these cases is not as a result of non-payment of the debt, but for breach of the court's order. However, how many other pieces of legislation on the statute book directly interfere to this extent in what is essentially commerce and place the State very firmly on the side of the supplier by criminalising the customer?

In addition, the least one might expect is that such interference might pass an 'in the public interest' test. Perhaps in 1926 or even in 1940, this may have been the case. However, in 2009, it cannot seriously be argued that it is in the public interest to imprison people at the taxpayer's expense because they were unable to meet the terms of an Instalment Order and did not turn up in court to explain such failure.

> **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.**

The original debt to the creditor who brought the enforcement proceedings in this case was €1700. This debtor spent three months in an Irish prison at a direct cost to the taxpayer well in excess of €20,000.

38 Enforcement of Court Orders Acts 1926-1940.

2.3 Background information about the debtors, their dependants and debts at the time of legal proceedings (incorporating Parts One to Five of the questionnaire)

Introduction

This section of the questionnaire was designed to yield preliminary information about the individual profile of each person interviewed. Part One focuses on specific information relating to the debtor. Part Two sought out information about the household in which the debtor was living. Part Three concentrated on that household's overall financial circumstances including the reasons why arrears accumulated in the first place and it also contains a note on irresponsible lending. Part Four looked at the category of debt and the attitude of the debtor towards repayment. Finally, Part Five examined the debtor's awareness of services that were there to assist and the use of those services or otherwise.

Part One — Personal details about the debtor at the time of proceedings including marital status, nationality, labour force status, gender and age.

Table 2.1: **Marital status**

Married with children	19
Married without children	2
Single with children	5
Single without children	4
Separated with children	5
Separated without children	1
Widow(er) with children	1
Widow(er) without children	1

A very high number of debtors (30 out of 38, or 79%) had dependant children. This is significant in terms of the distress that a number of children may have had to suffer in terms of witnessing the effect of over-indebtedness and debt enforcement procedures on their parent(s). Persons who were at the time of the proceedings married or cohabiting form a slight majority of debtors at 55% and the vast majority of these (19 out of 21) had children living with them. A further five who had children were either separated or divorced and one person was separated but did not have children.

Single people made up nine out of 38 (or 24%) of those surveyed, four of whom did not have children. There was one widow with dependant children and one widower who had children but they were dependent upon him.

Nationality

The vast majority of debtors were Irish (35 out of 38 or 92%). There were two of European nationality and one non-European.

Gender

A majority of debtors were male (22 out of 38 or 58%) whilst 16 out of 38 or 42% were female. It is interesting to note that the proportions of this sub-group of MABS clients are in almost direct contrast to the proportions of MABS clients in general who are more likely to be women than men.[39] **This figure suggests that further research into the issue of gender in relation to over-indebtedness might be worthwhile.** These numbers may suggest that women are more likely to acknowledge and address a serious debt problem more readily than men, as this group of debtors is exclusively made up of persons who ended up facing legal proceedings and in some cases only contacted MABS at the eleventh hour. It would be interesting to explore whether this is indeed the case and if so the reasons for this.

Age

In terms of the following age categories, the number of debtors in each category was as follows:

Table 2.2: **Age**

Under 20 years	0
20-30 years	3
30-35 years	7
35-40 years	5
40-50 years	15
50-60 years	4
Over 60 years	3
No age provided	1

The average approximated to 43 years of age. It is sometimes speculated that many of the most indebted people in Irish society may be in a younger age bracket than this, having had less fettered access to credit and less experience of low incomes in their lifetimes so far. However, the participants in this research do not confirm this supposed trend. Research as yet unpublished indicates the average age of the head of over-indebted households in Ireland to be around 45 years, again similar to the findings of this survey.[40]

As will be seen below, an unforeseen change of circumstance – such as illness, accident, unemployment, small business failure or relationship break up – is cited as the most frequent cause of debt problems in these questionnaires. These are life events perhaps more associated with people in middle age than those who are either younger or indeed older and may go some way towards explaining the relatively high average age of respondents to the questionnaires.

39 According to a MABS press release dated 4 January 2007, over 60% of MABS clients in 2006 were female - see http://www.MABS.ie/Media/Stories2007_1.htm#2006_Stats (last accessed 15June 2009).

40 Based on an analysis of the 2001 ESRI Living in Ireland Survey conducted by Stuart Stamp for the purpose of currently unpublished PhD research at the Department of Social Studies, NUI Maynooth, Co.Kildare in 2007-2008.

Part Two Information about the debtor's household

This part looked for information concerning the profile of the household the debtor was residing in at the time the legal proceedings that resulted in debt enforcement were brought against him/her. It covered matters such as household size and composition, the location of the household, the type of accommodation, i.e. owner occupier, private or local authority rented and the respective incomes of the debtor and his/her partner where relevant.

Location

There was a total of 38 valid questionnaires returned from 29 different Money Advice Budgeting Services in a variety of locations throughout the country, from urban centres to large and small towns to rural locations in each of the provinces. **This dispersal helped to ensure that although this is not a scientifically selected sample, it is broadly representative of the MABS client base countrywide.**

Table 2.3: **Location**

Open country	11
Village	3
Town (1,500 - 2,999)	2
Town (3,000 - 4,999)	2
Town (5,000 - 9,999)	3
Town (10,000 or more)	5
Waterford City	1
Limerick City	1
Cork City	3
Greater Dublin	7
TOTAL	38

Main income source of debtor at the time of the proceedings

Table 2.4: **Income source**

Social Welfare	25
Waged	7
Self employed	4
Private pension	1
Farm assist	1
TOTAL	38

A further breakdown of the types of payments that the 25 social welfare recipients were receiving is as follows:

Table 2.5: **Type of Social Welfare**	
Unemployment Benefit or Assistance	**4**
Disability Allowance	**6**
Disability Benefit	**3**
Invalidity Pension	**2**
One parent family payment	**5**
Other [41]	**5**

A significant majority of debtors were unemployed or in receipt of some form of social welfare payment at the time the legal proceedings and subsequent debt enforcement proceedings were taken against them (25 out of 38 or approximately 66%).[42] In many cases this reflected a change in status caused by one of the common triggers of indebtedness – illness, unemployment, business failure and relationship break up – from a position where the individual's credit commitments were being satisfactorily handled. Almost half of the social welfare recipients (11 out of 25) were receiving a payment associated with an illness.

Nine of the 25 contacted MABS as a result of debt enforcement action being taken against them. In eight of these cases, an accommodation was reached by the money advisor with the creditor on the debtor's behalf taking into account the debtor's straitened financial circumstances. In the other case, a money advisor submitted a financial statement into the court on behalf of the debtor. The creditor told the debtor that as a result of the submission of the financial statement, it was not necessary to appear at the hearing but nonetheless proceeded to obtain an Instalment Order for an amount that the debtor could not afford.

The remaining 16 of the 25 in receipt of social welfare payments did not respond to or attend the examination of means hearing set to assess ability to repay by instalment. Some claimed never to have received the summons in the first place. Others claimed not to understand the documentation or to be too intimidated to attend, factors that are considered below.[43] **Instalment Orders were made in the debtor's absence in all of these cases**. If the debtor was not present, it must be asked whether the court knew that a social welfare payment was the debtor's sole or principal source of income, often reflecting a change in financial circumstances from the time the loan was made. If the court did not, then it was working with plainly incorrect information with which to make a realistic assessment of ability to repay. Thus it may be said that the order was doomed to failure from the outset.

It is illogical that Instalment Orders should be made with incomplete or inaccurate information as they are highly unlikely to be complied with and will often lead to further enforcement steps being taken. This is a waste of court time and the creditor's money and ultimately costs the taxpayer. It also fails to respect the fundamental human rights of the debtor, notwithstanding his/her failure to appear at the hearing.

41 These included supplementary welfare allowance and widow's or widower's pension.

42 Child benefit is **not** counted here as a social welfare payment.

43 See page 69 for further detail.

Income of household

Total net **household** income at the time of the proceedings varied considerably from one debtor to another. The lower amounts were earned by those who were single and lived alone or in one case a person who had moved back in with her parents after her relationship broke up. However, even in the case of the couples with dependants, many were largely or entirely dependent upon social welfare payments and so their income had become extremely limited at the time that they were sued by the creditor. The actual breakdown of net household income was as follows:

Table 2.6: **Income of household**	
Less than €200 per week	10 cases
€200 - €300	6 cases
€300 - €400	6 cases
€400 - €500	6 cases
€500 - €600	4 cases
€600 - €800	2 cases
Over €800	4 cases

Taking the income of **all members** of each household into account, the overall average net income **per household** was **€395.33**. Most of these interviews were carried out in the calendar year of 2006. By comparison, according to figures from the Central Statistics Office, the average gross industrial wage in the manufacturing industry in 2006 was **€624.45** for men and was **€451.12** for women.[44]

Debtor's accommodation

Table 2.7: **Accommodation type**	
Owner/purchaser with a mortgage	8
Owner/purchaser without a mortgage	2
Owner/purchaser local authority	1
Tenant/sub tenant – local authority	13
Tenant/sub tenant – private	11
Living with relatives	3
TOTAL	38

The majority of debtors, 24 out of 38 (or 63%), were in rented accommodation at the time of the legal proceedings against them. Of these 24, 13 were in local authority rented accommodation, a further 11 were in private rented accommodation. Three persons (8%) were living with relatives. Eleven debtors were owner purchasers, eight of whom had mortgages, two appeared to have completed their mortgage and one was involved in a tenant purchase scheme with a local authority. **Notably, 27 (or 71%) of the debtors did not own or were not in the course of buying their own homes**.

44 See the Central Statistics Office website, Labour Market and Earnings section, http://www.cso.ie/statistics/indearnings.htm (last accessed 15 June 2009).

Part Three Information about the financial circumstances of the household

This part attempted to get a picture of the overall financial circumstances of the household in question, in particular the number of existing debts and the outstanding arrears on them, the causes as to why the arrears arose and the impact that this was having on the household.

■ Multiple arrears

It has become increasingly common, especially over the last decade, for clients to present to the MABS service with a wide span of indebtedness from a variety of sources. This phenomenon reflects the increase in access to credit that many people have had in recent years. For example, it is not unusual for a person to be servicing a personal loan, a hire purchase car loan and one or more credit card agreements from their income simultaneously, in addition to accommodation and utility costs. In some instances, the number of the client's debts run into double figures and the picture becomes even more complex when a small business that is failing or has failed is part of the picture.

Over three-quarters of debtors (29 out of 38) reported that they were in multiple arrears at the time legal proceedings were brought against them. Multiple arrears was considered for the purposes of this study to mean at a minimum being in arrears with payments to two or more creditors at the same time.

■ Perceived reasons for arrears

In order to determine the reasons for the arrears occurring that gave rise to the legal proceedings against him/her, debtors were given a set of triggers and asked to tick which ones, if any, were appropriate in his/her case. The list in the questionnaire is very extensive and it is not proposed here for reasons of brevity to analyse every heading. Obviously, more than one box could be ticked here, as there may have been a complex set of factors that might have caused arrears on the particular debt and a general deterioration in financial circumstances to occur.

Of particular interest here are the common life event triggers that may cause a significant change in a borrower's personal financial circumstances. Debts triggered by ongoing low income and an over reliance or an excessive provision of credit are also examined in some detail under this heading.

Life events triggers

The triggers most commonly cited by debtors were life events outside his/her control which gave rise to a decrease in income and thereby affected capacity to repay. The most common external causes of indebtedness chosen in this study are as follows:

- **21 out of 38 mentioned illness as a reason** (including one case where the illness of the debtor's partner was cited) and this was the most common reason provided comprising 55% of those surveyed. In five of these cases, psychiatric illness was specifically mentioned although this heading was not specifically divided into physical or mental illness.

- **14 cited unemployment as a reason** and this constitutes 37% of the group.
- **12 cited business failure as the reason** for the arrears, comprising a further 31%. When placed beside the 14 people who cited unemployment as a reason, this gives a total of 68% of debtors whose fundamental means of making a living drastically altered to their detriment thereby worsening their repayment capacity.
- **6 gave relationship break up as a reason** for their arrears, comprising 16%.
- **5 cited an accident as a reason** for arrears, making up 13%.

A total 34 of 38 debtors (89%) mentioned one or more of these common triggers as the reason that arrears on the particular agreement or agreements occurred. Of these 34, 16 (or 47%) mentioned one reason, 12 (or 35%) mentioned two reasons and 6 (or 18%) mentioned three.

There were common combinations of these factors cited. In many cases illness or accident led to unemployment and in a few cases was accompanied by relationship break-up, although where the relationship break-up came in the chain of events varied. In one case, for example, the money advisor observed on behalf of a client that **"[p]artner and client split 3 weeks before wedding. Client had borrowed for wedding costs and car. She then became ill with breast cancer and was unable to work, thus debts were the 'last thing on her mind'."**

In other cases, illness was accompanied by business failure, although it is not apparent whether the former was responsible for the latter or *vice versa*. For example in one case the debtor said that **"during periods of ill health I fell behind with repayments and my business was not operating while I was off sick."**

The reasons that the debtor became unemployed, his/her business failed or relationship broke up were not enquired into, but it is suggested that this is beyond the capacity of this work and not especially relevant to the effectiveness of the procedures this study analyses. What is clear is that the significant majority of debtors suffered a change in their basic circumstances beyond their control that affected their ability to repay.

It is not being suggested here that the participants in this study were at all times paragons of virtue. There is a fair amount of evidence of human weakness in these interviews. Matters may not have been handled well in some cases. Problems of addiction or attitudes of indifference may have been the cause of unemployment or reduced income capacity in some instances. People certainly delayed getting help when it was needed and in many cases there is general evidence of a failure to engage with the creditor from the service of legal proceedings onwards. Others may have remained in business when it should have been clear that it would have been better to cut their losses. Still others may have been unsuited and unprepared to run their own business and would have been better off using their skills as employees.

Some may have over-borrowed when it was clear or should have been clear to them that they lacked the capacity to repay. Nonetheless, the following quote from one debtor sums up the dilemmas involved:

> We were struggling to survive on our farm income. We borrowed from family at times to pay household bills. The farm was too small to be financially viable. We were too proud to go for help and found it hard to admit defeat. We both worked on the farm, in a remote area and lived in a small town. It is a family farm so we did not want to sell up or sell a site.

Another debtor, according to the advisor who carried out the interview **"fell victim to various life events and tried to pay debts by borrowing more. In the end he had no disposable income at all."**

The recurring theme is that in the majority of cases, life events intervened to cause deterioration in financial capacity and therefore ability to repay. In debt settlement codes across many countries of the European Union, this is generally the condition for entry into a scheme of repayment that may involve write-offs of residual unsecured debt at the conclusion of a defined repayment period. Some commentators and legal scholars have in the past referred to this as *Social Force Majeure*.[45]

It is generally clear from these interviews that debtors did not deliberately set out to get themselves into financial difficulties nor did they deliberately decide not to repay their debts. Attempts in many cases were made to negotiate with creditors before the debtor sought help from MABS. Offers of payment were made in some cases but, in the main, these were rejected by the creditor and there may be understandable reasons for this. A creditor may find it difficult to accept at face value an offer of payment generally far below the payments agreed in the loan contract without a detailed financial statement justifying such a reduced payment. This is why the intervention of money advice and an objective and rigorous process for presenting the full and verifiable financial picture is critical to resolving these types of cases.

Access to finance triggers

A second and significant grouping of triggers of debt includes reasons related to the debtor's perception of their own financial position and availability of credit from financial service providers.

Low income

Approximately a quarter of debtors (9 out of 38) believed their own ongoing low income to be one of the triggers for the cause of their arrears. This is significant because although the vast majority (34 out of 38) cited at least one of the common debt triggers generally thought to be outside a person's control as a factor, a significant number also thought that a lack of an adequate income may have been an influence, even though their personal circumstances may also have deteriorated. Notwithstanding the very worthwhile debate about access to credit and financial exclusion that has taken place in Ireland in recent years, it is also important to remember that an insufficient basic income is a perennial problem and is often the principal factor that may cause a person to seek to borrow in the first place. Whether low income results from low pay or reliance upon social welfare payments, it is likely to remain a significant factor in cases of over-indebtedness.

45 *Force majeure* literally means 'greater force' and is sometimes used in contract law to release a party to a contract from carrying out his/her obligations because an event outside that person's control has occurred which prevents the fulfilment of that contract.

Availability of credit

There was very little indication that unavailability of affordable credit was a factor giving rise to financial difficulties in these particular interviews with just one of the 38 debtors mentioning it as a trigger. Access to affordable credit has justifiably become an important policy issue in the past decade, in particular as the reliance on credit as a means of acquiring consumer goods and services grew. Measures such as the European Union money laundering directives and the regulations that transpose them may have had a negative impact on access to bank account facilities, and for many on low incomes sources of credit are still limited and often very expensive. Recent research reports have explored these issues in some detail and these include *Do the Poor Pay More?*[46] and *Financial Exclusion in Ireland*.[47]

In relation to this particular study, however, only one person cited the unavailability of affordable credit as a cause of arrears; in this instance, a particular creditor would not provide any further credit when requested. The comparative lack of response on this trigger may be attributable to the fact that the vast majority of the debtors in the sample borrowed from mainstream creditors such as the associated banks, credit unions and finance houses at what they may have perceived to be market and therefore affordable interest rates.

Over-lending/Over-borrowing

As already noted, many money advisors report that the amount of indebtedness and the range of credit commitments that clients present with has been on the increase over the past decade, mirroring the substantial increases in the provision of credit in Irish society.

According to the statistics section of the Central Bank, in early 2005 the ratio of household indebtedness (of which 80% was lending for housing purposes) to disposable income in Ireland had increased from 48% in 1995 to 113% in September 2004. It was forecast that this "rapid accumulation of debt has increased the vulnerability of Irish households to fluctuations in income, especially those arising from job losses or higher interest rates, and may raise questions about borrower's ability to repay should economic circumstances change."[48] Now more than four years later, it is clear that the feared change in economic circumstances has occurred. As a result, questions about the ability of borrowers to repay have become more searching and debt related legal proceedings are on the increase.[49]

Table 2.8: **Over-lending / Over-borrowing**

	Over-lending by creditors	Over-borrowing by client	Both
Yes	8	14	6
No	30	24	32
Total	(38)	(38)	(38)

46 *Do the Poor Pay More?: A study of lone parents in debt*, Conroy, P. and O'Leary, H., One Parent Exchange Network, MABS & Society of St Vincent de Paul, May 2005.

47 *Financial Exclusion in Ireland – An Exploratory Study and Policy Review*, Corr, C., Combat Poverty Agency, 2006.

48 *Credit Card Debt in Ireland: Recent Trends*, Kelly, J. and Reilly, A., CBFSAI Quarterly Bulletin 1, 2005.

49 For example, Business Pro, owners of *Stubbs Gazette*, reported an increase of 30% to 40% in debt-related judgments in 2008 over 2007.

The questionnaire attempted to gauge the extent of this problem by including in the reason for arrears section both over-extension of credit by lenders and over-borrowing by debtors as triggers. Over-extension by lenders was cited as a reason for arrears in 8 out of 38 (or 21%) of the questionnaires and over-borrowing was mentioned by 14 debtors (37%). 6 of the 14 who cited over-borrowing as a reason also cited over-extension of credit indicating that they shared responsibility for the situation, leaving eight people who seemed to have accepted that they had over-borrowed but were not trying to directly apportion responsibility to their creditors for this. Thus, only two debtors blamed over-extension by creditors but did not accept that they had over-borrowed.

There is a difficult balance to be struck here. It is not that long ago that a person with a secure job and a good income had to get down on their hands and knees to get approval for a home loan at very high interest rates. Without a steady job or a reasonable income, there was no prospect of borrowing money at all. Easier access to credit undoubtedly contributed to recent economic activity and growth in Ireland and a better quality of life for many in terms of lifestyle choices. Nonetheless, if access to credit is too unfettered, the outcome may be persistent default in payment and the pursuit of a debtor through stressful legal proceedings. On a wider level, as has now become abundantly clear arising out of the sub-prime crisis, the undermining of financial markets and the withdrawal of credit facilities leads to economic instability and dramatic job losses.

Of course, this is not a case of one-way traffic. The borrower too bears a responsibility not to borrow what s/he clearly cannot afford to repay. However, generally speaking, the impact of the excessive provision of credit is far greater on the debtor and his/her dependants than the lender, who can pursue legal remedies as far as practicable and write off the rest as bad debts. In addition, the lender usually has reserves of business knowledge and experience, whereas the understanding brought by the borrower to matters of finance and financial products may be rudimentary compared to his/her desire to improve his/her lifestyle. For the over-indebted borrower who has obtained or been given too much credit, a personal crisis from which many dire consequences flow frequently occurs.

A note on irresponsible lending

Introduction

During the now receding period of economic prosperity in Ireland, it is commonly accepted that an irresponsible or reckless lending problem developed. However, it is only after the event that this is now admitted, even though many including FLAC had been pointing this out for some time. Although the various representative bodies for the credit industry generally continued to claim that prudent lending criteria were utilised at all times, it is certainly clear that in many instances there was insufficient credit checking and assessment of ability of consumers to repay before making a decision to lend, quite apart from the highly dubious and now toxic loans made to developers for the purposes of construction and property speculation.

Competition for market share is one explanation for this. If a provider felt that it would lose potential business by being too careful, prudence took a back seat. At branch level too, staff and management were under pressure to meet targets and the entry of new providers into the market may have exacerbated this. It is ironic how quickly the effects of the sub-prime crisis and the resulting credit crunch led to a more rigorous screening of applications in relation to consumer loans, especially in the area of mortgage credit. Indeed, it might be argued that having benefited from a boom in the provision of consumer credit, credit institutions now have a social responsibility not to be unduly cautious in their lending practices. This assumes that credit institutions have the funds available in the first place and at the time of writing, it remains to be seen whether the recapitalisation of the banks in Ireland will ease the liquidity crisis and open up much needed credit lines for both small business and consumers.

The lack of a comprehensive credit agreement database to which all lenders provide information and have access has also been of concern during this period. Most credit providers subscribe to the Irish Credit Bureau Ltd and therefore have access to information about a potential borrower's commitments that may help them to evaluate his/her creditworthiness.[50] However, not all do so: significant omissions currently include many credit unions and licensed moneylenders. A comprehensive national database complying fully with data protection laws where information is accurate and kept up to date should be an essential feature of a responsible credit market.

The 'Credit for Consumers' Directive and irresponsible lending

Unease about irresponsible or reckless lending is not necessarily confined to those advocating on behalf of consumers. Article 8 of the revised EU 'Credit for Consumers' Directive[51] provides that Member States shall ensure that a creditor assesses the creditworthiness of consumers for loans, both through information provided by the consumer and, where necessary, by consulting a relevant database. This is in order to establish a potential borrower's capacity to repay before concluding a credit agreement with that borrower. Member States are responsible for taking measures domestically to ensure compliance with this provision. To this end, Member States must also ensure that cross-border credit providers have access to the appropriate databases in order to facilitate such an assessment. Where an application is rejected on the basis of such a database consultation, the consumer will have to be informed immediately and given details of the relevant sources consulted.

These provisions are somewhat watered down from what was a stronger initial proposal in the first draft from the European Commission. Some Member States of the European Union already have their own safeguards in place. Belgium, for example, already provides for mandatory creditworthiness checks prior to the conclusion of the credit agreement and it is interesting that the Directive will specifically allow any such Member state to maintain their existing legislation in the area.

European groups working with those in debt and lobbying in the area of consumer credit have been critical of the degree of consumer protection in these and other provisions of the Directive. The European Coalition for Responsible Credit (ECRC), in

50 For a full list of members that subscribe to the Irish Credit Bureau, see http://www.icb.ie/ - Membership listing.

51 Council Directive 2008/48/EC of the European Parliament and Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 97/102/EEC. This Directive should lead to a fundamental review of the Consumer Credit Act 1995 in Ireland by June 2010.

an extract from one of its core principles, suggests that:

> credit markets need rules that allow the benefits of credit provision to flow to all people and not just to the more fortunate, whilst rules are also required to protect those who are most vulnerable to exploitative lending practices. This balance between providing access to credit, whilst preventing the worst excesses of an unbridled market, is central to the concept of responsible credit.[52]

National Credit Act – South Africa

Some countries have taken a bolder approach than has been the norm in Europe and attempted to tackle the irresponsible lending problem head-on. In South Africa, for example, the National Credit Act 2005 contains a specific chapter entitled 'Over-indebtedness and reckless credit'.[53] Firstly, it is worth noting that this legislation obliges applicant consumers to answer truthfully requests for information made by a credit provider for the purpose of a loan. In turn, it obliges credit providers to assess both the proposed consumer's general understanding and appreciation of the risks and costs of a proposed credit and his/her debt repayment history under credit agreements as well as his/her existing financial means, prospects and obligations. A court may declare a credit agreement to be reckless if the credit provider failed to conduct the necessary assessment or, having conducted it, entered into the credit agreement despite indications that the consumer either did not sufficiently appreciate the risks and costs involved or that the agreement would make him/her over-indebted as defined in the legislation.

Serious potential consequences follow for the credit provider if a court declares a loan to be reckless. The court can set aside all or part of the consumer's obligations under the loan agreement or suspend or restructure the agreement. Nonetheless, a credit provider has a complete defence to any allegation that a credit agreement is reckless if it can show that the consumer failed to answer fully and truthfully requests for information and that this materially affected the ability of the credit provider to make a proper assessment.

Consumer Protection Code - Ireland

The strength of these provisions that have full force of law in South Africa put comparable provisions in the Financial Regulator's Consumer Protection Code in Ireland in context.[54] In brief, this Code states that before providing a product or a service to a consumer, a regulated entity must gather and record sufficient information from the consumer to enable it to recommend or provide a product or service appropriate to that consumer. In turn, the entity must ensure that, having regard to the information disclosed by the consumer, any product or service provided is suitable for that consumer. These principles could be applied in an irresponsible lending setting and they are a great improvement on the previous position where no such protection was in place. However, the question of how the Code and these specific principles are enforced is critical. Whilst the Code does provide that entities must comply as a matter of law with the terms of the Code and that the Regulator may enforce the Code by way of an 'administrative sanctions' scheme, the track record of the Regulator in bringing enforcement and prosecution proceedings thus far does not inspire great confidence.

52 See http://www.responsible-credit.net/ under 'ECRC principles of Responsible Credit', last accessed 15/6/09.

53 National Credit Act No 34/2005, Part D, Sections 78 – 88.

54 Consumer Protection Code, Financial Regulator, August 2006.

Conclusion

Although this is unlikely to be a popular notion – even with many borrowers – as it could arguably lead to restrictions in the provision of credit, legislating for a defence of irresponsible lending in Ireland in a similar manner to South Africa would concentrate the collective mind of the credit industry when lending money in the future. We need only look at some of the arguably very dubious housing loans made by sub-prime lenders in recent years, some of which have culminated in the loss or repossession of family homes, to see what havoc reckless lending can cause.

Part Four Information about the debt the subject of the proceedings

Introduction

This part looked for detail about the specific debt that gave rise to the legal proceedings ending in this form of debt enforcement. There were of course a number of cases where more than one creditor had brought legal proceedings against a debtor. However, in order to avoid over-complicating the interview, it was felt necessary to focus on the creditor who had obtained a judgment and used the Instalment Order procedure to enforce it. Where more than one creditor had used this form of debt enforcement, it was left to the money advisor to select the case where the most amount of information was available from the debtor for the purposes of completing the questionnaire.

In passing, it should be said here that it is not unknown for a debtor to be subject to a number of Instalment Orders running concurrently, obtained on different dates in the same District Court. As it is very common for the debtor not to appear in the court in many of these cases, these orders may not necessarily take account of each other and therefore the prospects of compliance, already rare, becomes remote in the extreme. As noted in *An End based on Means,*[55] there is no database or any enforcement of judgments office in existence in Ireland providing information to creditors on existing judgments, enforcement applications and orders.

In summary, this section sought information on the type of credit provided, whether the fact of the debt was accepted by the debtor and what the debtor's attitude and position was in relation to repayment.

Type of credit

There were six different types of credit agreement that gave rise to legal proceedings and in turn six types of creditor. The breakdown of agreements and creditors was as follows:

55 For a discussion of the potential merits of an Enforcement of Judgments Office, see pages 79-80 and 82-83 of that report.

Table 2.9: **Types of agreement and creditors**	
Credit Union loan	14 cases
Bank loan [56]	12 cases
Hire Purchase agreement from Finance House	6 cases
Provider of goods or services	3 cases
Moneylending agreement from licensed moneylender	2 cases
Credit card agreement from credit card company	1 case
TOTAL	(38)

- ***Whether amount claimed by the creditor was owed***

Table 2.10: **Who owed the debt?**	
Owed by debtor in full	29
Owed by debtor and another in full	5
Owed by debtor and another in part	3
Not owed by the debtor at all	1
TOTAL	(38)

In the vast majority of cases, the debtor did not dispute the amount claimed by the creditor. A very sizeable majority (34) accepted that they alone or in conjunction with someone else (notwithstanding the principle of joint and several liability) owed the money in question. This is consistent with the great majority of MABS cases where inability rather than liability to repay is the essential issue. Of the remaining four debtors, three felt that they owed the debt only in part in conjunction with another person and one questioned whether the debt was owed at all.

However, it is significant that, ultimately, none of the four defended his/her position despite believing that there may have been grounds to do so, so that **none of the 38 claims against debtors was defended.** Fear of the unknown, a lack of knowledge as to how to go about defending in terms of procedures, a perceived lack of access to legal advice and representation and the prospect of the debt growing as a result of an award of costs may have been factors in making this decision.

- ***Whether amount claimed by the creditor was owed***

Table 2.11: **Client's attitude to repayment**	
Couldn't pay	24
Could pay, needed more time	14
Wouldn't pay	0
TOTAL	(38)

The debtors were asked about their attitude to repayment and given three basic options: Were they in a position where they:

56 This figure includes overdraft agreements.

- won't pay,
- can't pay, or
- can pay but needed more time?

Whilst it is accepted that this is very much a leading question and that people are unlikely to admit that their attitude was simply one of a lack of desire to pay, it is worth noting that, when faced with a judgment, there was not a single 'won't-pay' amongst the 38 debtors. Neither did anyone express moral or ethical objections to the cost of credit or fact of debt recovery by profitable institutions, although one debtor was adamant that he did not in fact owe the money sought by a provider of goods. Thereafter, the 'can't-pays' and the 'needed-more-time-to-pays' divided on a nearly two-to-one basis. Thus, 24 of the 38 interviewees believed that they were not in a position to pay.

This question was not further qualified by any time guideline but it is at least indicative that a majority of debtors may have believed their position to be comparatively helpless, at least in the short term. A further 14 believed they could pay if given more time, in essence the objective of the Instalment Order system. Again the question did not set a target time within which payment might be made, so that any finding here is qualified by that omission.

Any enforcement system at both the debt collection and legal system levels should make strenuous efforts to distinguish between a 'won't-pay 'and a 'can't-pay' situation in order to be effective. According to Dominy and Kempson:

> the majority of people who fall into arrears with credit or household commitments have every intention to pay on time, but simply lack the money to do so. These include: people on low incomes who face unexpected expenditure; people who have had a substantial fall in income leaving them unable to meet all their commitments; and people with mental health problems which impair their ability to manage their finances. These are the archetypal 'can't pays'.[57]

Dominy and Kempson go on to classify 'won't-pays' into a number of sub-categories. These include people withholding money on principle, ex-partners withholding payment, people 'ducking responsibility' and people 'working the system'. Those who are ducking responsibility are described as people who have spent freely, owe large sums in consumer credit, blame the credit companies for having lent them money and feel no responsibility for repaying the money they owe. In turn, people working the system are described as people who deliberately and routinely wait until late in the debt recovery cycle before paying just about all of their bills.

There does not appear to be a single such person in the sample of debtors in this study. Only one person came up with the full amount of arrears and costs on the Instalment Order at the committal summons hearing and that was borrowed from a relative. In turn, in two further cases, the arrest and imprisonment of the debtor was prevented. In the first, the debtor made payment through a combination of an exceptional needs payment from a Community Welfare Officer and a loan from a local credit union. In the second case, a promise to pay was made by the debtor on the basis of future damages

57 From the Executive Summary of *Can't Pay or Won't Pay – A review of creditor and debtor approaches to the non-payment of bills*, Dominy N. and Kempson E., Personal Finance Research Centre, University of Bristol, March 2003.

from a personal injuries claim. This is not to say that 'won't pays' do not exist in Ireland, but they are unlikely to last long as clients of MABS, once the extent of their comparative ability to pay but lack of willingness to do so is apparent.

Dominy and Kempson argue 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, whilst those who both won't and can't pay, such as those ducking responsibility, should only be pursued once their financial circumstances have improved:

> 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.[58]

The role of money advice is even more critical in the Irish context. The basic debt enforcement system in the UK is much more pro-active than in Ireland, with more opportunity for the defendant to make an offer of phased repayment and an adjudication of the suitability of that payment made behind closed doors by a court official.[59] Equally, in the case of multiple and chronic debt, there are both formal Consumer Bankruptcy and Individual Voluntary Arrangement (IVA) procedures available. In contrast, the debt enforcement system in Ireland will often proceed without any input from the debtor. Thus, without money advice and money advisors and in the absence of a solicitor acting for the debtor, how does a creditor find out about willingness to pay but inability to do so, unless they are to accept at face value what a debtor tells them?

The legalistic, adversarial and public hearing aspects of the Instalment Order system in Ireland all seem to militate against the debtor's participation. 'Ducking responsibility' is, if anything, accidentally encouraged by the 'default setting' nature of the process. Without law reform and freely available and vigorously promoted money and legal advice, this is unlikely to change. One simple example of the influence that money advice (or legal advice) can have is the turnaround in appearance rates at debt enforcement hearings when a person becomes a MABS client. When a money advisor explains to a client that in order to prevent an excessive Instalment Order being made, it is imperative that s/he appear and be examined at a public court hearing, that client generally will appear, despite the embarrassment.[60]

58 Ibid, page 4.

59 For a fuller treatment of this procedure, see *An End based on Means*, Section 8, pages 69 – 71.

60 See pages 68-69 for the results of these questionnaires in this respect.

Part Five Client's awareness of services open to them

This part of the questionnaire sought more detailed information in relation to the referral of the client for money advice. It also addressed the critical question as to when assistance was sought by the debtor, whether in the debtor's view there was a delay in looking for such assistance and, if so, what was the principal reason for the delay.

Sources of referral for money advice

Table 2.12: **Referrals**

Friends / Family	9 cases
Self-referred	5 cases
Solicitor	5 cases
Accountant	1 cases
Community Welfare Officer	4 cases
Social Welfare Office	3 cases
Other state organisations	2 cases
Creditors	3 cases
Voluntary groups	3 cases
Gardaí	2 cases
Media	1 cases
TOTAL	(38)

These responses reveal that a very wide variety of agencies were ultimately responsible for the referral of the client to MABS. Again, this is a small sample and so the discussion that follows here must be considered speculative.

Only five people (or 13%) sought money advice on their own initiative. This does not of course necessarily signal that the remainder were unaware of the existence of MABS, but it is worth asking why this figure is so low. A greater number, nine people (or 24%), were referred to MABS by friends or family, bringing to 14 (or 37%) the number of clients who could be said to have attended the service without it being suggested by some external source outside their own immediate circle.

The remaining 24 (or 63%) were referred to MABS by a variety of sources. Six were advised by professionals from whom the debtor sought assistance with their difficulties (in five cases a solicitor and in one case an accountant), seven from either a local Community Welfare Officer (four cases), who in all likelihood was already dealing with the debtor's application for emergency financial assistance, or a Social Welfare Office (three cases) who may have already been processing that person's social welfare payment.

There were two referrals from other state-funded entities, one each from a Citizens Information Service and a District Court Office. The scarcity of referrals from the District

Court is curious. One would expect that a person served with debt enforcement proceedings might think of contacting the relevant District Court Office for information at some point during the enforcement process and yet only one referral in total is from a court official to MABS, a state-funded service designed to assist people with financial problems.

One might also expect that a person served with debt enforcement proceedings and on a low income might also look to the State's civil legal aid services to assist them. However, of the five referrals to MABS by solicitors, only one was from a Legal Aid Board law centre, with just one other debtor mentioning that s/he had sought assistance from the Board in the first place. The Gardaí were responsible for two referrals, even though they generally only become involved in the process at the very end, when a Committal Order and a warrant to execute it is sent to the relevant Gárda station.

Creditors themselves were only responsible for three referrals of debtors to MABS and this is also a surprisingly low number. In a difficult case where the creditor is having no success in engaging with the debtor through their standard debt collection process, one might expect the creditor to encourage the debtor to seek independent advice in the hope that it would lead to a potential resolution of the problem. Finally, only one debtor heard of MABS via the media and, in this case, it was through a local radio station.

■ *Stage at which advice or assistance was sought*

There are various stages in the obtaining of a judgment in a consumer debt case and the enforcement of that judgment using the Instalment Order procedure.[61] One of the hypotheses this study attempts to test is whether early referral to a suitable person (whether it be for money advice or legal advice or both) leads to a speedier resolution of a person's financial problems.

Thus, the questionnaire asks debtors at what point they sought assistance in relation to their indebtedness and from whom. All were at some point clients of MABS and the responses here refer almost exclusively to the point at which money advice services were contacted, although some debtors did have access to other sources of advice and assistance, in some cases from private solicitors. This particular question caused some difficulties in terms of identifying the correct point at which contact was made. It was necessary therefore with this question (as with some others) to clarify with money advisors by subsequent telephone conversation the point at which contact was first made by the particular debtor. Thus, a slightly adapted list of contact points from the questionnaire and the numbers that sought assistance at that point is as follows:

61 See page 52 for further detail.

Table 2.13: **When assistance was sought by the debtor**	
Before arrears occurred	0
In arrears but before legal proceedings	2
After receiving initial summons re legal proceedings	3
After judgment granted but before enforcement action taken	2
After enforcement began but before Instalment Order granted	6
After Instalment Order granted but before Committal Order granted	10
After Committal Order granted but before imprisonment	11
After a term of imprisonment had been served	4
TOTAL	(38)

It is clear from this table that many debtors contacted MABS very late in the process. Specifically, 10 people (26%) only made contact at the point that arrears had accumulated on an Instalment Order and a Committal Summons was issued by the creditor seeking the arrest and imprisonment of the debtor. This is effectively the only chance left for the debtor to explain to the court why the terms of the Instalment Order have not been adhered to and to show that it was neither due to his or her wilful refusal or culpable neglect that arrears on the order occurred. Thus, although it is late in the day, it is at least not too late. A debtor properly prepared to give an account of their situation at the hearing, with a detailed financial statement outlining their total indebtedness and income and expenditure, stands a good chance of preventing the committal and having a variation of the Instalment Order substituted instead.

However, a further significant proportion of debtors (11 or 29%) did not contact MABS until they became aware that a Committal Order had been obtained and a warrant to execute that order was in process. This is a very significant finding as, in theory at least, it is then too late to do anything about the committal in the District Court, although a debtor has 14 days from the date of issue of the Committal Order to appeal to the Circuit Court and even when this period has expired, it is possible to apply for an extension.

Finally, four debtors did not make contact with MABS until after they had served a term of imprisonment. It comes as a surprise to many that the term of imprisonment does not purge the debt - instalments will have continued to run while the debtor was in prison and further arrears will have generally built up.[62] Thus, it may still be vital at this stage that some arrangement is made with regard to the debt, whether by informal arrangement with the creditor or by actually returning to the District Court to seek a variation of the Instalment Order. Otherwise, a further term of imprisonment may follow for the debtor. Of the 994 persons imprisoned for debt offences between January 2002 and September 2006, 94 were committed a second time.[63] In 2008, 276 persons were imprisoned for 306 debt offences, indicating that 30 persons went to jail twice in that year.[64]

62 For a full explanation of the relevant practice and procedure, see page 85.

63 From figures provided by the Irish Prison Service, October 2006.

64 Response to Parliamentary Question No 608 by Caoimhghin O'Caolain, T.D. for Written Answer, 27 January 2009.

Whether there was a delay and the main reason for it

Debtors were firstly asked under this heading whether they felt they had delayed in seeking advice or assistance. Where there had been a delay, they were asked what in their opinion the main reason was for it. Four specific options were provided for guidance with a residual 'Other' category where debtors could elaborate on any other reason of their choice. It is notable that despite only being asked for the main reason, a number took the opportunity to cite more than one reason for their delay in seeking assistance.

Of the 38, 33 (or 87%) felt that they had delayed in seeking assistance and five (or 13%) felt they had not. Of the 33 people who had delayed, 20 people offered one reason for the delay and 13 offered two reasons each. The options and the numbers that cited them are as follows:

Table 2.14: **Reasons for delay**

Lack of awareness of services	19
Fear of being judged	8
Felt I could sort it out on my own	5
Potential cost	0
Other	14

Lack of awareness of the services that were there to help

By far the largest specific reason given for delay was lack of awareness of the services that were there to help. 19 of the 33 (or 58%) cited this as a reason for delay in seeking assistance.

This finding has clear implications for State services designed to provide advice and assistance to people in relation to both legal and financial difficulties. Only one specific referral to MABS came from a Legal Aid Board Law Centre and there are only two mentions of the state's civil legal aid services in the questionnaires. In many instances, there is a perception that civil legal aid provided by the Legal Aid Board is primarily a family law service and does not deal with debt matters, although there is nothing in the civil legal aid legislation to exclude such cases.

A mini-survey of money advisors who referred clients to legal aid services in 2005 revealed that in 3 out of 11 referrals, the potential applicant was told that legal aid was not available in debt enforcement cases.[65] A narrow application of the so-called 'merits test' for those applying for legal aid may be one of the reasons for the lack of representation in debt cases. In other words, if an applicant for legal aid accepts that the money sought by the creditor is owed, there may be no legal merit in defending that person's position. An alternative interpretation of this test, involving an assessment of the public interest in ensuring that a debtor who is genuinely unable to pay does not risk committal to prison, would be welcome.

It must also be pointed out that the Legal Aid Board provides legal advice as well as legal representation in court proceedings and the Board itself accepts that there is no impediment to legal advice being provided in debt cases, subject to the applicant

65 Conducted by MABSndl at the suggestion of FLAC in June 2005.

passing the means test.[66] This can extend not just to oral but also to written advice on the application of the law and the steps that a person might take having regard to its application. In addition, the applicant can be assisted to take such steps short of issuing or defending legal proceedings. This allows the Legal Aid Board to explain the law and the sequence of legal proceedings in debt and debt enforcement cases and even to liaise with creditors in relation to a person's indebtedness, without having to necessarily represent that client in legal proceedings. Having provided that initial legal advice, the Board can also act as a source of referral to money advisors who will in turn examine the debtor's financial circumstances and assess his/her ability to repay. Given that law centres and money advice services (not to mention citizens information services) can often be found within a short radius of each other in many towns in Ireland, it makes sense to adopt a joined-up approach to helping those in greatest need.

This finding in relation to a lack of awareness of services also has implications for MABS, the Citizens Information Board and the Department of Social and Family Affairs that fund and administer the provision of money advice and for the State generally.[67] Since a decision has been made on behalf of the taxpayer to fund a service assisting those with problems of over-indebtedness from the public purse (to the tune of €17.975 million in 2008), it should be incumbent on the State to sufficiently invest in promoting and publicising that service so that people are aware of where assistance can be obtained before a crisis point is reached. On the basis of the evidence here from what admittedly is a small sample, it is not clear that the profile of MABS was sufficiently high at the relevant time to ensure that money advice was sought early in the case of a number of debtors. Given the scale of the financial problems that many continued to face in Ireland through the so-called economic boom and now that the position has undoubtedly worsened, it is particularly remiss if people who are over-indebted are missing out on access to money advice because of a lack of knowledge of the services available.

Quite apart from the financial accommodations that money advisors may successfully negotiate on behalf of clients with creditors, there is also some tangible evidence of the beneficial psychological effects that engaging with a money advisor may have for the client. These may range from realising that the odds are not entirely stacked against you (as one debtor put it, **"MABS and CIC (Citizens Information Centres) are human – the rest of them are stiffs in suits – they don't care"**) to seeing some light at the end of the tunnel (**"MABS gave me hope that my financial difficulties could be sorted. I felt great relief after visiting the Advisor. I was very unwell and not able to cope on my own"**). The feeling of actually being believed by someone (it seems for a change) is well captured by the comment, **"[t]he MABS officer made me feel honourable and I felt at all times that he believed me and I always felt he treated me with dignity and respect."**

A money advisor may also be able to help increase a person's disposable income. It is sometimes assumed that people on low incomes or in financial difficulty are fully aware of the financial supports they may be entitled to from the State. However, as benefit take-up surveys have demonstrated, people who are legitimately entitled to social welfare or other assistance payments may not always claim them.[68] The money advice

66 For fuller discussion of the Board's view of debt in legal aid cases, see Section 3, page 124.

67 The budget of October 2008, as part of the rationalisation of State agencies, provided that MABS and the provision of money advice becomes a function of the Citizens Information Board. At the time of writing, there is as yet no firm detail of what this will entail in terms of structural changes to the provision of the service.

68 Benefit take-up survey involves a structured assessment of the extent to which households entitled to social welfare payments are aware of their entitlement and avail of it. For example, a small scale benefit take up survey of 103 households conducted by FLAC in the early 1990s in the Clondalkin area of Dublin revealed that 74% of heads of household were already in receipt of Social Welfare payments, yet 85% of households may not have been claiming all benefits that they may have been entitled to, in particular exceptional needs payments under the Supplementary Welfare Allowance scheme.

process, by finding ways to maximise income, may help to relieve the burden of debt. 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.

Fear of being judged

Eight debtors (or 21%) cited fear of being judged as a reason for delay in seeking assistance and this is not uncommon in personal debt situations. The fear and sense of failure many people feel when they are over-indebted is easily underestimated. One debtor simply commented, **"[I] was too afraid to discuss the matter. Felt too ashamed."** Taking that step of seeking help and admitting to others that there is a problem can require time and courage. It also bears repeating that a person with serious financial problems is often not without other personal difficulties, some as a result of debt and at times the cause of it. Although there are some whose indebtedness does not appear, at least on the surface, to unduly bother them, the stigma felt by many others in debt is not helped by a perception that the legal system is there to punish rather than to understand and rehabilitate. Outdated debt enforcement procedures reinforce this perception.

Felt I could sort the matter out on my own

Five debtors (or 13%) felt that they could sort the matter out on their own. Reasons were not requested here but in one case, it involved a combination of not realising the seriousness of the situation and a belief that the creditor concerned would accept their difficulty and reach an accommodation with them. As this debtor put it:

> My understanding was that when I received letters about this debt that if I started paying something it was then ok, so I never really looked or understood the content of the letters. It was only when I sent a payment and they returned it and said they couldn't accept it, that it was in the hands of the courts and the Gardaí and that it all had to be paid that I realised it was so serious.

Implicit in this quotation is that the creditor (or creditor's representative) not only tolerated partial payment and then 'moved the goalposts', but may have compounded this by failing to suggest that the debtor seek money advice and legal assistance. Not for the first time in this report, it should be pointed out that creditors in general may be naturally disinclined to take the word of the debtor at face value in relation to his/her financial circumstances. However, the intervention of a money advisor or other advocate such as a solicitor often alters this. There are instances in these interviews where the debtor made an offer of phased repayment in their own right which was refused, only for the same offer to be accepted at a later stage when based on a financial statement prepared by a money advisor.

Other reasons

Fourteen debtors cited the 'Other' category and a wide array of explanations were provided here, many overlapping with the specific options discussed above. Two specifically mentioned ill health as the reason for not seeking assistance and one cited

separation. Others said respectively: **"I denied the seriousness of the situation", "I thought nothing could be done"** and **"I was overwhelmed with debt."**

In general, the tone of these comments indicated an inability to cope with the situation and a lack of knowledge as to what could be done to change matters, in some instances even to the point of making a bad situation worse. As one debtor put it, **"I felt that by the time everything went wrong, it was too late to do anything about it. I buried my head in the sand. I kept borrowing more money to pay loans."**

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.**

This quote sums up well the plight of many indebted people in terms of both the panic brought on by financial problems and the belief that the approach of the creditor and the State will be to punish rather than to rehabilitate.

2.4 Information about the extent of the debtor's participation and the outcome of the various stages of the legal process (incorporating Part Six of the questionnaire)

■ Introduction

Part Six of the questionnaire was the most detailed section. It sought to focus on a stage-by-stage analysis of the legal proceedings brought against debtors in the order in which they are pursued. Thus, it examines participation of debtors at each stage of the legal process and their understanding of the procedures and documentation being used. It also attempts to gauge the debtor's awareness of their right to look for a variation of an Instalment Order at any time as well as their right to appeal a Committal Order to the Circuit Court.

In order of occurrence, the potential stages in this debt enforcement procedure are:

1. **Creditor obtaining a judgment**
2. **Notification of the judgment to the debtor**
3. **Examination of the debtor's means to make an Instalment Order**
4. **Service and payment of the Instalment Order**
5. **Seeking a variation of the Instalment Order**
6. **Issuing of summons for committal to prison for failure to pay instalments**
7. **Service and execution of the Committal Order**
8. **Imprisonment of the debtor**

Before setting out the data and findings in relation to each specific stage of the enforcement procedure from the questionnaires, how each stage of the procedure is supposed to function is outlined. Perceived deficiencies in the operation of these procedures, particularly from the indebted person's viewpoint, are also identified. These observations are based on over a decade's experience from FLAC's perspective of working with MABS in terms of providing advice and assistance to advisors to help their clients who are the subject of legal proceedings.

Finally, by way of introduction, the table below provides an overview and summary of the outcome of the 38 cases in terms of the debt enforcement process. It sets out the number of cases that were resolved at each particular stage and the influence of money advice on their resolution, as well as the number of cases that ultimately resulted in a committal being ordered and those that actually resulted in a term of imprisonment being served.

Table 2.15: **General Summary of the outcome of debt enforcement**

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 of order	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

Stage 1- Creditor obtaining a judgment

Steps in obtaining a judgment

Introduction

The debt collection practices of credit providers vary widely. While many have their own specific debt collection or credit control departments, they may still instruct debt collection agencies to act on their behalf and the approach of these agencies may vary enormously. It should be noted that these agencies are not subject to specific regulation by the State in the same manner as, for example, credit intermediaries or mortgage brokers. There is certainly a case to be made for a licensing system to be introduced. It should ensure that debt collection agencies adhere to minimum standards of conduct and provide clear and accurate information to debtors.

Many creditors are not in any hurry to sue. Numerous contacts in the form of letters, phone calls, texts or e-mails are generally made to the debtor looking for payment. Whether this is the best way to engage with an apprehensive debtor is open to question. Ultimately, if no acceptable arrangement is reached for the repayment of arrears and outstanding instalments on a loan (or other sum of money owed), a creditor may then commence legal action against a debtor for the recovery of a so called 'liquidated' (or cash) sum.

In relation to credit agreements covered by Part V of the Consumer Credit Act 1995, a pre-requisite to bringing any form of claim is the service of a so-called '**default notice**' on the borrower under Section 54 of that Act. This notice must explain to the borrower how s/he has breached the agreement and what s/he needs to do to sort out the situation. Generally, the borrower is then entitled to 21 days grace to pay whatever arrears and penalties may have arisen. This rule applies to cash loans, credit sales, credit card agreements, moneylending agreements and hire purchase agreements entered into by borrowers in their capacity as consumers, i.e. when acting outside the course of their trade, business or profession. However, it does not apply where the debt arose from providing goods or services on credit where the purchaser then failed to pay for them.

Choice of Court

Depending on the amount claimed, the proceedings will generally be issued in:

- **The District Court** – where the amount claimed is €6350 or under. The legal document used to bring the action is called a **Civil Summons**. A variety of civil summonses are available to a plaintiff (i.e. the person suing, in this instance the creditor or person to whom the money is owed) depending on the type of case. These include claims for a cash (or liquidated) sum, such as a debt which is not covered by the Consumer Credit Act 1995, and claims for a cash sum that fall under the Consumer Credit Act. In relation to this last category, a further variety of summonses is provided according to the type of agreement that the creditor alleges has been breached, for example, a hire purchase, a credit sale or a credit agreement.

- **The Circuit Court** – where the amount claimed is €38,092 or under. The legal proceedings are brought by serving a **Civil Bill.** In cases where the creditor is seeking the recovery of land, such as where there has been a default in payments under a mortgage, the document is called an **Ejectment 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**).

The Courts and Courts Officers Act 2002, which proposes to alter the financial jurisdiction of the courts, still awaits the relevant Ministerial Commencement Order. If and when it is finally put into operation, it will raise the courts' maximum financial jurisdictions respectively to up to €20,000 in the case of the District Court; up to €100,000 in the case of the Circuit Court and over €100,000 in the case of the High Court.

Options for the borrower

These documents – the Civil Summons, Civil Bill and Summary Summons respectively – will contain details of the contract between the parties, the details of the default on the part of the defendant, 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 judgment involving payments by instalment by agreement with the creditor's solicitor. Otherwise a general consent to judgment can be signed which may then be followed by the issuing of an Instalment decree for summary judgment.[69] These consents are enforced by the solicitor for the creditor filing the appropriate affidavits (sworn statements) in the relevant District Court office.

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 'notice of intention to defend' must be entered. It is commonly suggested that there is no point in entering a defence where the debt is not disputed, as this may force a formal legal hearing to take place that requires evidence of the debt to be provided and legal argument to be prepared. This will increase the creditor's legal costs and therefore may ultimately increase the amount to be repaid by the debtor to the creditor if a judgment is granted against him or her.[70]

69 District Court Rules, Schedule C, Order 45, Rule 2(1) (c) No 45.8 and Schedule C, O.45 Rule.2(1), No 45.15

70 Some practitioners suggest 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 of the offer was unreasonable. Much would depend on the attitude of the individual judge to the debtor's predicament in this type of situation.

Where a hearing does take place and judgment 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'. The court can do this where it is satisfied that the person is:

- unable to discharge by an immediate payment in full the sum of money set out in the judgment and
- this inability is not caused by the person's own conduct, act or default and
- the court is satisfied that reasonable grounds exist to do so.[71] This stay of execution can include the making of an instalment decree whereby the debt is ordered to be paid in instalments.[72]

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. If there is no defence entered, there will be no hearing; 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.[73] Although this is explained in the court documents, it is somewhat lost in the body of the text and is explained in quite formal language. In the often pressurised circumstances of over-indebtedness, many people may not open registered letters, or if they do, may find the documentation difficult to understand and panic at the prospect of an appearance in court. These difficulties are compounded where there is little or no access to legal advice or information. Literacy and language problems can also play a significant part in limiting understanding.

Obtaining a judgment – Some perceived flaws

Legalistic language and documentation

Passages in the current Civil Summons document may cause both fear and confusion for a debtor. For example, take the following extract:

> If you do not act in accordance with (A), (B) or (C) above, you will be held to have admitted the claim and the Plaintiff may, without further notice to you, lodge an affidavit of debt in the District Court Office, obtain judgment and proceed to execution for the full amount claimed and costs.[74]

What is a '**Plaintiff**'? For all many people know, it could be some Government office that comes down on you like a ton of bricks, rather than the person bringing the action against you. It is also surely expecting too much of the average citizen to know what an '**affidavit of debt**' is? The phrase **'proceed to execution'** included here is likely to both intimidate and confuse a debtor, as it may carry connotations of confiscation or arrest and imprisonment.

Lack of access to legal advice and money advice

Many consumers and small business people in debt do not have access to legal or money advice when they are first sued, having failed to make repayments on loans and other credit commitments. Available figures from the Court Service Annual Reports on

71 Enforcement of Court Orders Acts, 1926-40, Section 21.

72 District Court Rules, Schedule C, O.46, Rule.7(2)., No.46.1

73 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 and if it is, which type of consumer credit agreement it is.

74 See sample document, Appendix Four, pages 206-207.

the number of summary (i.e. undefended) judgments granted in any year, coupled with anecdotal evidence from MABS and other sources, indicate that many consumers in debt cases in the District or Circuit Courts do not defend the claim when legal proceedings are brought against them by their creditors, resulting in judgments being obtained in the relevant court office in the person's absence.

The covering letter accompanying the summons from the creditor's solicitor usually suggests that the defendant contact his/her solicitor for advice. However, many will feel they cannot afford a solicitor to explain the consequences of the proceedings and what may lie ahead if they do not take a realistic attitude to dealing with their financial problems. Equally, the Legal Aid Board, the State's civil legal aid service, has played a negligible role in debt proceedings in recent years.[75] There is some anecdotal evidence that this may be changing a little, but it is difficult to be certain as the Legal Aid Board has not provided a specific figure for representation in debt cases in its Annual Reports of 2005, 2006 or 2007.

Consent to judgment and Instalment Decree

As noted above, one of the options provided on the Civil Summons is not to defend but to admit the claim and request time for payment. However, the summons goes on to explain that to exercise this option, the debtor should call to the office of the Plaintiff's solicitor within 10 days. This may be at least one of the factors that lead to this option being very rarely exercised in our experience.

In the case of debts not governed by the Consumer Credit Act 1995, (i.e. in general terms debts that do not result from consumer loans), consent to judgment and to payment by instalment can take place at one and the same time. In the case of agreements governed by the Consumer Credit Act 1995, i.e. the vast majority of consumer loans, the debtor may first consent to judgment being granted. An Instalment Decree may subsequently be issued separately where it is agreed that the debt will be repaid in instalments. If the debtor fails to pay, the entire amount then becomes due.

Apart from being too technical and beyond the understanding of many debtors, these consents to judgment and payment by instalment are entirely dependent upon the solicitor for the creditor agreeing to the instalment payment. There is an imbalance of power here that can clearly be exploited to insist upon a payment that the debtor cannot afford and which may subsequently result in a default and an application for committal. What seems to be missing here is an opportunity to **objectively** assess at an early stage the debtor's ability to repay, not what the creditor would like to receive.

Opportunity to defend

Two separate written notices of intention to defend must be served on the creditor or their solicitor and the relevant District Court clerk respectively.[76] These notices to defend are attached to the original summons, but in the absence of legal advice, it is not always clear to the defendant that the right to defend depends upon filling out these documents. Indeed, it has not been uncommon for a defendant in a debt case to turn up in the District Court, for example, on the return date on a Civil Summons (when either the case will be heard or a decision may be made as to when the case will be heard if it has been defended), ready to state their position, only to be told that they have failed to

75 For example, in 2003 the Board dealt with three debt cases and in 2004 with one debt case, according to its own Annual Reports.

76 District Court Rules, Schedule C, O.41, r.1 (1), No.41.1.

specifically enter notice of intention to defend as required on the summons and it is now too late to do so.

Stay of execution

A linked difficulty is that a defence must be entered for the 'stay of execution' option outlined above to be available where a judgment is given in the creditor's favour. Where no defence is entered there will be no hearing, so the court does not have the benefit of hearing from the debtor as to why a stay should be granted. It is ironic that a defendant must defend his/her position and run the risks of potentially increased legal costs just to have the right to ask the court to exercise its discretion to put in place a workable arrangement that might prevent subsequent enforcement steps having to be taken.

■ Questionnaire results in relation to obtaining a judgment

This part of the questionnaire asked debtors whether they recalled receiving the initial legal documents (or 'proceedings') and their understanding of what the documentation meant. The questions and responses are set out in the next table and then analysed in sequence below.

Table 2.16: **Initial proceedings**

	Yes	No	Total
Did debtor receive draft proceedings?	20	18	38
Did debtor understand it was a draft?	10	10	20
Did debtor remember receiving actual proceedings?	26	12	38
Did debtor understand the proceedings?	14	12	26
Did debtor understand his / her options?	6	20	26
Did debtor contact the creditor?	11	15	26
Did debtor defend the claim against him / her?	0	38	38

Draft proceedings

It was reported by some money advisors in the lead-up to this research being conducted that some of their clients had been initially receiving a **draft summons** from solicitors acting for a creditor, rather than an actual official court-stamped summons.[77] The effect of this is to add a further layer to what is already a multi-staged process. Presumably, the intention of this tactic – where it is used – is to impress upon the potential defendant what may happen if s/he does not engage in meaningful negotiations about repayment of the debt; a kind of a dress rehearsal for the real thing, without having to incur the costs of stamping the relevant documents in the courts.

A surprisingly large number of debtors in the sample, 20 out of 38 (53%) reported that they had received a draft summons in advance of the real thing. Note that the replies to this question should be treated warily, as there may be some amount of confusion amongst debtors about which summons is which. Nonetheless, at the very least it is evidence that this may be a practice amongst some solicitors acting for creditors. Why would a creditor and his/her legal representative wish to do this? As outlined above, it is likely to be an attempt to concentrate the mind of the borrower on repayment and has the added bonus of saving money in that no stamp duty will be paid on processing the

77 It should be noted that the word 'summons' is used at all times in this section, but if the initial proceedings were in the Circuit Court, the document initiating the proceedings would have been a 'Civil Bill' as opposed to a 'Civil Summons'.

draft document. As such, it is arguably an understandable tactic in the circumstances.

However, there is potential here for further confusion amongst already harassed and troubled debtors as to what exactly they are facing, in that many may not know the difference between the draft and the real thing. It is also worth pointing out that these letters are unlikely to suggest to the recipient that legal aid and/or money advice should be sought by the debtor, unlike in family law cases where solicitors are obliged to point out the availability of civil legal aid. The drawback, then, is the potential confusion that it may cause in the mind of the debtor who may already have more than enough to be concerned about.

The next question in this sequence then seeks to gauge whether debtors understood that the summons was a draft only. **Exactly half, or 10 out of the 20 who reported receiving a draft summons, understood it was a draft, suggesting that the remainder did not**. What were the ten who did not understand that the first summons was a draft then supposed to make of receiving the real summons? It would be interesting to hear the views of the Courts Service and indeed the Law Society in relation to this alleged practice. However, as a minimum, any solicitor serving a draft as opposed to an actual summons should be obliged to make it absolutely clear in any covering letter that this is a draft only. The draft summons itself should also underline this fact.

Actual proceedings

Over two-thirds of debtors recalled receiving the initial summons meaning that just under one-third claimed not to. The question was asked primarily to try to get an indication of the state of mind of the recipient when the summons was received. People with wide-ranging debt problems sometimes do not open registered correspondence for fear of what may be inside or having opened such letters do not realise or may not wish to realise their significance. This may be due to a combination of lack of knowledge of the system and a myriad of personal problems associated with over-indebtedness. Recall may also be affected by a person's mental state at the time the proceedings were served; this may be compounded if the debtor is under pressure from a number of other creditors and has received a number of warning letters and legal documents.

A further difficulty here is that the person may no longer be living at the address the solicitor for the creditor has on file. In these cases, it is not unknown for another person to sign for a registered letter but fail to pass it on to the person for whom it is intended. In one of the questionnaires for example, a debtor specifically explained that he had not received the respective summonses (though they had been signed for) as he had fallen out with his family and they had deliberately withheld the documentation from him. In total, 12 out of 38 (or 32%) claimed not to have received the original summons and this is a disturbingly high percentage.

Those who accepted that they received the documentation were then asked the extent to which they understood what they had received. **Nearly half of those who recalled receiving the initial summons (12 out of 26) claimed not to have understood it**. Thus, the responses of debtors to this question would appear to suggest these basic summonses need to be considerably simplified.

Understanding of options

A further and related question is the extent to which debtors, having received the initial proceedings, understood what their subsequent options were. Of the 26 who recalled receiving the summons, **over three-quarters (20 out of 26) claimed not to understand their options at this stage**. Although court documentation does broadly explain to defendants in debt cases what options are open to them, these are phrased in a language that is often inaccessible compared to, for example, their UK equivalents.

Although the Courts Service Information Office has in recent times produced some helpful guides, it is unclear whether these are aimed at a potential creditor or debtor and the language and terminology used may still be troublesome for many, especially under the anxiety and pressure of indebtedness. **When a person does not clearly understand their options, it is more likely that they will do nothing.**

One debtor was unhappy at both the documents and the difficulty in obtaining straightforward information, saying:

> **Documents were worded in legal jargon that I could not understand. On the occasions that I phoned to ask for explanations, I found that my options were not explained to me. For example, I had to ask a specific question to get an answer. No knowledge that Instalment Order could be varied.**

One debtor's comment on their position was blunt and to the point: **"No I didn't know my options and didn't think of the consequences. I couldn't afford to pay, that's all I knew and couldn't afford a solicitor."**

Another offered a fairly honest assessment of a borrower's position once legal proceedings are brought against him/her: **"Creditors** [i.e. lenders] **are mostly fair in relation to the number of chances they give clients regarding repayments, but when it gets to the court stage I feel people who owe money are treated as criminals."**

Another accepted that s/he understood – to an extent – the significance of the legal proceedings although that did not necessarily mean that action to deal with it was taken: **"It was just more letters looking for money though I knew court papers were serious."**

Contact with the creditor

A majority of debtors did not contact the creditor upon receipt of the initial summons. **For those who did and who then made offers of payment at this stage, they were almost all rejected.**

Of the 26 who accepted that they received the proceedings, 11 claimed to have subsequently contacted the creditor. Of these 11, 10 made offers of phased repayment. In nine of these 10 cases the offer was rejected. This is an interesting finding particularly in light of the option available at least in District Court cases to consent to judgment and payment by instalment. It seems that in these nine cases the creditor and/or the creditor's solicitor did not feel that this option was worth exercising or did not feel that the debtor was offering enough to make it worthwhile. Subsequently, in a number of these instances where the money advisor made a similar offer on the debtor's behalf, it was accepted by the creditor.

In the final case, the offer was rejected but only because the creditor wished the debtor to contact MABS in order to assess whether the offer was a realistic and affordable one based on income and expenditure, a much more realistic and sustainable approach.

In relation to the position taken by creditors, one debtor **"was surprised at the action as I was paying as best I could. They were not strangers to me. They knew I would pay eventually. I don't hold it against them. I know they have a boss to answer to as well."**

Some were less than impressed with the speed with which their creditors took legal action having been so eager to loan money in the first place, with one debtor commenting: **"Creditors went legal very quickly. I felt they could have called me in to discuss my difficulties and to reschedule the loans. They were very interested in meeting me when I was looking for the loans and things were going well for me but were not available when I ran into difficulties."**

Another debtor commented on the lack of willingness of his creditors to negotiate thus: **"My wife and I found that the creditors would not negotiate with us even though we both tried. MABS was able to get us a much better deal."**

Yet another expressed **"frustration at lengths creditors would go to collect debt when they know how desperate your situation is. Many creditors were local and would know of loss of home and health, yet prepared to send me to prison."**

Defence of claim

Ultimately not one of the debtors interviewed defended the claim against him/her (bearing in mind that 12 claimed never to have received the civil summons or bill in the first place)**.** In a few cases, debtors did not agree with the amount of the debt allegedly owed and in one case the debt was denied completely, but none ultimately made the decision to challenge it. Anecdotal evidence from MABS and FLAC's own experience suggests the participation of debtors in the initial legal proceedings is very low. Unless the defendant enters a notice of intention to defend in the case of a District Court case or an appearance followed by a formal written defence in the case of Circuit or High Court cases, there will be no hearing.

Why do so few enter a defence? Firstly, as noted above, many are not aware that a hearing does not automatically take place if they do not formally defend the case. Secondly, the perceived wisdom is that if you accept that you owe the money, there is not a lot of point in incurring the potential extra costs of a full court hearing to decide the issue. Thirdly, many ignore the matter entirely, hoping that it will somehow go away, or not having a clear enough grasp of what is happening.

Admittedly, 38 cases do not constitute proof of a general trend, but this finding confirms the general trend with clients of MABS. It is also the case that all 38 of these cases then progressed to the debt enforcement by instalment procedure; some spiralled the full way to the ultimate imprisonment of the debtor with many stopping just short of it. This happened despite the fact that the existence of the debt was not challenged by the debtor at this crucial initial stage in any instance.

Stage 2 – Creditor obtaining a judgment

Steps and some perceived flaws

Where the debtor has not defended the case and a sworn statement that the money is owed (called an affidavit of debt) has been filed in the relevant District Court office by the creditor's solicitor on behalf of the creditor, a decree issues to the creditor for the amount claimed plus prescribed costs and this is signed by a judge. No court hearing takes place.

There does not appear to be any formal requirement in District Court rules for the debtor to be served with a copy of the decree. However, clearly it makes sense from the creditor's perspective that this would be done, as it may prevent the need to take enforcement steps against a debtor who may be in a position to make acceptable repayments. Moreover, if the debtor is not notified of the fact of the judgment, it may come as a complete surprise to him/her some months later to be served with enforcement proceedings, especially if no defence was entered to the original claim. Many debtors in this situation may have forgotten that a claim has been brought against them, hoped or thought it had gone away or were unaware of its consequences in the first place.

Questionnaire results at notification of judgment stage

Questions in this part of the questionnaire attempted to gauge to what extent debtors were aware that a judgment had been obtained against them. It also attempted to assess the effectiveness of any negotiations between creditors and debtors that might have taken place between the granting of judgment and the beginning of enforcement.

Table 2.17: **Notification of judgment stage – 38 cases**

	Yes	No	Total
Did debtor receive a notification of judgment?	25	13	38
Did debtor understand the letter?	11	14	25
Did debtor understand his/her options?	4	21	25
Did debtor contact the creditor or solicitor?	10	15	25
Did debtor make an offer of payment after this contact?	8	2	10
Was the offer accepted by the creditor?	1	7	8
Was debtor aware of effect of judgment on credit rating?	12	13	25

Receipt of letter notifying judgment

One-third of debtors reported that they did not receive any letter notifying them that the creditor had obtained a judgment against them. Although it may seem self-evident that the debtor should receive such a letter from the creditor's solicitor, the figures here seem to support the conclusion that this does not always happen. While it makes perfect sense from the creditor's viewpoint to inform the debtor in the hope that this will be

enough to extract payment in full and avoid any further procedures in terms of debt enforcement, existing anecdotal evidence from money advice clients had indicated that this was not always done. It should also be borne in mind here that the debtor actually may have received the documentation and, because of his/her state of mind at the time, may have misunderstood it or not realised its significance or may simply have ignored it.

Failure to warn the debtor of the fact of judgment arguably makes the subsequent debt enforcement by instalment process even more of a surprise and mystery to him/her. By now it may be several months from the service of the original proceedings which the debtor did not defend; things might have appeared to have gone away since then. In this instance, the temptation is there to continue ignoring the issue.

Understanding of options

Those who had received notification were asked whether they understood the letter. It may seem like common sense that it would clearly explain what had occurred, and it would be hard not to understand at that point that a court had found that money was owed and must be paid to the creditor. Nonetheless, **14 out of the 25** claimed not to have properly understood what it meant. More tellingly, in response to the question as to whether the debtor understood his/her options, **21 out of 25 (84%)** answered in the negative. Again the absence of clear, user-friendly written information with details of where help can be obtained would seem to be a major contributory factor here.

Contact made with creditors

As in the case of the initial summons stage, where offers were made to creditors or their solicitor at this stage, they were overwhelmingly rejected.[78] Of the 25 debtors who received a notification of the judgment, 10 (or 40%) made contact with the creditor or the creditor's solicitor as a result. It may be suggested therefore that this means that each of these 10 understood fully what was happening, but it can equally be argued that the creditor would be the first person you would contact when uncertain about the point of the correspondence.

Of these 10, eight made offers of payment in the course of this contact. In one case, in which a money advisor was already assisting the debtor, the offer was accepted. In each of the remaining seven, the creditor rejected the offer. Only one of these seven debtors had the benefit of money advice at the time and although the offer of payment by instalment (made through the money advisor) was rejected, at a subsequent examination of means hearing the judge refused to make an Instalment Order in the creditor's favour and adjourned the application. An agreement was subsequently reached on a suitable instalment.

Effect on credit rating

It is said by many (including some money advisors) that people in debt are often most concerned about the effect that a judgment will have on their credit rating and that this is sometimes the greatest impetus for making arrangements to repay money that is owed. It is clear that many creditors also believe this to be true, as debt collection techniques often emphasise this consequence in calls and correspondence with debtors. Interestingly, concern about credit rating was not found to be as prominent an issue at this stage as might be imagined among this group of debtors.

78 See Page 60.

A supplementary question in this section attempted to test the awareness of debtors about the effect of judgments on credit rating and therefore, of course, subsequent access to credit. Twelve out of the 25 who received notification of judgment claimed awareness of this issue. This certainly indicates it is a prominent matter, but perhaps not to the extent imagined. It may be that credit rating is more likely to occupy the minds of younger borrowers, especially in terms of future access to mortgage credit.

Stage 3 Examination of the debtor's means to make an Instalment Order

Introduction

There are a variety of methods of enforcing a judgment against a debtor.[79] This study specifically focuses on the Instalment Order procedure, as it is increasingly used especially in the case of debtors who have no property against which, for example, a judgment mortgage might be registered or who have very little equity in a property. It provides a means by which regular payments may be made to the creditor backed by a court order, in theory until the debt is satisfied.

Creditors appear to increasingly prefer it as a method of debt enforcement to the seizure and resale of the debtor's goods by a Sheriff. A previous requirement to first attempt to enforce a judgment by the seizure of goods before an Instalment Order could be applied for was removed in 1986.[80] A Sheriff is only entitled to resell goods that actually belong to the debtor and cannot seize wearing apparel, bedding and tools of a person's trade. The current re-sale value of common second-hand goods such as televisions, computers, DVD players, sound systems and other consumer durables is now relatively poor. In addition, the Sheriff is entitled to deduct fees from the proceeds of sale for carrying out his/her duties, further reducing the return to the creditor. Sheriffs will sometimes make a 'no return' (or *nulla bona*) report to the relevant court, meaning that there are no or insufficient goods to seize and resell. In practice, therefore, where a debtor does not possess valuable personal property, it is often more sensible from the creditor's perspective to look for a periodical cash payment by instalment as the preferred method of enforcement.

However, the Instalment Order procedure is also the form of debt enforcement that may lead to imprisonment by default of any appearance by the debtor after a number of steps have been followed and an average of 200 people per year were imprisoned for so called debt offences from 2002 to 2007. It is notable that this figure increased to 276 in 2008 indicating that economic recession may be having an impact on both the number of applications for committal and a hardening of attitudes on the part of some creditors, especially in the latter half of the year when 170 imprisonments took place.[81]

Steps in the examination of the debtor's means

As a first step in this process, the creditor (regardless of whether the judgment was obtained in the District, Circuit or High Court) applies to the relevant District Court

79 See summary diagram, page 18 and Section 3, pages 21 – 27, *An End based on Means*, May 2003, Free Legal Advice Centres.

80 See Section 1 - Courts (No.2) Act 1986.

81 See the introductory chapter to this report – Page x.

office for the issue of a 'Summons for Attendance of Debtor' to have the debtor's financial circumstances examined in court.[82] The creditor must declare that the debt is due under a judgment and that the debtor ordinarily resides in the relevant District Court district where the summons is issued.[83] A copy of the summons must be served on the debtor, normally by registered post, at least 21 days in advance of the examination date. Both the original summons and a statutory declaration of service must be lodged with the court clerk four days before the examination date.

The creditor must also send a *statement of means* form with the summons.[84] In theory, the debtor should fill in this form and send it back to the Court at least one week before the hearing date set for the examination.[85] The statement of means form is a short document which allows the debtor to give to the court details of his/her income, expenses, liabilities and those for whom the debtor is 'legally or morally responsible', i.e. dependants. It is less detailed than financial statements generally used by money advisors in practice in their negotiations on behalf of clients with creditors. If the debtor attends the subsequent court sitting, which is in open court, it is open to the creditor's solicitor to question any information set out in the statement of means by cross-examining the debtor. The judge may also seek to clarify any of the information. The object of the process is to allow the judge to assess what a suitable instalment might be, based on the financial information revealed in the statement and at the hearing itself.

However, there is no legal obligation on a debtor to fill in this form and send it into the District Court clerk and many do not attend the subsequent hearing as it is not compulsory to do so. Nonetheless, the examination of the debtor's means will normally go ahead on the appointed day, regardless of whether this information is available to the court and regardless of whether the debtor turns up to give an account of his/her financial situation.

Once a decision is made on the appropriate instalment, an order is issued by the relevant District Court judge and normally served by registered post on the debtor by the creditor.[86] Set legal fees are added to the debt for the work involved in processing the application. The Instalment Order itself sets out the amount of the instalment and the intervals (generally monthly) by which the amounts must be paid.

■ Examination of the debtor's means – Some perceived flaws

Poor rates of response and attendance

The Annual Reports of the Courts Service do not provide a figure for the number or percentage of debtors who attend court in response to these summonses. However, the anecdotal evidence from money advice staff, court officials and legal practitioners is that few send in the statement of means form and turn up in court as requested. For example, unpublished assignment work carried out by two money advisors during their period of work experience in the Dublin Metropolitan District Court (as part of the University of Limerick Diploma in Community Development course) in 2004 records the appearance rates of two samples of debtors at such hearings.[87] In a 1995 sample, 14

82 Under Section 15 (1) of the Enforcement of Court Orders Act 1926 as substituted by the Section 1 (1) of the Courts (No 2) Act 1986. The particular form is prescribed by Schedule C, O.53, r.3 (1), No.53.1. of the District Court Rules – For a sample see Appendix Four, page 208.

83 District Court Rules, Schedule C, O.53,r.3 (1), No.53.2

84 See Appendix Four, page 209.

85 District Court Rules, Schedule C, O.53, r.4(1), No 53.3

86 District Court Rules, Schedule C, O.53, r.6(1), No 53.5

87 Brown, S. and Gavin, B. (2004).

out of 95 debtors (or 15%) attended the examination hearing. In a 2002 sample, only 6 of 98 (or 6%) attended.

On 24 and 25 July, 2008 two FLAC interns attended the sittings of the Dublin Metropolitan District Court dealing with applications for Instalment Orders and Committal Orders respectively and took notes of attendance figures.

On 24 July, there were 52 applications for Instalment Orders. Eleven debtors appeared in response to the examination of means summons and only two of these were legally represented. Only seven sent in the Statement of Means in advance of the hearing. A large number of cases were adjourned and a number were also struck out with only 14 orders being made in total.

The following day (25 July), 53 applications for committal to prison were due for hearing. Only three out of the 53 defendants appeared in response to the Committal Summons and two of these were legally represented. This is an extremely low figure given the possibility or indeed likelihood that an order for the debtor's imprisonment would follow at the hearing. Again a large number of cases were subsequently adjourned, a significant number were struck out and in total 16 Committal Orders were made.

The reasons for such a large number of adjournments and cases struck out on both days can only be speculated at. It is possible that these can be attributed to a combination of a lack of financial information being available to the court, ongoing payments being made on a voluntary basis through MABS, the debtor making full payment and the judge being reluctant (as he reportedly was) to make orders in the debtor's absence.

Why are attendance rates so low? The summons has an intimidating look for those unfamiliar with law and the courts. Arguably, it carries connotations of criminal sanctions suggested by the intimidating title of 'Summons for Attendance of Debtor' and the liberal use of unfamiliar words such as 'whereas' and phrases like 'you are hereby required'. A more straightforward form, written in plain English, with a booklet explaining the procedure, its consequences and the opportunities open to the debtor to explain his/her circumstances might improve the chances of the debtor attending.

Hearing in open court

As noted in the introduction, the hearing is also in open court and this puts off many debtors from attending, in particular in rural or provincial locations where it is possible that there will be people in court on the day known to the debtor. The prospect of having your finances discussed and analysed in public is an intimidating prospect for anyone, especially with no legal representation to defend your position, and it is quite common for such cases to be reported in local newspapers. The consequences of not being present, however, are potentially disastrous as in general an Instalment Order will be made on the unquestioned evidence of the creditor and their representative, unless the presiding judge chooses to adjourn. Although the judge may ask some cursory questions about an absent debtor's finances, there will frequently be no statement of means before the judge and there will often be several similar applications to be determined at the same sitting of the court. Lack of time therefore, especially where the

debtor does not attend the hearing and the creditor's representative is pressing for an order, may be a factor in the judge making an order that may not be appropriate to the debtor's financial circumstances.

Out of date information

With no attendance from the debtor, an instalment may be set with a very limited amount of information on the debtor's financial situation at the court's disposal. This information is likely in many cases to be out of date, as it is often based on the creditor's perceived knowledge of the debtor's finances at the time the loan was first applied for. As regards the debtors in this study, 34 out of 38 claimed to have suffered a deterioration in their financial circumstances caused by one or a combination of unemployment, illness or accident, small business failure or family break-up between the time the debt was incurred and the time they were sued.[88]

Multiplicity of debts and orders

The Court's knowledge of the debtor's indebtedness to a number of different sources is also likely to be very limited if s/he does not appear in court. Indeed, it is also not uncommon for two or more Instalment Orders to be in place against the same debtor at the same time, with the second or subsequent applications not having taken into account the first or previous Instalment Orders in terms of ability to pay, even though they may well have been ordered by the same court or even by the same judge.[89] The Court also has the power to order that the judgment be paid in its entirety in one instalment payment and this is known as an 'Instalment Forthwith'.[90]

Unrealistic orders

The cumulative effect of these factors is the likelihood of an unrealistic order being made beyond the means of the debtor to pay. Once an Instalment Order is made in the absence of the debtor, the slippery slope to a potential committal is well and truly begun. It is likely that the debtor will not have the means to comply with a prohibitive instalment and the next stage in the process will generally follow.

It simply does not make sense to make an Instalment Order in the debtor's absence, as default is far more likely than compliance in these circumstances. Even with the current system, littered with problems as it is, it would make far more sense to adjourn the hearing and allow the debtor a second chance to come forward in order to assess his/her means.

■ Results of the questionnaire in relation to the examination of means stage

Introduction

Of the 38 cases in the sample, two led to informal agreements being reached post-judgment and just prior to the creditor bringing any formal debt enforcement action seeking payment by instalment. **In both of these cases, the debtor had accessed a money advisor who assisted with the negotiations.** In both instances, the debtor had made an offer of instalment payment after the judgment had been granted which the creditor had refused. However, when a money advisor on behalf of the client made a broadly similar offer, it was accepted.

88 See page 36 for further detail.

89 One of the respondents to our questionnaire had a total of eight Instalment Orders made against him, many made by the same District Court.

90 Another respondent who did not attend the hearing had an Instalment Forthwith ordered against him in the amount of €3000.

One of the objectives of this study is to gauge the effectiveness of money advice as an intervention in debt cases where the legal process has begun. This initial example shows how effective it can be. The creditors involved accepted the bona fides of the money advisor and client concerned on the basis of verifiable financial information, reached an informal arrangement and unnecessary, time consuming and costly debt enforcement proceedings were avoided. **Settlements such as these support the contention that the earlier the reference to MABS is made, the better the likely outcome.**

As has been noted, many debtors do not respond to the examination and an Instalment Order is made in their absence. This may set off a chain of events whereby the instalment is unaffordable, a default occurs and further enforcement steps take place. Thus, the questionnaire sets out to gauge the response of debtors to the summons requesting attendance at the examination of means, seeking to explore issues such as whether the documentation was received and understood and to what extent the debtor then participated at this crucial juncture of the process that is designed to assess ability to pay on a phased basis.

Table 2.18: **Examination of means stage (36 cases)**

Documentation	Yes	No	Total
Did debtor remember receiving the examination?	25	11	36
Did debtor understand his/her options?	5	20	25
Did debtor send in details of means to court?	13	12	25 [91]

Settlements	Yes	No	Total
Number of cases informally settled prior to hearing	8	28	36
Where case settled, number who got money advice	8	0	8

Hearings	Yes	No	Total
Number of clients who attended the examination hearing	4	24	28
Number of Instalment Orders granted	27	1	28
Where order was not granted, number who got money advice	1	0	1
Where order granted, number who got money advice	2	25	27
Number who got money advice at this stage overall	11	25	36

Receipt of examination of means documentation

Again, as with the initial summons, a significant proportion of debtors (nearly one-third) did not recall receiving the examination of means documentation. Eleven out of 36 (or 31%) did not recall receiving this documentation. This is not to maintain that it was not received but the debtor did not recall it. It must be served on the debtor by registered post, so in theory it should not be hard to remember receiving it. However, again anecdotal evidence would suggest that documents are not always personally served on the debtor and/or subsequently received by him/her. Then again, many

91 Note that this figure only includes those who accepted that they received the Examination of Means Summons.

registered letters may be signed for but may remain unopened or may be destroyed. Thus, of the 11 who claimed not to have received the examination, it was clear that it had been served in some cases but the debtor's mental or physical health or general state of confusion persuaded them that it had not. In one case, the debtor insisted that such a document had never been served but the money advisor was able to show the client the document from the client's file.

One debtor specifically commented that he **"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."**

Another commented **"(I) saw no way out of situation, very down"** and another that **"I was in ill health anyway and the process certainly didn't make it easier."**

In a few instances, the debtor specifically indicated that the Examination of Means Summons must have been accepted by another person as s/he was no longer resident at the address in question. These replies must be taken at face value though there are some who would doubt this version of events, believing that this is a convenient excuse on the debtor's part. The knock-on effect of this is that the person who received the summons did not pass it on, so that the debtor was genuinely unaware of the hearing. In one particular case, the debtor indicated that due to family disputes, a number of summonses were deliberately withheld from him. In another case concerning a Committal Summons, it has been firmly established that a family member signed for the document but neglected to pass it on to the debtor (and was prepared to give evidence to this effect if necessary).[92] There are enough debtors in the survey claiming not to have received various court documents for this to cause concern.

Understanding of options

The vast majority of debtors did not know what to do about the examination of means. Of the 25 who remembered receiving the examination summons, 20 (or 80%) claimed not to understand the options open to them at this stage. This is a very similar figure to the 20 out of 26 who had the same answer to the same question in relation to the service of the original legal proceedings.[93] Given that the purpose of this stage is to set an instalment that the debtor will be obliged to pay for some time and which is supposed to be an assessment of ability to pay based on verifiable financial information, it is very worrying that the debtor's understanding of the process is so limited in this sample of cases.

Many of the comments in this area seem to indicate that the debtor's lack of understanding stemmed from a combination of two elements, namely the relative complexity of the legal documentation and the stressful situation of over-indebtedness that can cloud a person's judgement and ability to react and act appropriately. One debtor said that **"I didn't understand some of the language used but felt that I was inundated with documents, as I was receiving letters from solicitors and creditors."** Another expressed his **"fear, embarrassment, shame and lack of knowledge of the system"** but simultaneously accepted that **"(I) thought by ignoring it, it would go away."** Another quite simply said that **"Plain English is not used and my options were not clear."**

92 For further detail, see pages 79-80.

93 See page 58.

Response to examination to means

The key factors for participation in this critical stage of the procedure are that the person sends his/her financial details into the court and attends the subsequent hearing to determine an appropriate instalment. **A key finding of this study is that a significant majority of debtors did not send in their financial details to the court at the examination of means stage and did not attend the examination hearing to determine their capacity to pay by instalment unless they had sought help from MABS.**[94]

In total, 23 of the 36 surveyed (64%) did not respond in any way to the examination of means proceedings. Eleven of these 23 claimed never to have received the summons in the first place. The remaining 12 accepted that they received the summons but did not respond to it. **None of these 23 had the benefit of money advice at that point.**

This left 13 debtors who responded to the examination of means by sending details to the court and to the creditor's solicitor. Those cases proceeded as follows:

Settlements

Eight cases were settled here without the need for further court action. No hearing took place and a formal Instalment Order was not necessary as an agreement was reached between a money advisor on behalf of the client and the creditor on an affordable informal instalment.

In three of these eight cases, the creditor had already rejected a similar offer of payment from the debtor post-judgment, but accepted the offer when it was made by the money advisor based on a financial statement. In a fourth case, in a testament to the effectiveness of money advice, the client made an instalment offer post-judgment which the creditor in question refused, but not for the usual reasons. The creditor suggested that it would be in the client's interests to contact MABS and have a financial statement drawn up, in order to assess whether the offer that had been made was a realistic one which the client could afford and could maintain, a humane as well as a pragmatic attitude to the situation.[95] It is worth noting at this point that all eight of these debtors were social welfare recipients at the time.

Hearings

In the other five cases, Instalment Order hearings went ahead. In four of these five cases, the debtor attended at the hearing to determine an appropriate instalment. These cases worked out as follows:

- In the first, a money advisor had been assisting the debtor but agreement could not be reached with the creditor on an affordable instalment payment. Thus the hearing went ahead but the judge refused to make an Instalment Order and adjourned the matter encouraging the parties to agree on an appropriate payment for an informal instalment which they subsequently did.
- In the second, a formal Instalment Order was made by the Court on consent between the creditor and a money advisor working on behalf of the client.
- In the third and fourth cases, the debtors concerned had not contacted a money advisor but had sent in details of their financial circumstances in response to

94 Part 7 of the questionnaire explores in greater detail the reasons for non-appearance at court hearings. See pages 93-95 for more detail.

95 In the remaining four cases, no offers of payment had been made to the creditor prior to contacting MABS. In two of them, the debtors concerned claimed never to have received the original legal proceedings in relation to the debt so that no offer of payment could have been made after the judgment had been granted.

the examination and turned up at the hearing of their own volition. An Instalment Order was made by the judge on the basis of what s/he believed the debtor could afford to pay.

- In the final and fifth case where the debtor had responded to the examination, an Instalment Order was obtained for an amount over and above what the debtor could afford when, having received a financial statement from a money advisor on behalf of the debtor, the creditor's solicitor assured the debtor that there was no need to attend the hearing.

Access to money advice

It is worth directly contrasting the outcome for those who had a money advisor working with them on their financial difficulties at this stage with those who had not contacted a money advisor and were generally responding to enforcement proceedings alone.

Of the 11 debtors who accessed money advice, informal arrangements to repay were made in nine out of the 11 cases on the basis of negotiations around what the debtor could afford; in eight cases in advance of the hearing and in the ninth following a judge's refusal to grant an Instalment Order. One formal Instalment Order was agreed in advance of the hearing and in the final case an Instalment Order as explained above resulted from the creditor's solicitor discouraging the debtor from attending the hearing.

By contrast, of the 25 debtors who had not accessed money advice, no agreements were reached prior to the Instalment Order hearing in any of the cases. Eleven claimed never to have received the examination of means documentation in the first place. Only two of the remaining 14 sent in details of their finances to the court in advance and attended the subsequent hearing. **Instalment Orders were made in all 25 cases. However, in 23 of these 25, the Court only had the creditor and its representative present to assess the question of the debtor's ability to pay by instalment.** This in itself was almost a guarantee that default in Instalment Order payments would ensue, sooner rather than later.

It might be said in passing that attendance by the debtor does not always lead to an affordable arrangement being put in place. In one of the two cases where the debtor, without the benefit of money advice, sent in details of income and attended the hearing, a prohibitive Instalment Order was put in place with the judge refusing to believe that the debtor had as limited an income as he claimed. Whether he would have fared better had he had legal representation at the hearing or if financial information had been prepared by a money advisor for the hearing on his behalf is open to question.

Finally, it should be noted here that, in response to a question on this point, none of the 36 debtors borrowed to clear the debt at this point of the enforcement process.

It is clear from this section that in respect of the particular group of debtors in this study, early referral to MABS and intervention by a money advisor generally worked very well. On the other hand, those who did not have access to money advice spiralled on in the process. On this basis, the case for vigorous promotion of the money advice option at the earliest possible opportunity, reiterated at every stage of the proceedings is very strong.

Stage 4 Service and payment of the Instalment Order

Steps and some perceived flaws

At the examination of means hearing, an order is generally made for the payment of the debt in one or more instalments, with or without the debtor being present. This Instalment Order must be served by registered post on the debtor, so in theory there should be no difficulty recalling receiving it.[96] However, again anecdotal evidence would sometimes suggest that orders are not always personally served on and/or subsequently received by the debtor. Admittedly, it may also be the case that those who ignored it when it arrived may have difficulty recalling it at a later stage.

If the debtor does not attend the examination and an Instalment Order is made in their absence, it is especially important when the order is served that the debtor understands its effects and the consequences of not complying. At present there is no such explanation on the order and this is an astonishing omission given that an application for the debtor's arrest and imprisonment may follow if a default in payment occurs.

Results of the questionnaire – Service and payment of the Instalment Order stage

Instalment Orders were made in 27 of the 36 cases that proceeded to debt enforcement. The remaining nine cases settled with informal instalments at this point with the assistance of a money advisor; two cases had already settled through the intervention of MABS without formal debt enforcement proceedings needing to be issued.

Table 2.19: **Service and payment of Instalment Order stage**

Service	Yes	No	Total
Did debtor receive a copy of the Instalment Order?	18	9	27
Did debtor understand his/her options?	6	12	18
Did debtor understand this was a court order?	10	8	18
Did debtor ignore the order?	7	11	18

Payment	Yes	No	Total
Did debtor pay the Instalment Order in full?	1	26	27
Did debtor make part payment of Instalment Order?	11	15	26
Was part-payment accepted by the creditor?	4	7	11

One-third of the debtors in the study did not recall receiving a copy of the Instalment Order at this stage. Of the 27, nine (or 33%) claimed never to have received a copy of the order, even though again the creditor or representative is bound to serve it by registered post. However, the same reservations apply in relation to this finding as in other instances where it was claimed that documents were not received. The accuracy of the debtor's recall and the confused state of mind of the debtor may have contributed. However, whilst accepting that the responses here may be inaccurate or even

96 See Appendix Four for a sample order, page 210.

disingenuous in some cases, there is still enough suggestion of non-receipt by the debtor to cause concern.

Understanding of options

A significant majority of debtors (over two-thirds) did not know what steps to take at this stage. Of the 18 who recalled receiving a copy of the Instalment Order, 12 (or 67%) claimed not to understand what their options were from there. While this is still a high figure, it is lower than the corresponding answer to the same question at the previous stage.

Realisation that document was a court order

In turn, eight of the 18 (or 44%) claimed not to realise that this was a court order which they were obliged to comply with. Again, this may seem incredible to some but this response may reflect a lack of understanding of and engagement with the system thus far, as well as the fact that only two of the 27 subjects of the Instalment Orders had sought advice from a money advisor or legal advisor before the Order was made.

If this response is taken at face value, it means that almost half the debtors who accepted that they received the Instalment Order did not realise the potential consequences of not meeting payments under it. The fact that these debtors had not submitted any financial details to the court and had not appeared at the Instalment Order hearing to give an account of their situation may serve to explain why.

Response to the order

Seven of the 18 (or 39%) accepted that they ignored the order, only one less than the number who claimed not to have understood that it was a court order in the first place. There may be logic to this in that those who ignored it may also have been those who did not know it was a court order. On the other hand those who ignored the order may simply have felt the situation was hopeless and wished it would go away and did not know that it might result in their imprisonment.

Borrowing to repay debt

There is sometimes a view among those enforcing debts that with the onset of legal proceedings, debtors will find the means through borrowing to clear an outstanding debt. As with the last stage, none of the 18 debtors who recalled receiving the Instalment Order borrowed to pay off the debt at this point.

Payments made under the order

The Instalment Orders varied in amount from the lowest at €25 per month to two Instalment Orders 'forthwith' (i.e. in one payment) to the tune of €4200 and €6000 respectively. Eight of the orders fell within a €200 - €300 monthly band and this range was by far the most common Instalment Order sum. Given that the majority of debtors in general terms were social welfare recipients at the time the proceedings were brought against them (25 out of 38 or 66%), it is little wonder that sums of this magnitude proved very difficult if not impossible to pay. As we have also demonstrated, a substantial majority of the debtors in the study did not appear at the examination hearing, so it comes as no surprise that **only one of the 27 Instalment Orders continued to be paid in full. In 15 of the other 26 cases (or 56%) no payment was made at all while 11 of the orders (or 41%) resulted in part-payment.**

The order referred to above that was agreed by consent between the money advisor/client and the creditor was the only one that continued to be paid in full.[97] The debtor in this case had sought the assistance of a money advisor when the Examination of Means Summons was served. Details of the debtor's financial circumstances were sent into the court in advance of the hearing date and copied to the creditor concerned. On the basis of this material, the creditor and the debtor's money advisor were able to agree on the appropriate instalment amount ahead of the hearing date. Nonetheless, the creditor insisted on this instalment being rubber-stamped as an order of the relevant District Court, rather than remaining an informal agreement. From the creditor's point of view, the rationale here is that if there had been a default on an informal arrangement, no legal procedure would have been available to enforce it. However, once it is an order of the court, a Committal Summons seeking imprisonment could issue where payments are not being made.

Nonetheless, the order continued to be paid as agreed. This is likely to be because the amount to be paid was calculated taking the entire financial circumstances of the debtor into account on the basis of a recognised money advice process, where the creditor or creditor's solicitor had the opportunity to examine the financial position of the debtor. Thus, the chances of default in this kind of situation are reduced. In addition, if there is some deterioration in the debtor's financial circumstances, the position can be reviewed, especially as there is already a dialogue in place between the creditor and the money advisor and his/her client. The contrast between this case and the remainder of the Orders, where the instalment was unrealistic and led to a quick default, is stark. This is again a good example of the effectiveness of a negotiated settlement where both the creditor and the debtor are prepared to negotiate and have realistic expectations.

Settlements

Default in payment did not necessarily mean that each of the remaining 26 cases resulted in the next potential stage of the process – the issuing of a committal summonses for the arrest and imprisonment of the debtor.

In four of the 11 cases involving part-payment, money advisors had become involved on behalf of the client and presented financial evidence of inability to pay the instalment in full, after which the creditors concerned accepted the payments offered and took no further action. However, the threat of a Committal Summons being issued continued to hang over the heads of each of the debtors, because although the creditors accepted less than the full instalment amount for the time being, a formal court variation of the order was not sought by the debtor. Thus, in theory arrears on the order continued to accumulate and could have led to further action by the creditor concerned.

Thus, a total of 22 cases proceeded to the next stage: that is, 15 where no payment had been made by the debtor at all and seven where s/he had made a partial payment which the creditor did not accept as adequate to comply with the order.

97 See page 70 for further details.

Stage 5 Seeking a variation of the Instalment Order

Steps and perceived flaws

A District Court Judge has the power to vary the amount and/or the times at which instalments may be paid, on the application of either the debtor or creditor.[98] Although this option is open to both debtor and creditor, the creditor is less likely to use it and only when it is apparent that the debtor's financial circumstances have improved. Costs may be awarded to the creditor at the discretion of the judge. S/he also has the power to "direct that such variation order shall apply and have effect as from a specified date prior to the date thereof".[99] This is a useful provision from the debtor's point of view, as it appears to allow the variation to be retrospective to a time before the hearing of the variation application. In theory, there seems to be no reason why the variation could not even stretch back to the making of the original instalment order, in particular if the debtor did not respond to the examination of means form, did not appear at the examination hearing and was in a position to show that the instalment set was way beyond his/her capacity to pay.

In terms of the documentation required to initiate this procedure, whichever of the parties seeks the variation must issue the prescribed summons.[100] Again, a copy must be served by registered post on the debtor or creditor, as the case may be, at least 21 days before the date set for the hearing. The summons, the statutory declaration of service and the registered post slip must be lodged in the District Court Civil Office at least four days before the date fixed for a hearing. If the order is granted, a further document – 'Order Varying Instalment Order' – must be served on the other party, whether creditor or debtor, by registered post.[101]

The possibility for the debtor of seeking to vary the Instalment Order - especially retrospectively - is a potentially useful option, but it is questionable to what extent debtors are aware of it. Frequently, the judgment has been obtained without any defence been offered or any hearing taking place and it may be some time after the judgment is obtained that an examination of the debtor's means is sought. Although a note at the bottom of the Instalment Order served on the debtor states that the Court has the power to vary the instalment, that note is far from prominent and is written in language that the debtor may not find straightforward.[102]

Results of the questionnaire – Seeking a variation of the Instalment Order stage

Table 2.20: **Knowledge of variation procedure**

	Yes	No	Total
Did the debtor know a variation could be sought at any time?	1	21	22
Did debtor seek a variation of the order at any stage?	4	18	22
Did debtor get advice from MABS to seek variation?	4	0	4

98 Section 5 of the Enforcement of Court Orders Act 1940 as amended by Section 3 of the Courts (No 2) Act 1986.

99 Section 5 (2) (b).

100 Schedule C, O.53, r.7 (1), No 53.6. – see Appendix Four for a sample form, page 211.

101 See Appendix Four for a sample, page 212.

102 The exact wording of the note at the bottom of the Instalment Order reads as follows: "NOTE: The Court has the power to vary the terms of the above order relating to the manner in which the above debt and costs are to be paid by substituting payment by instalments for a single payment or by altering the amount or times at which instalments are to be paid. A party who requires such variation should consult a solicitor or the District Court Clerk."

There was a very low awareness that Instalment Orders could be varied among debtors in the study. Of the 22 who responded to this section, only one claimed to know independently that a variation of the Instalment Order could be sought at any time. In turn, of the 22, only four actually applied at any stage for a variation of the Instalment Order and each of these did so with the advice and assistance of MABS (this included the debtor who knew himself that a variation could be sought at any time).

One of these variations was applied for by the debtor during the course of an Instalment Order and two were granted in lieu of a committal where the creditor had applied for the arrest and imprisonment of the debtor for defaulting on an Instalment Order. The final variation was granted where the creditor in question sought a second committal in respect of non-payment of subsequent instalments on the same Instalment Order, the debtor having already served a term of imprisonment for arrears on previous instalments.

Although it is again important to emphasise that this is a small sample, the low level of awareness about the right to apply for a variation order indicates that the Instalment Order document itself does not adequately advertise it. It should be noted that this option only involves a right to **apply** for a variation and it is up to the sitting judge to decide on the basis of the financial evidence before him/her whether or not to grant it.

However, where the debtor has not appeared at the original hearing and an unaffordable Instalment Order has been made or where the debtor's financial situation has deteriorated since the making of the order, it makes sense to redress the situation as soon as possible.

No figures are provided in the Courts Service annual reports as to the number of variations of instalments sought in any particular year, let alone any details of how many such applications are successful and how many are sought by debtors and creditors respectively. Therefore it is difficult to know how often the option is utilised.[103] However, better awareness of the variation option should be a critical factor in the prevention of further and more damaging enforcement steps down the line.

Where the debtor has become a MABS client after going into arrears on the Instalment Order or has otherwise tried to get to grips with his/her financial difficulties, thereby demonstrating good faith, a retrospective variation based on verifiable financial information makes sense.

Even from the creditor's perspective, a variation of the order to an amount that is affordable for the debtor is more likely to result in a greater level of payment and less time wasting and costly administration. Thus, it is arguable that creditors and their legal representatives should also promote awareness of the variation option in their correspondence to the debtor.

103 See Page x for further detail of the general statistics provided by the Courts Service on these procedures.

Stage 6 Issuing of summons for committal to prison for failure to pay instalments

Steps in issuing a summons for committal

Where a debtor does not pay instalments due under an Instalment Order as required, s/he is considered to be in breach of that order and the creditor concerned may make an application seeking his/her committal to prison.[104] As explained in Section One of this report,[105] the State's view is that imprisonment takes place for failure to meet the terms of an Instalment Order and so the debtor is being jailed for contempt of court rather than inability to pay a debt. In theory, a person need only miss paying one instalment to trigger a right of action for the creditor but, in practice, a larger number of instalments may have been missed before any action is taken. The creditor must issue and serve another summons (called a 'Summons on application for arrest and imprisonment of debtor', or simply 'Committal Summons') on the debtor by registered post.[106] The Committal Summons and a declaration of service, together with the registered post receipt, must be filed in the District Court office at least four days before the date set for a hearing.

A District Court judge is empowered to order the imprisonment of the debtor for up to three months, but in practice, shorter sentences are generally imposed. The legislation provides as follows:

> The Justice shall not order the arrest and imprisonment of the debtor under the next preceding paragraph of this section if the debtor (if he appears) shows, to the satisfaction of such Justice, that his failure to pay was neither due to *his wilful refusal nor to his culpable neglect*.[107]

The question of who must show what is critical here. Despite the fact that it seems to have been envisaged in the legislation that the debtor might not respond to the summons (note the use of the words "if he appears") the onus is still on the debtor to establish that failure to pay was not due to "wilful refusal" or "culpable neglect". Clearly, s/he cannot do so without being in court to give an account of the situation and it is frequently the case that many debtors do not appear either because they do not understand how serious the situation is or because they are refusing to address their debt problems.

Recent cases heard in the High Court concerning imprisonment for debt have focused in detail on this key question of where the onus of proof lies under the enforcement of court orders legislation.[108] Indeed, in one of these cases, O'Neill J, in ordering the release of a man imprisoned for failure to meet the terms of an Instalment Order, is reported to have held that to shift the onus of proof onto a debtor to establish that he was not guilty of wilful refusal or culpable neglect was impermissible in what had become criminal proceedings, given that a term in prison was the likely outcome.[109] Nonetheless, that is precisely what the wording of the section seems to do.

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104 Section 6 of the Enforcement of Court Orders Act 1940 sets out the rules for the potential arrest and imprisonment of a person who has breached the terms of an Instalment Order and further administrative detail is provided in the District Court Rules, Order 53, Rule 8.

105 See Section One, pages 12-13, Is imprisonment for contempt of court or failure to repay the debt?

106 See Appendix Four for sample form, page 213.

107 Section 6 (c) – Enforcement of Court Orders Act 1940 (emphasis added).

108 See page 11.

109 As reported by Mary Carolan, *Irish Times*, 27 May 2009.

It is worth contrasting at this point how civil debt and maintenance (of spouses and/or children) cases are treated when there is a default in payment and the question of the imprisonment of the debtor arises. The parallel provision in maintenance cases authorises the District Court judge to '**by warrant** cause the person by whom such sum or sums are payable… to be brought before him'.[110] Evidence can then be taken and again unless the debtor can show that failure to pay was neither due to his wilful failure nor culpable neglect, a term of imprisonment may follow. At least, however, the judge can compel the debtor's attendance for an explanation to be provided.

As we have seen, the debtor (or indeed the creditor) has the right to look for a variation of the Instalment Order at any time while it is in force.[111] At the hearing where the creditor is seeking the committal of the debtor for failure to meet the terms of the Instalment Order, the judge also has the specific power, instead of ordering the arrest and imprisonment of the debtor, to treat the application as an application for a variation of the Instalment Order on his/her own initiative. Again, the judge has the same power to order such a variation from a date preceding the application so that the order can be varied retrospectively. Thus, the question of the arrears built up under an Instalment Order that was clearly beyond what the debtor could afford to pay can, in theory, be dealt with effectively even at this stage. Obviously, however, this will not happen in the debtor's absence.

Issuing a Committal Summons – Some perceived flaws

One would imagine that at what amounts to a 'last chance saloon', the debtor would appear in court to explain to the judge why the Instalment Order has not been paid or would at least turn up to try to dissuade the judge from making an order that would lead to his/her imprisonment. At this late stage, a variation of the Instalment Order is only going to be ordered where the debtor attends the Committal Summons hearing and offers a satisfactory explanation to the court. However, anecdotal evidence again suggests that many debtors do not attend the hearing, despite the gravity of the situation.

Why is this? For a start, the Committal Summons may be the latest in a series of documents that the debtor has either not read or has found difficult to understand. It is even conceivable that the debtor did not receive the summons personally and that someone else signed for it to satisfy the requirements of registered postal service. It may also be the case that the debtor's head is buried so deep in the sand at this point that there is little prospect of getting to grips with the reality of what is about to unfold.

It has been noted above that a judge has the power to vary the Instalment Order on such terms as s/he deems appropriate instead of ordering a committal, either at the request of the debtor or on his/her own initiative. Critically, the Committal Summons document does not alert the debtor to this possibility, confining itself to informing the debtor in fairly dramatic terms that the summons is an application for his/her arrest and imprisonment.

110 Section 8, Enforcement of Court Orders Act 1940 (emphasis added).

111 See page 75 for further details.

Results of the questionnaire – Issuing of summons for committal to prison stage

Introduction

As outlined above, 22 of the 27 Instalment Orders (or 81%) resulted in the issuing of a Committal Summons to the debtor, as four creditors decided to accept part-payment and did not take further enforcement action and one order was paid and kept up to date by the debtor.

Table 2.21: **Issue of summons for committal to prison stage (22 cases)**

	Yes	No	Total
Did the debtor recall receiving Committal Summons?	18	4	22
Did debtor understand that s/he could go to prison?	12	6	18
Did debtor understand his/her options?	6	12	18
Did debtor understand variation could be sought?	2	20	22[112]
Did debtor ignore the summons?	7	11	18

Receipt of summons

Of these 22 summonses, only four (or 18%) debtors did not recall receiving the document at this stage and this is a lower percentage than at any of the other arguably less serious stages of the procedure. For the purpose of comparison, it is worth noting that 33%, 31% and 33% of debtors did not recall receiving the initial legal proceedings, Examination of Means Summons and Instalment Order respectively. Is this percentage drop attributable to a realisation of the greater seriousness of the Committal Summons compared to the other documents? If this is so, can it be argued that recollection improves when the prospect of prison beckons?

Even if this is accepted, four debtors clearly stated that they did not recall receiving the Committal Summons. In two of these cases it appears that psychiatric illness may have been the reason, and in one of the other cases the debtor no longer lived at the address where the summons was served and claimed that the person who accepted service of it did not bring it to his attention.

In the final case, follow up action took place with the money advisor as the file was still ongoing at the time that the questionnaire was carried out. This particular debtor contacted MABS for assistance for the first time following the service of the Instalment Order, as arrears had begun to quickly accumulate. This is critical to the ensuing story as the money advisor in question reported that she had specifically advised the debtor to look out for a Committal Summons and to let her know if one arrived, pending her attempts to assemble a financial statement and negotiate with his creditors.

The money advisor contacted the solicitors acting for this particular creditor and made a payment proposal. No reply had been received to this offer when it transpired that a Committal Summons had indeed arrived by registered post. However, in this instance, the debtor's niece was allowed by the postal worker to sign for the registered post

[112] An answer was sought here from all clients subject to the Committal Summons procedure, even those who claimed not to have received the summons.

containing the Committal Summons. She forgot to bring this to her uncle's attention (and she was prepared to give evidence to this effect if it was required). As a result, the hearing took place in the debtor's absence and a committal was accordingly ordered by the judge.

This order was served on the debtor. He then realised that a hearing had taken place at which imprisonment had been ordered in his absence. He contacted the money advisor who in turn contacted the solicitor for the creditor to try to avert the committal. The solicitor apologised for not coming back on the offer made by the money advisor on the debtor's behalf but would not withdraw the Committal Order, which by this point had been sent together with the warrant to execute it to the relevant Gárda Superintendent. The money advisor then contacted the District Court clerk in the relevant area, explained what had occurred and sought to have the matter reopened with a view to having the order set aside. She reported that the Court Clerk laughed and said that debtors were always claiming that they had not received correspondence relating to debt enforcement and he refused to do anything about it.

The money advisor contacted the creditor's solicitor again and said that she had recommended the debtor to appeal the order to the Circuit Court. Although the time period to appeal had passed, she advised that the debtor would seek an extension of time to appeal given the circumstances and added that the debtor's niece was prepared to give evidence of her failure to pass on the correspondence to her uncle. Ultimately, the solicitor agreed to withdraw the order on the basis that instalments in line with the original proposal of the money advisor would be paid.

This particular case again illustrates some of the difficulties with serving legal documentation already referred to in this report, in that the debtor was never properly served with the Committal Summons. The debtor in this case was in receipt of €173 per week unemployment assistance as his sole source of income at the time. Despite this, he had faced up to the fact that he was unable to pay the Instalment Order and had taken the difficult step of contacting a money advisor to try to put his affairs in order. There was no good reason why, having been warned in advance of the consequences by the money advisor, he should ignore the Committal Summons. On the contrary, the money advisor reported that he was fully prepared to attend any hearing and explain the reasons for non-payment of the order in order to avoid imprisonment, having not attended in response to the original examination. Yet neither the court officials nor, initially, the solicitor acting for the creditor were prepared to cut him any slack at all, despite a very plausible explanation provided by the money advisor on his behalf. Only for the intervention and persistence of the money advisor (and the fact that she had access to legal advice) and his own decision to avail of money advice, this man would in all probability have gone to prison.

Awareness of possible imprisonment

A significant proportion of those who did accept that the documentation was served claimed not to understand what it meant. Of the 18 debtors who accepted that they received the Committal Summons, six (or one-third) claimed not to have understood that they could go to prison. Again, this may seem surprising, given that the summons

clearly uses the word 'imprisonment' twice. A possible explanation is that the debtors in these instances might have had literacy problems or may not have read the document at all, seeing it as one in a sequence of registered letters, complete with small print and legal jargon.

Understanding of options

A significant proportion of debtors (two-thirds) who received the Committal Summons did not know what their options were, with 12 out of the 18 debtors claiming not to understand what to do from there. At first glance, this may seem a very high number but an examination of the text of this summons may provide an adequate explanation. There is no information on the summons that would give the debtor the impression that s/he has any options whatsoever; that s/he may appear at the hearing and look for a variation, i.e. reduction, in the amount of the Instalment Order or that the judge has the power to order such a variation.

Possibility of a variation

Specifically regarding the possibility of seeking a Variation Order, all 22 debtors who were served with a Committal Summons (whether they recalled it or not) were asked about their awareness of this option at that point. Each was asked whether s/he knew that an application could be made for a variation at the committal hearing and that the judge could on his/her own initiative order a variation at the committal hearing. The responses were identical in relation to each of these questions. **An overwhelming 21 out of the 22 did not realise that a variation of the instalment was an option open to them and/or to the judge**.

As well as the absence of clear information on the Committal Summons regarding the variation option, the wording on the document is, arguably, intimidating and archaic. According to the summons, the hearing is

> an application on behalf of the creditor for an Order for your arrest and imprisonment for your failure to comply with an Order for payment made against you on the ___ day of ___ or for such other relief as to the Court in the circumstances may seem meet, and for the costs of the application.

A person without a legal background is likely to be uncomfortable with this kind of phraseology. Such arcane language is all the more unforgivable given that the debtor's failure to appear is likely to result in his/her imprisonment.

Ignoring the summons

Seven of the 18 (or 39%) admitted to ignoring the summons. This may have been due to a failure to understand its consequences or the options that were open to deal with it, or simply a vain hope that it might go away if it was left aside.

Table 2.22: **Outcome of Committal Hearing stage (22 cases)**

	Yes	No	Total
Did the debtor recall receiving Committal Summons?	18	4	22
Was a hearing avoided because of successful MABS intervention?	4	14	18
Did debtor attend the hearing?	2	12	14
Number of Committal Orders made	16	6	22

A significant majority of the relevant debtors did not attend the committal hearing despite the imminent threat of imprisonment. In total, 22 Committal Summonses were issued. As we have seen above, four of the 22 did not attend the hearing because they claimed never to have received the Committal Summons. Of the remaining 18, in four cases no hearing took place because a money advisor successfully negotiated a settlement on the debtor's behalf for the payment of an affordable instalment. Of the 14 cases that remained, two attended the hearing and 12 did not. In both cases where the debtor attended the hearing, no Committal Order was made. Adding the four who claimed not to have received the summons to the 12 who received it but did nothing about it, a total of 16 Committal Orders were issued by District Court judges in this study.

Orders

In all 16 cases, the debtor was not present to attempt to show why an order of imprisonment should not be made. Under the enforcement of court orders legislation, the onus is very clearly on the debtor to show that the failure to meet the terms of the Instalment Order is neither due to his/her 'wilful refusal' or 'culpable neglect'. It is clear that if the debtor is not present or represented, this onus cannot possibly be discharged. However, it is worth quoting again the view expressed by Judge Barron in the High Court in the case of *Grimes v Wallace*,[113] in the course of deciding whether a summons to arrest and imprison a debtor had been legitimately served on a debtor who had left the jurisdiction:

> There has never been a hearing on the merits as to whether or not the applicant can afford to pay the debts. Secondly if he cannot afford to pay these debts then he is to be imprisoned for debt which is something which our law does not allow. Obviously if he had been evading service or if he was aware that the documents existed then, if he stayed away, he stayed away wilfully. But even in those circumstances he should not be imprisoned for a debt he cannot pay.

At worst, the 16 debtors who failed to attend the committal hearing to determine whether or not they should be imprisoned might be said to have 'stayed away wilfully'. Even if they did, should they be jailed for not paying an Instalment Order that the court has not established they could afford to pay, a fact subsequently confirmed by this study?

Settlements

Six cases were resolved at this point, at least for the time being. In four of these cases, a committal hearing was not necessary as the four debtors contacted MABS at some point between the service of the Committal Summons and the holding of the hearing. In turn, a money advisor submitted a financial statement on behalf of the client and an offer of

113 See Section One, page 12.

payment based upon that statement. In each case the creditor ultimately accepted the proposals; in three instances almost immediately, in the fourth following adjournments. In one of these cases, the debtor did not subsequently pay the agreed instalment and the creditor again threatened committal. The debtor then sought and obtained a variation of the Instalment Order.

In the remaining two cases, the debtors appeared in court on the day of the hearing. One paid off the arrears and costs and thus avoided an order being made. She borrowed this money from a friend and turned up in the District Court with a cheque. It should be added here that the debtor in question was due to receive compensation from a claim relating to institutional abuse as a child and was therefore likely to soon be in a position to repay this money.

The final case is a good illustration of the sometimes bizarre nature of debt enforcement proceedings in Ireland. The debtor was already in prison on foot of a Committal Order obtained and executed by another creditor when a further Committal Summons arrived to his home by registered post and was signed for by his wife. She brought it to the jail and the Prison Governor ordered the man's temporary release to attend the second committal hearing. When the judge was informed that the debtor was already in prison on foot of another Committal Order, he did the sensible thing, adjourned the hearing and referred him to MABS for assistance. In passing, one might have imagined that the relevant prison social services might already have sought assistance from money advice and/or legal aid services in advance of the hearing. In any event, on the renewed hearing date and on the advice of his money advisor, the debtor applied for and was granted a variation of the Instalment Order in lieu of a further Committal Order and term of imprisonment.

Access to information on debt enforcement proceedings

Did the second creditor know when applying for a committal that the debtor was already in prison because of a previous Committal Order? The answer to this is very likely to be no. There is no central court database that would provide this kind of information to an applicant creditor to avoid unnecessary enforcement proceedings. Indeed, one of the debtors in this study had at one point eight Instalment Orders in place against him simultaneously, many ordered by the same District Court. He had attended none of the relevant examination of means hearings and in all likelihood, none of the creditors were even aware of the existence of other orders.

The intervention of money advice

In all six of the cases that were resolved in a variety of ways at this point in the enforcement procedure, a MABS office was contacted at some point after the service of the Committal Summons, which helped to settle the issue. However, it is not suggested, either here or in the previous stages of the procedure where a debtor's intervention led to an accommodation that a money advisor simply waves a magic wand and everything falls into place. On the contrary, creditors will generally drive a hard bargain, questioning elements of the financial statement in terms of both income and expenditure and these negotiations are sometimes difficult.

In addition, it must not be forgotten that the debtor also has to make sacrifices when s/he seeks out money advice. The reality of over-indebtedness has to be faced and the commitments that are entered into require sustained effort. This is not always easy or indeed possible and it is not uncommon for debtors paying their disposable income on a *pro rata* basis to encounter hiccups and missed payments along the way. Ultimately, however, where compromise and common sense prevail, it is still likely to be the best solution for both the client and his or her creditors.

Stage 7 Service and execution of the Committal Order

Steps in the service and execution of the Committal Order

This is the final step in the procedure where the judge orders the arrest and imprisonment of the debtor following the committal hearing. A specific committal order form is prepared by the solicitor acting for the creditor and is signed by the District Court judge.[114] This order outlines the amount of the arrears and costs that must be paid and the length of the term of imprisonment the debtor must serve unless this amount is paid. The judge also signs a warrant to enforce the order of arrest and imprisonment and this document is directly addressed to the superintendent in the relevant Gárda station.[115]

Although it is common, it does not appear that the creditor is strictly obliged by the District Court rules to serve a copy of the Committal Order upon the debtor. Equally, no specific time limit seems to be set down for the application for a warrant after the committal order has been granted.

However, in *Berryman v Governor of Loughan House,*[116] it was decided an undue delay in processing an application for a warrant to enforce the Committal Order without giving notice to the debtor may invalidate any subsequent arrest and detention. In this particular case, the delay was approximately 14 months between the grant of the Committal Order and the issuing of the warrant and a further four months before the execution of the warrant. O'Hanlon, J held that the detention of the debtor in this case was unlawful and that the appropriate procedure given such delay should have been to apply afresh for a new Committal Order so that the debtor might have the opportunity to present a case for a variation of the order.

The Gardaí have a general time period of six months (or whatever other time period is indicated on it) to 'execute' or carry out the arrest ordered by the warrant before it must be returned to the Court with an explanation as to why it has not been carried out. The District Court may re-issue the warrant at its discretion. Where the warrant is executed and an arrest and imprisonment takes place, the governor of the prison must give a receipt for each prisoner to the relevant District Court clerk.

Both the order and the warrant specify the amount of the current arrears on the Instalment Order and the costs of the committal application. Once the debtor or some

114 See Appendix Four for a sample form, pages 214.

115 See Appendix Four for a sample document, page 215.

116 [1993] 3 IR 573.

other person on his/her behalf pays these amounts to either the court clerk, the Gárda Superintendent or the Prison Governor as the case may be, the debtor is no longer required to serve the sentence or is entitled to be released, depending at what point the payment is made.

Once the sentence is served, many creditors will leave well enough alone at this point, having gambled that the debtor would pay up to avoid imprisonment and found that they could not or did not. However, even though a prison sentence is served, that may not be the end of the matter from the debtor's perspective. Whilst it seems to be reasonably clear that a debtor cannot be imprisoned again in respect of the same default on the same instalment, the Instalment Order itself will generally have continued to run and any default on any subsequent instalments due to be paid in the interim may be considered to be a fresh breach of the Order and may give arise to another application for arrest and imprisonment. For example, in *Cafferkey v Campbell*,[117] having been imprisoned for three months in respect of failure to pay the first instalment due under an Instalment Order, a debtor was imprisoned for a similar period for the subsequent failure to pay the second instalment.

On this point, it should be noted that of the approximately 1000 people imprisoned in relation to civil debt offences in Ireland between January 2002 and September 2006, nearly 10% of these were committed a second time.[118] According to the most recent available figures for 2008, 276 persons were imprisoned for a total of 306 debt offences, indicating that some 30 debtors were imprisoned twice or more last year.[119]

■ Service and execution of the Committal Order – Some perceived flaws

Service of the Committal Order

There does not appear to be a formal requirement set out in the District Court rules to serve the Committal order on the Debtor, although in practice it is common and indeed logical for the solicitor acting for the creditor to do so. Because the imprisonment can be avoided by paying the arrears on the Instalment Order and the costs of the committal application, it makes sense that the debtor should know that the order has been made and the amount that it is for. This is especially the case given that many orders are made in default of the debtor's appearance. It is not in the interest of the creditor or indeed of wider society that a debtor serves a term in prison, even though the creditor is responsible for using the procedures that can lead to this outcome. Some debtors still do not realise the full consequences of what is happening even at this late stage, especially when the order has not been served upon them prior to the execution of the warrant. Others are aware of what is happening but are simply not in a position to clear the arrears.

Full payment only

Part-payment of the arrears and costs is no longer 'officially' an option at this stage. The conventional view amongst solicitors acting for creditors is that only payment of the full amount of arrears and costs will lift the Committal Order and that under no circumstances should part-payment be accepted at this stage. To do so, it is argued, may even be contempt of court on the part of both the solicitor and the creditor, as it

117 [1928] IR 44.

118 Some 94 out of 994 were recommitted, as indicated in figures provided by the Irish Prison Service, October 2006.

119 Response of the Minister for Justice, Equality and Law Reform to Parliamentary Question No 608 by Caoimhghin O'Caolain, T.D. for Written Answer, 27 January 2009.

interferes with the Court's order. Equally, the order may no longer be enforceable if part-payment is accepted because the creditor has expressly varied the Court's order. Of course, at this point, the creditor as well as the debtor is in the 'last chance saloon'. Having taken the available enforcement steps, the creditor may finally realise that the debtor is not capable of paying the amount of the Instalment Order. Forcing the debtor to serve a term of imprisonment is unlikely to change the situation and may make the prospects of getting any money less likely. The debtor may even lose his/her job (if indeed s/he currently has one) depending on the length of sentence, so accepting part-payment may in fact be a more sensible option.

It is sometimes suggested that only those who have the ability to pay but are trying to avoid doing so get this far in the process, so-called 'won't pays' as opposed to 'can't pays'. If this were universally true, then there would be no imprisonment for non-payment of Instalment Orders. The debtor, realising that the game was up as the Gardaí arrive to execute the warrant, would simply arrange to make payment to the Gárda Superintendent of the amount set out on the order. The reality is that over 200 people per year were imprisoned for 'debt offences' from 2002-2007 and a further 276 in 2008. Is it seriously being suggested that these people opted for imprisonment even though they had the resources to prevent their incarceration, given that in addition they would still owe the money when they were released? It is far more likely that those facing imprisonment have an insufficient income and are without resources or relatives to help them out of a doomsday situation. Some will attempt to borrow from whatever source they can find at whatever cost; again there is anecdotal evidence from money advisors of debtors getting into further financial difficulty with more exacting creditors as a result of borrowing to prevent their imprisonment.

Lack of statistics

On the question of the available statistical evidence, comprehensive figures on the various stages of this procedure are difficult to source, an issue that is discussed in more detail in a later section of this report.[120] For example, there is no figure available for the number of Committal Orders granted (as opposed to applications made) in 2007, the last annual report available from the Courts Service. It follows from this that there is no figure for how many of these orders ultimately end in a prison sentence, let alone the reasons why they may not, whether this was because full payment was made or because the creditor accepted a lesser payment. Thus, any view offered by anyone working in this area is principally anecdotal, based on his/her experience of his/her casework. Similarly, any overview of this procedure offered by the State is unlikely to be statistically valid, unless it is based on an analysis of figures that have not been made publicly available.

■ Results of the questionnaire – Service and execution of the Committal Order

A committal order was issued in 42% of cases in the study as 16 of the total of 38 cases resulted in Committal Orders being issued by the relevant District Court. Only two of the debtors concerned contacted MABS when the Committal Summons was served upon them and before the Committal hearing took place (four of these 16 clients claimed never to have received the Committal Summons at all). The remaining 14 had no contact with a money advisor until after the order was made.

120 See Section 4, pages 127-133.

The first of these two cases was the one described above where the Summons was served upon the debtor's niece and she neglected to inform him of it, so that he did not know of the hearing and therefore could not have attended it.[121] The second case involved an 'Instalment Forthwith' (i.e. in one payment) for a large sum. The money advisor had tried to negotiate with the creditor on behalf of the debtor but without success. The creditor in this instance was a provider of goods and services alleging that a bill was unpaid, as opposed to an institution lending money, and seemed to be determined that the money would be paid or else the debtor would go to prison. This attitude perhaps reflects his lack of familiarity with the limitations of the procedure. It did not help that the debtor failed to attend the committal hearing but, again, he claimed never to have received the committal summons. **In summary, therefore, not one of these 16 clients against whom orders were made attended the hearing to determine whether s/he should be arrested and imprisoned.**

Table 2.23: **Service of Committal Order**

	Yes	No	Total
Did debtor remember receiving Committal Order?	14	2	16
Did debtor read and understand order fully?	7	7	14
Did debtor understand his/her options?	5	9	14
Did debtor know s/he could appeal the order?	1	13	14
Did debtor learn from MABS that order could be appealed?	2	11	13

Service of Committal Order

Of the 16 debtors against whom Committal Orders were made, two claimed not to have received the Committal Order. As already stated, there does not appear to be any formal requirement in the District Court rules specifically obliging the creditor or their representative to serve the order upon the debtor. The rules only require the order to be signed by the District Court judge and that the order and the warrant to execute it (both generally prepared by the creditor's solicitor) be sent to the relevant Gárda Superintendent for execution. It is conceivable therefore that the first indication the debtor will have of the actual order itself is from the Gárda calling to arrest him/her, although the Gardaí will often, on their own initiative, have contacted the debtor in advance to give some time for the matter to be sorted out.

It is in the creditor's (and the State's) interest that the debtor knows about the order long before it is executed. It should be said that there is some recent anecdotal evidence of District Court judges granting a committal but with a stay of a month or more put upon its execution. A stay being granted is at least encouraging; at least this may create an opportunity for payment of the arrears or for some other payment arrangement to be made.

Understanding of the order and options

In response to further questions under this heading, only half of debtors (seven out of 14) who were served with an order claimed to understand it fully. In turn, nine out of

[121] For more detail, see pages x-y.

the 14 said that they did not understand their options from there. Again, many may find this hard to believe, given that the order is headed 'Order for Arrest and Imprisonment' and specifically states in the final paragraph that imprisonment will follow unless a specific sum of money in arrears and costs is paid to the Court Clerk, Prison Governor or Gárda Superintendent by the debtor or someone on his or her behalf. However, this option is at the bottom of the form and embedded in the text. It is also notable that the right of the debtor to appeal or to seek an extension of time to appeal the Committal Order to the Circuit Court is never mentioned, even though an appeal will lead to the recall of the order and the warrant until the Circuit Court decides the issue.

Right of appeal to the Circuit Court

The debtor (or indeed the creditor where an order has not been granted) is entitled to appeal the Committal Order to the Circuit Court within 14 days.[122] Where the debtor has not attended the committal hearing or indeed the original examination that set the Instalment Order in the first place, there is a reasonable prospect that an appeal might succeed on the basis that it is a fresh opportunity to show the Circuit Court that failure to meet the terms of the Instalment Order was neither due to the debtor's 'wilful refusal' nor 'culpable neglect'. In these circumstances, the Circuit Court has the same power to order a variation of the Instalment Order rather than a committal that the District Court would have originally had.

The District Court Rules provide that an appeal against the granting of a Committal Order will act as a *stay* (or stop) against that order, although the *appellant* (person appealing the order) may be required to enter into a form of *recognisance* (i.e. a form of financial deposit as a guarantee that the debtor will turn up to pursue the appeal) as a condition for a stay being granted.[123] Where an appeal has been lodged against an order for arrest and imprisonment and the warrant to enforce the order has not been issued by the District Court clerk, the warrant may not be issued until the appeal has been decided. Where the warrant has been issued but not executed by the Gardaí when the appeal is lodged, the clerk must notify the Gárda Superintendent of the appeal and request the return of the warrant for cancellation.[124] Thus, an appeal will prevent the imprisonment of the client, at least in the short term, regardless of whether or not the warrant has been issued. However, since the order does not alert the debtor to this right of appeal (and s/he may not even have received a copy of it), s/he may simply not be aware of this option.

A further difficulty in practice here is that a Committal Order is often made by the judge there and then at the hearing in the District Court in the absence of the debtor. It may, however, be some time before the order is drawn up by the creditor's solicitor, signed by the judge and served on the debtor. However, an appeal against the Committal Order by the debtor to the Circuit Court requires the notice of appeal to be filed within fourteen days from the date on which the decision was made, rather than on the date the decision was communicated to the debtor. This can lead to a situation where a debtor runs out of time to appeal and has to apply to the District Court for an extension and must notify the creditor that an extension is being sought. Without access to legal advice and representation, a debtor is unlikely to take this on alone.

122 The debtor can seek an extension on this time limit but must notify the other party of his/her intention to do so.

123 Order 101, Rule 5 of the District Court Rules.

124 Order 53, Rule 9 of the District Court Rules.

Eventual outcome of cases

The following is the eventual outcome of the sixteen Committal Orders that were issued by various District Courts in relation to the debtors in this study.

Table 2.24: **Outcome of Committal Orders made (16)**	
Number of Circuit Court appeals (all successful)	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

Circuit Court appeals

There were **three** appeals to the Circuit Court on the advice of the money advisor involved and in each case legal representation was arranged for the debtor. In two of these cases, a hearing took place and the court ordered that the Instalment Order be varied instead of the committal. In the third case, the creditor accepted a proposal to vary the order in advance of the Circuit Court hearing, withdrew the Committal Order and a formal variation of the Instalment Order was put in place.

Settled cases

In **eight** (or 50%) of the cases, the Committal Order was not executed or enforced by the creditor.

In **two** of these cases, full payment was either made or promised. In the first, the money was found through a combination of an exceptional needs payment made by a Community Welfare Officer of the relevant Health Board (now HSE) together with a loan from a Credit Union underwritten by the MABS Loan Guarantee Fund, an emergency credit facility used exceptionally in crisis situations. In the second case, the creditor agreed to withhold execution of the order on the basis of a promise that payment would be made when compensation in a claim being brought by the debtor in a personal injuries case materialised.

In the remaining **six** cases, the creditors effectively compromised the order by entering into negotiations and accepting what the debtor could afford to pay by way of instalments. In the first of these cases, the money advisor on behalf of the debtor threatened to appeal the order to the Circuit Court. Again, this is the case outlined above where it was clear that the debtor's niece accepted service the Committal Summons and never informed the debtor, so that he was not aware of the hearing.[125] The order was ultimately withdrawn and a variation was accepted.

In the remaining **five** of these six cases, the creditor accepted reduced payments on the basis of a financial statement submitted by a money advisor on behalf of the debtor, outlining his/her inability to comply with the terms of the original order. As already stated, many creditors have argued that they are powerless to stop the execution of the warrant at this stage, as acceptance of anything less than full payment may be

125 For more detail, see pages 79-80.

considered to be contempt of court by interfering with the execution of the Court's order. However, the reality is that in many of these instances creditors accept that the final card has been played and the debtor going to prison will hinder rather than improve the chances of getting any payment. There may well be a minority of debtors who are in a position to pay but are holding out in the hope that the creditor will give up enforcement action. However, the current system insists that you must obtain your order first and go about executing it before you find out.

In each of these five cases, this 'call your bluff' scenario was being played out and in each instance **the debtor only obtained the assistance of a money advisor after the committal order was granted.** None of the five debtors in these cases had appeared at any of the hearings up to this point, so neither the Court nor creditors necessarily had accurate, up-to-date information about their financial circumstances. Four of the five were in receipt of a social welfare payment at the time, in two cases disability allowance (indicating potential long-term inability to pay) and in two cases, one parent family payment (indicating sole responsibility for dependent children). The fifth person was waged but had multiple arrears on a number of debts.

In addition, in four of these five cases, the relevant 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. In the fifth case, the money advisor was contacted by the debtor after the Committal Order had been served. The money advisor then contacted the Gárda station where the warrant was held and again found the Gardaí very willing to wait on the execution of the warrant, pending the efforts of the money advisor to resolve the matter. These examples confirm FLAC's experience that, subject to the odd exception, this is the general approach of the Gardaí in these types of cases. Most would prefer to avoid having to arrest and accompany to a prison a person who has not committed any criminal act and who is, at worst, guilty of not addressing their financial problems.

Imprisonment cases

Five of the 38 (13%) debtors in this study ultimately served a term of imprisonment. Three of these five cases involved creditors who were owed money for goods or services provided and these were the only three cases out of the total of 38 involving this type of creditor. As they are not routinely involved in providing credit as such, this may go some way to explain why they, in tandem with their legal representatives, were prepared to allow matters go as far as this.

Both of the other two cases involved credit unions and this may come as a surprise to many, given the close relationship often enjoyed by credit unions and MABS locally. In FLAC's experience, the attitude of credit unions to debt enforcement can vary enormously from one credit union to another. For example, in one case referred to above, the debtor, through a combination of a loan and an emergency needs payment from the Health Board, managed to pay the arrears and costs on an Instalment Order and have the Committal Order withdrawn.[126] It is ironic that the emergency loan in question was arranged through a money advisor on behalf of the debtor from one credit union in the area, whilst the creditor seeking the arrest and imprisonment of the debtor was another local credit union.

126 See page 89.

Some credit unions take the view that by failing to repay money borrowed, the customer has breached the 'common bond' that is the essence of credit union membership. There may be a tendency to take this personally in some cases, as the relationship between the credit union and its customer may be characterised as being not just a commercial but also a community-based one. In addition, many credit unions will feel that if defaulting on payments is tolerated, it will set a bad example locally and this may also contribute to the comparative willingness to follow through on debt enforcement proceedings. The associated banks and finance houses, on the other hand, may take a more pragmatic attitude, with the bottom line being the recovery of as much of the debt as is feasible, whilst being simultaneously anxious to avoid negative outcomes and publicity. The statistics published in the Courts Service Annual Reports do not break down debt enforcement applications made and orders obtained into the different categories of creditor. It would certainly be extremely useful if the Courts Service collated this information, as it would deliver a clearer picture of how the various strands of the credit industry approach this type of debt enforcement.

All five of the debtors who were imprisoned were in receipt of a social welfare payment as their only or principal income at the time of the committal. Three had been self-employed attempting to keep small businesses afloat which ultimately went under. In two of these three cases, there were substantial multiple debts as a result of the business failure.

In the fourth case, a lone parent who had been employed and had borrowed to furnish and decorate a new house lost her job and got into repayment difficulties. The final client was semi-retired and suffered from a number of personal difficulties including psychiatric and addiction problems. Indeed, in the case of all five debtors, the triggers of indebtedness already referred to in this study generally thought to be beyond the control of the debtor were very prominent. Illness was cited in four of the five cases (two of these specifically referred to psychiatric illness), business failure in three of the five and unemployment also in three of the five. The overlap of business failure and unemployment here may have been caused by a period of unemployment following the failure of the debtor's business.

On the key question as to when money advice was accessed, only one had become a MABS client at the time of the imprisonment. In this case, the debtor had not attended the committal hearing, claiming not to have received the Committal Summons. The money advisor tried to negotiate with the creditor to stave off the imprisonment but the creditor was not for turning. In each of the other four cases, contact was only made with a money advisor after a term of imprisonment had been served.

Following their respective releases from prison, two of the debtors paid the debt in question in full through borrowings from relatives, as the creditors concerned threatened a fresh application for committal in respect of subsequent missed instalments. In one further case, a money advisor negotiated affordable repayments and in another a variation order was sought and obtained on the debtor's behalf upon release from prison, as again a further committal application was threatened. In the final case, the debt remained outstanding. Due to the fact that, from his perspective, the

creditor had been the cause of his imprisonment, the debtor was even less inclined to deal with it than before.

The experience of each of the five debtors in relation to their prison stay is explored in the responses to Section Eight of the questionnaire below.[127]

Summary

Five of the 16 Committal Orders resulted in terms of imprisonment being served. It is sometimes speculated that debtors avoid imprisonment because they are waiting until the last minute to pay the arrears and costs if it proves necessary, having had the means to pay up all along. There is no evidence of this behaviour in this sample of MABS clients, but this is not to deny that there are instances where this does happen. Only one debtor actually paid off the arrears on the order and it was through a combination of further borrowing and a Health Board discretionary payment. Another debtor avoided imprisonment on the basis of a promise to pay from a future compensation award.

Each of three Circuit Court appeals by debtors resulted in the Committal Order being substituted with a variation of the Instalment Order. In the remaining six cases an accommodation was reached without the need for an appeal and the order was withdrawn. 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 persisting where the money simply is not there. 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. **However, it must be repeated here that without money advice or other intervention to concentrate the minds of both debtor and creditor, a term of imprisonment that is costly to the State, counter-productive for the creditor and personally disastrous for the debtor – and any dependants – would have been the most likely outcome**.

2.5 Debtor's reasons for non-attendance and experience at court hearings (incorporating Part Seven of the questionnaire)

■ Introduction

Where Part Nine of the questionnaire[128] sought to explore the debtor's experience of and views in relation to the debt enforcement system as a whole, Part Seven attempts to ascertain why the debtor may not have attended court hearings in the first place and, if s/he did attend, what kind of experience s/he had. It also explores whether debtors had legal representation or were otherwise accompanied to the hearing by someone else, such as a money advisor or relative, as well as their understanding of the hearing procedure and how it might be improved.

■ Attendance at court hearings

None of the debtors defended the original claim and so no hearing took place to determine whether the debt was properly due or not, with judgment being granted to

127 See pages 100-103.

128 See pages 18-29.

the creditor upon filing the correct legal papers in the relevant court office. In relation to the subsequent debt enforcement steps, debtors were asked under this heading to what extent (if any) they attended hearings to which they were then summonsed. Hearings here could have comprised any one of the following:

- a hearing arranged to examine a debtor's means with a view to setting an instalment;
- a hearing seeking to commit the debtor to prison where the terms of an Instalment Order had been breached;
- an application to vary an Instalment Order prior to any application for a committal;
- an appeal in the Circuit Court against the granting of a Committal Order;
- an application to vary an Instalment Order after a term of imprisonment had been served.

Of the **38** cases, **10** were settled prior to a formal examination of means hearing through the assistance of a money advisor. Thus, no hearings ultimately took place in these instances.[129]

Of the remaining **28**, only **one** debtor attended all relevant hearings relating to his case while **17** (or 61%) attended no hearings whatsoever. **Ten** debtors (or 36%) attended some hearings.

The **27** debtors who missed some or all hearings were then asked to explain in their own words why they did not attend (some options were listed in the questionnaire). Many of the debtors gave more than one reason. **The main finding of the study in this respect is that debtors do not attend debt enforcement hearings because they fear the embarrassment and shame of having their personal financial difficulties (and the reasons for these) discussed in a public forum and because in some cases they are not even aware that they should attend such hearings.**

Table 2.25: **Reasons given for failure to attend hearings (27 cases)**

Was not aware that I should attend	14
Was too embarrassed / frightened to attend	16
Did not want to go to an open court hearing	13
Did not understand what was going on	5
Did not feel that I should pay	2
Other	8

Responses offered under the category of '**other**' included two debtors who did not attend because they had no advice, three who felt their attendance would not have made a difference, two admitted to burying their head in the sand and one came to an agreement with his/her creditors.

129 For further details see pages 67-68.

The number of debtors who were not aware that they should attend is quite high at fourteen, but this includes those who claimed not to have received the relevant documents in the first place, of whom there were a number at different stages of these procedures. Nonetheless, it is of concern that a number still formed this impression even though they had been served with the relevant summonses. It points once again to the limitations in understanding existing documentation and to the need for a very clear explanatory booklet to be provided with all legal documents that are part of the debt enforcement procedure, stressing the need to appear at each and every hearing in this procedure. Of course, it may also indicate that unless attendance is obligatory, some debtors will not feel it necessary or useful to attend.

Being too embarrassed or frightened to attend the hearing was cited by 16 of the 27 debtors and not wanting to attend an open court hearing by 13. There is a close connection between these two reasons. Many people who have lost control of their finances often feel deeply embarrassed about it and fearful of the consequences. There may also be an element of the 'rabbit' caught in the headlights" in this situation. Doing nothing sometimes seems to be the easiest option and the last thing that a person may wish to do is to appear in a public forum such as a court to explain what has happened. One debtor, when asked why he did not attend, cited **"[f]ear, embarrassment, shame and lack of knowledge of the system. Thought by ignoring it, it would go away."**

The law can instil fear in many people whose first direct exposure to it may be these very proceedings. Unsurprisingly too, some associate courts directly with crime and punishment. One debtor remarked, **"[I] had been locked up in an industrial school when young and was terrified of being locked up again. So terrified [I] contemplated suicide."**

Another very clearly stated that **"if court was *in camera*** [i.e. in private] **I would have attended"** and another that **"[i]t would have been much better if it was held in private as I am not a criminal"** and this sentiment was echoed by a number. **"I don't think that debt cases should be held in a public court. It is very embarrassing in a small town where everybody knows each other,"** was another similar view.

Another debtor expressed **"[f]ear and embarrassment of going to open court and no answer to give as no money available."**

On a similar theme, the negative publicity that might affect her reputation in her local community was an overriding concern of another debtor, on whose behalf the money advisor in question said **"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."**

This comment was echoed by another, who said that **"[i]t was a fright to get called to court and assume this means a name in the paper."** This assumption is perhaps based upon the fact that local newspapers regularly report on proceedings (including debt enforcement proceedings) in the local District Court, though people are not always specifically mentioned by name.

Another debtor would not have attended the hearing but for the persuasion and assistance of the money advisor concerned: **"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."**

In some cases, the debtor may be at the end of his/her tether trying to keep any control over the situation and may have given up hope of resolving it. One, when talking about understanding of the procedures simply commented, **"I didn't understand it. So broken at the time, it meant nothing to me."** Another who **"was not sure what an attendance would achieve"** echoed this feeling of helplessness.

It is also important to reiterate the feeling that many debtors have that the odds are stacked against them. One commented, **"I would never have gone into court to sort this out. The creditor would always win."**

■ Representation at and experience of court hearings

The main finding here is that debtors who did summon up the courage to attend hearings were daunted by the process and did not know what to do, where to sit or what to say unless they had sought help. Of the 11 who attended at some of the court hearings, only four had legal representation at any one of the stages. Seven attended hearings without the assistance of legal professionals though many had the help of money advisors.

Of the four cases where legal representation was obtained for a hearing, two were in respect of successful appeals to the Circuit Court against the granting of Committal Orders. In one of the other cases, the debtor obtained legal assistance to seek a variation of the Instalment Order upon her release, having already served a term of imprisonment.

In the final case, although the debtor obtained legal representation for a hearing to decide whether an order should be made to arrest and imprison him (as a favour from his solicitor), he did not appear with the solicitor at the hearing. The judge took his absence as a sign of contempt for the process and ordered his imprisonment, despite the solicitor's arguments to the contrary. It should be pointed out that this particular debtor had sent in details of his income to the court and had attended the examination of means stage on his own, only to find the judge sceptical that as a self-employed tradesman he could not afford the €100 weekly instalment requested by the creditor, when in fact he had a plethora of serious debts and work was slack. Having had such a negative experience when he turned up in court the first time, he said that the solicitor attended the hearing on his behalf but he couldn't face it himself. He added that he **"felt not properly listened to, the creditor felt there was money which there wasn't, I faced every stage and creditor would not negotiate, the Sheriff called and there was nothing to take."**

This particular case illustrates that where an accommodation cannot be reached with a given creditor, even legal representation and as the case may be, the willingness of the debtor to attend hearings does not guarantee that a judge, who ultimately has the sole

power to make the decision, will necessarily make a fair and rational one. Of course, what appear to be arbitrary decisions on the amount of an Instalment Order that do not reflect the financial information available can be appealed to the Circuit Court.

In total, 10 of the 11 debtors who attended a hearing commented on how fearful they were of the process. Responses here included that the **"process was cold and frightening"** or **"[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."**

Another expressed succinctly the uncertainty of being in an unfamiliar place: **"I was met by no one and I didn't know where to sit or who to approach. By chance the solicitor for the bank knew me and spoke to me to explain what I should do."**

One debtor was less than happy with the attitude of lawyers, remarking that the experience was **"[h]orrible and nerve-wracking on own and felt had no support from legal profession."**

Another described the ordeal curiously as **"awakening – frightening – a chastening experience as it was first ever time in court."** Another felt that the process was **"nerve-wracking and frightening. The judge was very abrupt at first which was frightening. It was very embarrassing as I didn't know who would see or hear me."**

An element of these hearings that sometimes takes the debtor by surprise is the comparative speed with which these matters are dealt. The District Court processes a lot of business and judges are not generally used to the debtor turning up to give an account of his/her situation. One commented in this respect 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 remarked that **"[i]t was a horrible experience going to court and I was on my own. The judge seemed very stern at first and I found it hard to think."**

However, despite the fear and trepidation of appearing in court, some debtors did not in retrospect find the experience as daunting as anticipated, with four of these eleven debtors accepting that they were treated with courtesy and got a fair hearing; only one claimed he was not well treated and did not get a fair hearing. Six did not express an opinion on these opposite ends of the scale but two of these six debtors said that although the experience was okay, it all happened too quickly. These responses may reflect the anecdotal evidence that, with some exceptions, debtors are generally dealt with fairly when they appear, subject to the time restrictions that are part and parcel of life in busy District Courts.

■ Understanding of what was going on and suggestions for improvement

Of the 11 who appeared in court at any stage of the procedure, five felt that they completely understood what was going on. Three of these five had legal representation

at the time and the outcome of these cases is referred to above. In the other two of these five cases, the debtor had the procedure well explained to them by a money advisor in advance of the hearing and one of them **"found the judge helpful and understanding, explaining things as he went along."**

In turn, in the remaining **six** cases, two felt that they understood the process to some extent, two that they did not understand the process well and finally, two did not understand the process at all.

Finally, debtors were asked what could have been done to improve the experience from their point of view. One said that she had been forced to **"ask the Solicitor for Bank for advice on the Instalment Order payment as there was no one else to get advice from".** This led her to suggest that there should be **"a neutral person in court to give advice on how to deal with the order or how to represent myself."**

Another echoed this suggestion when saying that there should be an **"Information Officer or Secretary outside of open court that I could approach for direction and advice."** Yet another suggested that **"for debt proceedings/committal a room should be made available or a person should be made available in order to act as a mediator between court and debtor thus reducing extreme stress."**

Finally, one debtor simply asked that the courts **"use plain English!"**

Thus, two general points emerge from the responses to the questions under this part of the questionnaire**. Firstly, there is a general reluctance to participate in debt enforcement proceedings** (assuming that the documentation has been received) principally due to a combination of a lack of awareness of the importance of attending, fear and embarrassment at attending and, closely related to this, not wishing to attend in a public setting.

Secondly, for those who do muster the courage to attend, there is little assistance provided in any meaningful way to present their case. In this context, it should be emphasised that debtors are very rarely in a position to avail of private legal representation (except occasionally by way of a goodwill gesture). Equally, as noted a number of times in this report already, civil legal aid is rarely provided in debt cases, despite the fact that debt-related proceedings are within the remit of State law centres under the Civil Legal Aid Act 1995. To summarise, legal representation when clients did attend hearings was rare and generally only sought and obtained when the situation was desperate, i.e. to prevent a committal or to look for a variation after a term of imprisonment.

Although it is commonplace for money advisors to send in a debtor's financial information to the District Court in advance of hearings, they have no right of audience in the courts to further explain the circumstances of their clients. For those who do accompany debtors to court, they 'can only speak when spoken to' although there is evidence from some District Courts around the country that judges have found the contribution of money advisors very useful in making assessments of ability to repay.

This is by no means a consistent approach and there is also some evidence of financial information, which was submitted by money advisors for the purpose of adding to the District Court file not being taken into account in making a subsequent instalment assessment. There is scope here for a greater understanding of the role that money advisors play in assisting with the presentation of verifiable financial information and this is a matter that might be pursued with the Courts Service.

2.6 Debtor's experience of arrest and imprisonment (incorporating Part Eight of the questionnaire)

■ Introduction

This part of the questionnaire is broadly divided into two sections, containing firstly, questions in relation to the debtor's experience of contact with the Gardaí and the process of arrest and secondly, questions in relation to the experience of imprisonment itself.

There were a total of 16 committal orders obtained out of 38 debtors who took part in this study. Twelve of these 16 orders were followed by the subsequent issue of warrants to follow through on these orders. These are sent to the local Gárda Superintendent for execution, i.e. for the arrest and imprisonment of the debtor to be processed. In the remaining four cases, matters were sorted out before the warrants were sent to the Gárda station. In one of these four cases, the debtor appealed to the Circuit Court quickly so that the Committal Order was no longer valid. In a second case, agreement was reached by a letter of undertaking that the debt would be paid when the debtor's compensation claim came through. In the final two cases, negotiations resulted in alternative agreements being reached prior to the sending of the warrant to execute the order to the Gárda station.

■ Process of arrest

Gárda contact in advance of the arrest

In 12 cases, therefore, warrants intended to execute the Committal Orders concerned were sent to the relevant Gárda station. However, as we have seen, only five of these actually resulted in terms of imprisonment being served. It is notable that in four of the five cases of imprisonment, there was no contact in advance by the Gardaí. In the final imprisonment case, the debtor was contacted in advance by the Gardaí whom he described as being very helpful, with the local Sergeant explaining the process and even going to meet him when he was brought to prison. However, the creditor concerned would not review the position and it may also have been relevant that the debtor did not avail of money advice and had no legal advice until after his release from prison.

In the remaining seven of the eight cases where the Gardaí contacted the debtor in advance of the potential arrest, imprisonment was ultimately averted and this is a significant finding. The exact circumstances of these cases varied, but all had one thing in common: the apparent efforts of the Gardaí to avoid imprisonment as an outcome. These are summarised below:

Case One - The relevant Gárda referred the debtor to MABS and was described by the money advisor as being 'very reluctant' to execute the warrant and by the debtor as being 'very helpful'. The creditor accepted an instalment proposal just prior to the execution of the warrant.

Case Two - The Gárda called to the door in advance and explained that he did not wish to take the debtor away as she had a young child but that he would have no choice unless she came up with the money. He referred her to a social worker who in turn referred her to MABS. The creditor ultimately agreed to vary the Instalment Order downwards and withdrew the warrant.

Case Three - In this instance, the Gárda on his own initiative telephoned and advised the debtor on the best course of action, referring her to the Community Welfare Officer in the then Health Board, who in turn contacted MABS. Ultimately, the creditor did not want to negotiate and a solicitor was engaged to appeal the Order to the Circuit Court. A variation was obtained.

Case Four - In this case the debtor was on friendly terms with local Gardaí. They called to his door to let him know what was happening and he was given plenty of time to arrange a MABS appointment. Instalment terms were agreed and the order was withdrawn.

Case Five - Again there was contact made in advance by the Gardaí in this case. The debtor got in touch with a MABS money advisor and then engaged a solicitor to make a late appeal on the Committal Order to the Circuit Court. The creditor agreed a variation of the Instalment Order ahead of the hearing.

Case Six - The Gardaí telephoned and explained that they would give the debtor as long as they could, but ultimately he would have to come to some arrangement. Money was borrowed in this case to pay the arrears and costs through a combination of an exceptional needs payment and a credit union loan.

Case Seven - The Gardaí put the debtor in touch with MABS and agreed to postpone the execution of the warrant pending discussions. The solicitor for the creditor would not initially withdraw the Committal Order but ultimately agreed to a reduced instalment.

The length of time between Committal Order and execution of the warrant

Nine of the 12 debtors concerned answered this question. The other three either did not recall or did not think the question applied in their case. Only five debtors were actually imprisoned, so the question should really relate to the length of time between the granting of the Committal Order and the first contact made by Gardaí in the other four cases where an answer was provided. In any event, the question was aimed at finding

out how quickly warrants were acted upon. Before presenting any information on this issue, it should be noted that recall on this question may be hazy and unreliable if the debtor was unaware of the date of the committal hearing in the first place.

Six of the nine debtors who responded to this question were contacted by the Gardaí in relation to the warrant or had the warrant executed within six months of the order being issued; in three of these cases, the contact/execution was within three months, in three others between three and six months. In the three remaining cases, the period exceeded six months. As has been explained, six months is generally the limit stipulated for execution unless the warrant says otherwise. It is therefore surprising that this notional limit was allegedly exceeded in three cases; the debtors claimed that the delays involved were 12 months, 18 months and four years in the final case. These delays may also reflect efforts on the part of the Gardaí concerned to prevent a person being imprisoned in relation to non-payment of a civil debt wherever possible.

■ Debtor's experience of imprisonment

Location of prison

In relation to location, of the five debtors who ultimately served a sentence, two were imprisoned in Mountjoy prison, two in Castlerea prison and one in Limerick prison. All three are medium security prisons.

Attitude of Gardaí during arrest

In relation to their treatment by the Gardaí in the course of the arrest and subsequent imprisonment, three found the attitude of the Gardaí towards them was good, one felt it was okay and the final debtor had a negative impression of the Gardaí involved.

Length of sentence

Under the Enforcement of Court Orders legislation, a term of up to three months in prison may be ordered by a District Court judge for failure to meet the terms of the Instalment Order, but in practice shorter custodial sentences are generally imposed, according to the anecdotal evidence. Of the five debtors in this sample who were imprisoned, one served the maximum sentence spending 90 days in jail, one served three weeks and the remaining three served approximately two weeks each. The cliché occasionally advanced by some legal practitioners working in the debt enforcement area of a squad car pulling up to the jail and the debtor being kept for a token overnight stay, only to return home by squad car the following day is therefore not borne out by this sample, small though it is.

It is interesting that this portrayal has also been advanced by the State on occasions where it has been called upon to defend this procedure. For example, in its response to concerns raised by the Human Rights Committee of the United Nations on the debt for imprisonment issue arising out of Ireland's State Report under the International Covenant on Civil and Political Rights (ICCPR) in 1998, the Irish delegation stated that:

> at any one time the number of persons actually in custody for non-payment of debts is less than 1% of the (prison) population. i.e. about 25 people. This is due to the fact 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.[130]

130 CCPR/C/IRL/98/2, p 45, Paragraph 196.

No figures were presented by the State to the Human Rights Committee to validate this assertion and similar assertions in the State's most recent report in 2007 were also presented without empirical evidence.[131] However, in each case of imprisonment in our sample, the length served was the full term ordered by the judge with none of the five being in a position to borrow money to obtain an early release. The conventional wisdom is that normal remission arrangements do not apply in relation to sentences under the enforcement of court orders legislation so that the full sentence must be served, unless the debtor discharges the arrears and costs on the Committal Order. However, the Minister for Justice, Equality and Law Reform does have the power under Section 9 of the Enforcement of Court Orders Acts 1926-1940 to order the debtor's release. S/he may direct that the debtor be released either without any payment or with part payment of the arrears on the order. However, the Minister must first consult the judge by whom the order was made about the 'propriety of such release', unless 'such consultation is impracticable in the circumstances'.

In September 2008, FLAC wrote to the Director General of the Irish Prison Service requesting details of the length of sentence served by persons imprisoned for debt offences in 2006 (the last year for which figures were then available). The letter also asked whether the Minister for Justice, Equality and Law Reform had exercised his power under Section 9 of the Act to seek a debtor's release at any time in 2006. At the time of writing (June 2009), this information is still outstanding. However, a recent response to a parliamentary question by the Minster for Justice, Equality and Law Reform indicated that in 2008 the average length of sentence for a debt-related offence was 27 days and the average time served was 20 days.[132]

Experience of imprisonment

Two weeks in jail for a person unprepared for the ordeal can seem like a lifetime. Three months in the case of one debtor must have seemed like an eternity. One debtor remarked in relation to her imprisonment: **"It was 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."**

A debtor who was on a variety of medications for an assortment of ailments and who had been in a psychiatric hospital prior to his arrest 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 was also extremely unhappy about his treatment while in prison, claiming that he had been denied necessary medication, despite having a doctor's prescription. He also said that failure to release him slightly early for a family gathering had humiliated him

131 See Section Three pages 105-119, for a detailed discussion of Ireland's State reports on this issue.

132 See Section Three pages 109-110 for more detail on this issue.

unnecessarily:

> **[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 current system once the endgame has been reached, insufficient money is forthcoming and the debtor is arrested and hauled off to prison is well summed-up by the following contribution (the Instalment Order in this particular case was originally for €300 per month):

> **(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.**

In a nutshell, the last two sentences of this quote describe very well the absurdity of the current procedure. The bill to the taxpayer to carry out the arrest and accommodate the imprisonment will generally be far higher than the amount due to the creditor under the order. The debtor, once imprisoned, is powerless to do anything to change matters. No-one benefits, not the State, not the creditor who still has not received any money and most obviously not the debtor who may have been humiliated and traumatised.

The final irony is that the debt is not purged after this experience and remains to be collected at the discretion of the creditor. As one debtor commented, **"[it is] ridiculous to still owe money after imprisonment."** Contrast this with the case where a person goes to prison for non-payment of a fine imposed by the State in respect of a minor criminal offence. Here the State spends considerable amounts of money in prosecuting, fining and then incarcerating the defendant for the non-payment of a debt due to itself, only for the fine to be purged when the term of imprisonment is served. Absurd as this may be in terms of value to the taxpayer, at least the money is no longer owed.[133]

The detrimental effects of the experience do not necessarily end when the debtor is released from prison. The short-term costs of this procedure, consisting of judicial, court official and Gárda time in addition to the high costs of the prison stay, have already been pointed out. It is also conceivable that where the debtor is employed, s/he may lose his/her job as a result of the imprisonment or, having served a prison sentence, may have a prison record that might have to be disclosed to future employers upon request.

Less tangible but just as potentially costly is the longer-term damage to the individual's health and well-being and that of his or her dependants. As one debtor explained, **"[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 described **"[n]ightmares, flashbacks, worry, stress, illness, unable to sleep."**

One advisor speaking on behalf of her client said that **"The whole experience was horrendous – it is not unfair to say it psychologically changed our client."**

133 At the time of writing (June 2009), a Fines Bill 2009 has been published. It proposes to introduce an instalment system for paying fines, to impose fines where appropriate according to the person's means and capacity to pay and to allow for a community service order instead of imprisonment for failure to pay a fine.

The effects of serving a term of imprisonment may also endure in relation to a person's standing in their local community and prospects of improving their situation. The following contribution from one debtor in truth requires no further commentary:

> **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.**

Nor does the experience necessarily lead to a changed attitude on the part of the debtor for the future, as may be the aspiration of the standard crime and punishment model. A money advisor, on behalf of one debtor, stated that **"[t]here are now other cases pending and he will not deal with them. His wife went in to court a few months ago. His wife is 35 and on blood pressure medication. She deals with the debts now to shield him."**

Finally, the effect of such arrest and incarceration on partners and dependants, powerless to do anything to avert the situation and forced to witness their parent or partner being hauled away, is summed up by this debtor's conclusion: **"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."**

debt-related imprisonment and international human rights law

3.1 Introduction

The purpose of this section is to examine the State's justification of the debt enforcement procedure that may culminate in imprisonment, when set against its obligations under international legal instruments such as the United Nations International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms.

For this purpose, this section includes details of the State's defence of these procedures in terms of the potential outcome of imprisonment, before the Human Rights Committee of the United Nations which monitors the compliance of States with the International Covenant on Civil and Political Rights. It also includes an analysis of the compliance of these procedures with the European Convention on Human Rights and its Protocols.

3.2 Ireland's obligations under the ICCPR

Introduction

The Charter of the United Nations was adopted in 1945, following the Second World War, with its principal objectives being to maintain international peace and security, to develop friendly relations between nations and to promote and encourage respect for human rights. The Universal Declaration of Human Rights, a core statement of the fundamental human rights of all human beings, followed in 1948.

Since then, a large number of Conventions on specific human rights issues that flow from the Declaration have been adopted by the UN. Amongst these is the 1966 International Covenant on Civil and Political Rights (ICCPR). This was signed by Ireland on 1 October 1973 and ratified following acceptance by the Oireachtas on 8 December 1989. This Covenant sets out key civil and political freedoms that must be guaranteed to residents in all signatory states. In the context of this report and the debt enforcement by instalment procedure being examined, Article 11 of this Covenant provides that:

> No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

All United Nations Human Rights Conventions and Covenants are subject to a specific monitoring system. This monitoring system in general takes two forms; the obligation of each signatory State to compile periodical reports (called State reports) to a monitoring committee and, additionally for some Covenants such as the ICCPR, the right of individuals to make a complaint that a particular aspect of a Convention or Covenant has not been adhered to.

In the case of the International Covenant on Civil and Political Rights mentioned above, each State has to report to a body called the Human Rights Committee every five years. On the basis of the report submitted in advance, the Committee then poses questions to a delegation from the State concerned at a formal session. Following on from this meeting, the Committee issues its concluding comments on the State's report which may include recommendations such as amendments to legislation where necessary.

Article 11 – United Nations International Covenant on Civil and Political Rights (ICCPR)
It has been noted above that Article 11 of this Covenant provides that "no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." Given the fact that, on average, over 200 persons per year (276 in 2008) are imprisoned in Ireland in connection with matters of civil debt, the compliance of Ireland with this part of the Covenant has previously come to the attention to the Human Rights Committee.

1993 State Report
In 1993, the then Attorney General, on behalf of the Irish Government, responding to concerns raised by the Committee in relation to this issue said:

> The question of imprisonment for debt in Ireland had been raised. No person was imprisoned in Ireland simply for inability to pay money due. 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. If after that examination the Court was satisfied that that there was capacity to pay, it might order payment in one or more instalments. The District Court orders were subject to appeal to the Circuit Court, and to review in the High Court. Only after refusal to pay at that stage did the question of imprisonment arise, and then, since the Court had satisfied itself that there was capacity to pay, the imprisonment resulted from failure to obey a court order, not from inability to pay the debt.[134]

Analysis of 1993 State Report
The certainty portrayed in this passage is striking. It states that the District Court "conducted a thorough examination of the person's means" to establish whether s/he is in a position pay, and only where satisfied that there is such capacity, will order such payment. Further on it is stated that "since the Court had satisfied itself that there was capacity to pay, the imprisonment resulted from failure to obey a court order, not from inability to pay the debt."

Contrast these statements with the findings from our survey of debtors in Section Two.[135] Of the 28 cases where an examination of means hearing took place to determine an appropriate instalment, only four attended to give an account of their financial

134 Summary Record of 1239th Meeting - Ireland CCPR/C/SR, 20/7/1993, Paragraph 24.
135 For further detail, see pages 68-69.

situation.[136] In turn, of the 18 cases where a hearing ultimately took place to determine whether an order for the arrest and imprisonment of the debtor should be issued when the Instalment Order had not been paid, only two debtors attended.[137]

This passage therefore does not convey an accurate picture of the reality of debt enforcement in Ireland on the basis of our survey. The reality is that many people are imprisoned without a court ever hearing from them in relation to either the debt that gives rise to the judgment or their financial ability to pay the judgment by instalments. Yet twice in this relatively short passage, the very firm impression is given that there must be a means assessment before imprisonment takes place. The fact that frequently the debtor does not appear and a prison term results by default is never alluded to.

No data whatsoever was produced to back up these assertions. The concluding part of this section will examine the available statistics in relation to this procedure from recent Courts Service Annual Reports and will demonstrate that they are superficial and incomplete. Thus, we believe that it is unlikely that the Attorney General would have been in a position in 1993 to demonstrate the accuracy of these observations had he been called upon to do so, unless he was in possession of information that was not in the public domain. A report commissioned by the Department of Justice itself to look at the question of imprisonment for non-payment of fines and civil debt, published in 2002,[138] concludes that "there is scant information on the number, characteristics and circumstances of persons in prison for these reasons."[139] Later (in the specific case of fines) it states that "enquiries in the court process about offenders' means and capacity to pay fines would appear to be non-existent or at best cursory."[140]

1998 State Report

In its second State Report, the Irish Government again responded to concerns raised by the Human Rights Committee on the question of imprisonment in debt cases and explained the position in considerably more detail as follows:[141]

> **192.** In its comments on Ireland's first report (A/48/40, para. 606), The Human Rights Committee expressed concern over the use of imprisonment for failure to pay a debt.
>
> **193.** Article 11 prohibits imprisonment "merely on the ground of inability to fulfil a contractual obligation". Such imprisonment has not been a feature of the Irish legal system since debtors' prisons were abolished in the nineteenth century. 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. An order for imprisonment may not be made, however, if the debtor shows to the satisfaction of the courts that his failure to pay was due neither to his wilful refusal nor culpable neglect (Enforcement of Court Orders Acts 1926-1940).
>
> **194.** It is for the courts to interpret the phrases "wilful refusal" and "culpable neglect". In practice, for example, wilful refusal could arise where the debtor is in dispute with the creditor over the validity of a debt, despite the fact that the court

136 Representing only 14% of those surveyed.

137 Representing only 11% of those surveyed.

138 *Imprisonment for fine default and civil debt, Report to the Department of Justice, Equality and Law Reform*, Nexus Research Co-Operative, May 2003.

139 *Ibid*, Page 7.

140 *Ibid*, Page 53.

141 CCPR/C/IRL/98/2 pages 44-45 28 April 1999

has ruled on the issue. In such circumstances the person may be purposefully refusing to comply with the court order. Culpable neglect could be expected to arise 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.

195. Statistics relating to the number of applications for committal orders for non-payment of debt dealt with by the District Court in the year ending 31st July are as follows:

Year	No of applications for committal orders
July 1993	8,658
July 1994	9,059
July 1995	9,919
July 1996	11,747

196. However, at any one time the number of persons actually in custody for non-payment of debts is less than 1 percent of the prison population, i.e. about 25 people. *This is due to the fact 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*[142]. It should be noted that the Minister for Justice, Equality and Law Reform has no power to release debtors until their debt is paid, or they have purged their contempt of Court.

197. Legislative proposals to end imprisonment where practicable for civil debt and inability to pay fines are currently being prepared in the Department of Justice, Equality and Law Reform.

Analysis of 1998 State Report

In Paragraph 193, the State differentiates between "the imprisonment of a person for mere failure to pay a civil debt" and imprisonment "for failure to comply with a court order to make certain payments in discharge of a debt" and goes on to explain that "an order for imprisonment may not be made, however, if the debtor shows to the satisfaction of the courts that his failure to pay was due neither to his wilful refusal or culpable neglect."

Paragraph 194 attempts to explain what might constitute "wilful refusal" or "culpable neglect". *Wilful refusal*, it says, could arise where the debtor still questions the fact of the debt even though a court has ruled on the issue. In practice, however, this would be a very rare event in consumer debt cases where the fact of the debt is seldom in dispute. In the interviews for this study, not one of the 38 debtors defended the proceedings and none said that s/he simply would not pay.

Culpable neglect might arise "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 or her to do so, in circumstances where blame could be attributed to the debtor." If

142 Our emphasis added.

imprisonment on grounds of culpable neglect was limited to the situation as described above, it could only occur where the debtor had appeared and given an account of their financial position. Yet it is clear that in many instances there is no such appearance and yet an order for the debtor's arrest and imprisonment still takes place.

Indeed, this explanation of what might constitute culpable neglect is reminiscent of the same certainty apparent in the Attorney General's analysis of the procedure in 1993 outlined above. It implies that before a Committal Order can be issued, the court must be satisfied that the person had the means to comply with the order but refused to do so. Once again, no figures on participation in the process that might confirm this hypothesis in relation to culpable neglect are provided. There is no reference made to the fact that in many cases (for example, close to 90% in our survey), there is no appearance made by the debtor throughout the process, so that when the District Court forms the view that complying with the order was within the debtor's means, it does so either on the sole evidence of the creditor or simply because the debtor is not present to give an account of themselves.

The response then goes on in paragraph 195 to cite statistics of the number of applications for Committal Orders made from July 1993 to July 1996. However, this does not explain for the Committee the number of orders actually obtained or subsequent numbers of persons imprisoned on execution of those orders.

Paragraph 196 repeats the familiar assertion – routinely used by respective Ministers for Justice when answering parliamentary questions on the issue of imprisonment relating to debts – that, in reality, less than 1% of the prison population at any one time is in jail for this reason, as if this in some way justified the practice.[143] It is then stated that "this is due to the fact 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."

It is notable again that no statistical evidence of any kind is presented to back up this claim, reflecting again the absence of firm data on these procedures and their effect at that time. The State did not provide a total figure for Committal Orders granted, followed by a total figure for persons ultimately imprisoned on foot of these orders, let alone the length of sentences served by debtors imprisoned. Yet it was able to inform the Human Rights Committee of the United Nations that many debtors make payment either on committal or shortly afterwards.

It is now of considerable note in this context that in reply to a recent parliamentary question on this subject, the Minister for Justice, Equality and Law Reform, Dermot Ahern T.D., for the first time to FLAC's knowledge, provided a figure for the average length of sentence served by persons imprisoned for debt offences in 2008. He stated that the average length of sentence imposed for each 'offence' was 27 days and the average length of sentence served was 20 days, indicating that some persons may have paid their debt while in prison which would automatically release them from their sentence.[144] These figures are very revealing and flatly contradict the repeated assertions of the Irish State Reports to the Human Rights Committee of the United Nations on two grounds – firstly, they demonstrate that in 2008 at least, many debtors did not make

143 For example, in November 1997, in a written response to parliamentary question No. 365 from Jim O'Keeffe, T.D. (Fine Gael), then Minister for Justice, John O'Donoghue, T.D. (Fianna Fáil) stated: "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."

144 Response to Parliamentary Question No 608 by Caoimhghin O'Caolain, T.D. for Written Answer, 27 January 2009.

payment 'on committal or shortly afterwards' and secondly, they show that the average length of time served by debtors in 2008 was not 'quite short'.

Of course, the clear inference in this statement in the 1998 State Report is that debtors are in general capable of meeting the terms of the order but choose not to do so until the last possible moment or early into the term of imprisonment. If this were true, it might help the State to justify the continuation of these procedures as it would imply wilful default in most cases. Whilst it may be that a minority of debtors do make payment to avoid imprisonment or to obtain early release, many will not do so from their own resources. Most people will strenuously avoid prison and will borrow from whatever source they can to prevent it, whether that is a relative or indeed a moneylender. Others may, through the assistance of the MABS or legal representation, achieve an agreement that involves a phased repayment of arrears even at this late stage.

However, what of the 200-plus people who do not avoid imprisonment each year? They clearly do not fall into the category of 'can-but-won't-pays'. Are they to be the sacrificial lambs in the attempt to concentrate the minds of errant debtors who may be holding out? The answer to this question would seem to be yes; this clearly implies that, **in practice, a sanction as overwhelming as imprisonment is being imposed upon one person without the resources to avoid it in order to encourage another person with resources to pay.**

In our study, a total of 16 Committal Orders were issued. There were three successful Circuit Court appeals against orders; six cases were settled with the creditor accepting part-payment that effectively rendered the order void and five cases resulted in terms of imprisonment being served. That left only two out of the 16 committal cases where the debtor paid the arrears and costs on the order when faced with the likelihood of imprisonment. In one of these instances the money was sourced through a combination of an exceptional needs payment from a Community Welfare Officer and a loan from a credit union. In the other, future payment was promised out of the proceeds of a personal injuries claim that was pending for the debtor. Thus, even in the two cases where the order was complied with, the money did not come from the debtor's existing finances.

All five of those imprisoned served the full term ordered by the judge. One person served the maximum term possible under the procedure of three months; one served a sentence of three weeks and the remaining three served two weeks imprisonment each. All served the full sentence, with none of them "making payment on committal or shortly afterwards," the outcome suggested by the State to be a common occurrence. If such assertions were to be made, one would expect they might have been supported with some kind of empirical data. If the State has failed to monitor the effectiveness and outcomes of procedures that can culminate in the imprisonment of its citizens relating to non-payment of civil debt, it is unacceptable that it should then compound the error by dressing speculation up as fact.

It is also notable that in paragraphs 195 and 196 of its 1998 Report, the State itself indulges in a telling contradiction, referring twice to persons in custody for non-payment of debts, instead of persons in custody for failure to comply with a court order.

This confusion is reiterated in paragraph 197, when referring to legislative proposals to end imprisonment where practicable for civil debt and inability to pay fines. If the State, which ultimately supports maintaining this option and insists that imprisonment is for contempt, is unclear in its language, the reality that this process is about inability to repay debts is apparent. **Finally, it is worth noting the information in paragraph 197 that legislation to end imprisonment in certain circumstances related to debt was in preparation in April 1999. As will be seen from an analysis of the most recent report, this proposal has been abandoned in the interim.**

No Bill ever materialised in relation to civil debt. A long-standing commitment first proposed in the Government legislative programme of October 1997, to introduce legislation that would simplify and improve the payment of fines, eventually resulted in the publication of a Bill that lapsed with the general election in 2007.[145] However, the debt part of the proposal was never acted upon. There was a Private Members Bill (initiated by Jim Higgins, then T.D. of Fine Gael) proposed in 1998, which sought to reform the Enforcement of Court Orders legislation by introducing attachment of earnings orders and other alternative mechanisms in lieu of imprisonment in debt and fines cases, but it was voted down by the Government in February 1999. In the course of the debate on this Bill, the then Minister for Justice, Equality and Law Reform, John O'Donoghue, T.D. assured the Dáil that the Government would address the issues in its own legislation in due course.[146] This has not happened to date.

2007 State Report

Ireland's most recent State Report to the Human Rights Committee was published in September 2007.[147] In relation to Article 11 and imprisonment on the ground of inability to fulfil a contractual obligation, the State Report is succinct. It notes that "there have been no developments relating to this article of the Covenant since Ireland's last report to the Committee."[148] This is despite the specific commitment in its second State Report to introduce "legislative proposals to end imprisonment where practicable for civil debt." As outlined above, not alone did such legislation not materialise, but no proposals were ever made.

In May 2008, prior to the State's appearance before the Human Rights Committee, the Committee asked the Irish government on the question of Article 11; "are any steps being taken by the State Party to repeal the provisions of the legislation permitting imprisonment for failure to fulfil a contractual obligation"?

In June 2008, the State responded to this and other issues raised by the Committee. In relation to Article 11, the detail provided was as follows:

Issue 14: Imprisonment for Failure to fulfil a Contractual Obligation (Article 11)

72. Ireland does not have legislation providing for criminal sanctions or imprisonment for failure to fulfil a contractual obligation. Imprisonment for non-payment of debt was abolished in Ireland by the Debtors (Ireland) Act 1872. However, refusal to fulfil a

145 Fines Bill – No 4/2007 – Introduced on 26 January 2007.

146 Dáil Debates Official Report 24/2/1999 – Page 10-11.

147 ICCPR – Third Report by Ireland on the measures adopted to give effect to the provisions of the Covenant. CCPR/C/IRL/3, 4 September 2007.

148 Paragraph 299, Page 80.

contractual obligation or pay a contractual debt may amount to civil contempt of court, for which imprisonment may be imposed.

73. Contract law is a civil matter and the primary remedies available to a complainant, through the Courts, would be enforced performance of the contract or damages. Where a person refuses to obey a court order relating to providing a remedy for contractual default to another person/organisation, imprisonment may be one of a number of remedies ultimately for non-compliance. The imprisonment of such defaulters is very much a last resort. The person will, generally, have been given every opportunity to fulfil the contract or to discharge the debt.

74. The number of persons in custody in Ireland for non-payment of debt on 23 May, 2008 was 8 out of a total prison population of 3,574 which represents 0.22% of the prison population.

75. The Law Reform Commission in its Report on Contempt in 1994 considered that the case for abolition of the sanction (of imprisonment) had not been established in regard to civil contempt. The Commission felt that the powers of the court in this regard were coercive more than punitive. It is an appropriate remedy only where the desired result cannot be achieved by other means and the defendant's active cooperation is a vital ingredient.

76. There are no proposals in the current Government Legislative Programme to reform the law in regard to civil contempt in how it might be applied to default of contractual obligations or failure to pay a civil debt.

77. A person can be committed to prison for civil contempt for failure to comply with an order of the Court to discharge a debt by instalments. Instalment orders involve a statutory procedure to require the examination of a debtor's means by a court which will then consider fixing a periodic instalment to be paid to discharge the debt taking into account the income and outgoings of the person concerned. If the person against whom the order is made fails to meet periodic payments an application may be made for arrest and committal to prison but this requires a further hearing by the judge under Section 18 of the Enforcement of Court Orders Act 1926, as amended by Section 6 of the Enforcement of Court Orders Act 1940. The judge may not order an arrest and imprisonment unless satisfied that the failure to pay was due to wilful refusal or culpable neglect. The judge may treat the hearing for imprisonment as an application to vary the instalment order and instead of ordering imprisonment may adjust the payments under the instalment order to meet the debtors changed circumstances.

78. It should not be presumed that all persons failing to meet their debts do so because of poor financial circumstances. Imprisonment is only used in cases where the Courts are satisfied that a person has the ability to discharge a debt, but has not done so. In many cases, when a person committed for failure to pay a debt or fine is faced with the reality of imprisonment, they do, in fact, make payment.

The 'Shadow' Report

On this occasion, an alternative analysis was also presented to the Committee. The UN Human Rights Committee had before it a so-called Shadow Report, which was a report

compiled by three non-governmental organisations – FLAC, the Irish Council for Civil Liberties (ICCL) and the Irish Penal Reform Trust (IPRT) – and endorsed by a further nineteen organisations.[149] This report constituted an alternative view from a non-governmental perspective of how the Irish State complied with its obligations under the ICCPR. It gave a different account to the Committee of Ireland's performance under Article 11 as follows:

> 117. The Committee has expressed concern on a number of occasions about the use of imprisonment for failure to pay a debt in Ireland. In 1993 the Irish Attorney General on behalf of the State told the Committee that no one was imprisoned simply for inability to pay money due. He explained that where a debt had to be enforced, there was a thorough examination of the person's means. After that a person might be ordered to pay by one or more instalments. There was provision for appeal thereafter. Imprisonment, he said, only arose after a court had satisfied itself that the debtor had a capacity to pay. At that stage the imprisonment resulted from failure to obey a court order, not failure to pay the debt.
>
> 118. However, the debt enforcement system does not oblige a debtor to attend or to provide a full financial statement. In the vast majority of cases, debtors do not attend enforcement hearings. The fact that these hearings take place in public in the debtor's local court is a substantial barrier to participation, together with the stress and lack of understanding of legal procedures affecting people in debt. Debt enforcement legislation is complex and is primarily based on the Enforcement of Court Orders Acts 1926-1940. Few debtors are legally represented. Instalment Orders are frequently made by judges without any actual knowledge of the debtor's financial circumstances.
>
> 119. Imprisonment can thus 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.
>
> 120. In its response to the Committee in 1999, the State announced that legislative proposals to end imprisonment where practicable for civil debt and inability to pay fines were then being prepared in the Department of Justice, Equality and Law Reform'. No legislation has been introduced or passed in this area. From January 2002 to September 2006, almost one thousand people were imprisoned for periods of up to three months for 'offences related to debt' with ninety-four people committed more than once for the same debt. The State insists that there is no remission for those imprisoned for debt who may only obtain early release by paying their debt or "purging their contempt" which is only possible by paying the debt.

The Shadow Report recommended that the Government should amend the law of contempt to ensure that it cannot be used to imprison an individual for failing to fulfil a contractual obligation or for inability to pay a civil debt.

[149] FLAC, ICCL & IPRT – *Shadow Report to the Third Periodic Report of Ireland under the International Covenant on Civil and Political Rights*, Dublin, June 2008.

Thus, two contrasting views were presented to the Committee. The State position outlined in Paragraph 74 is that the number of persons in custody for non-payment of debt on 23 May, 2008 was eight out of a prison population of 3574. However, this figure merely provides a snapshot on a particular day, whereas the Shadow Report showed that almost one thousand people were imprisoned, without any possibility of remission of their sentences, from 2002 to 2006 for debt offences. Subsequent figures released by the Department of Justice, Equality and Law Reform in response to parliamentary questions indicate that 201 and 276 persons were imprisoned in 2007 and 2008 respectively as a result of failing to comply with a court order in relation to payment of a debt.[150]

Further analysis of the 2007 State Report

Once again, the response of the Irish Government, in common with both the 1993 and 1998 reports, puts forward a theoretical position in Paragraphs 72 and 73 which does not reflect reality and which was not backed up with any hard information. As the findings of the survey in this report have demonstrated, many of those imprisoned for non-payment of debt do not wilfully refuse to obey a court order relating to a remedy for contractual default; they are simply incapable of meeting the terms of the order.

The reference in Paragraph 75 of the State submission to the Law Reform Commission's 1994 Report on Contempt of Court is interesting in that it fails to point out that the question of imprisonment for non-payment of debt is not explicitly examined in that report at all.[151] Neither are there any specific references to the enforcement of court orders legislation and the sanction of imprisonment for non–compliance with Instalment Orders. On the other hand, the Commission does examine enforcement of maintenance obligations by way of imprisonment in that report and concludes as follows:

> Having considered these arguments, we concluded that the sanction of imprisonment for wilful refusal or culpable neglect to obey a court order to *support one's family* should be retained. Sensitively and prudently applied, it was an appropriate response to such a default. The view was expressed at the seminar that attachment of earnings was a more desirable and less counter-productive means of ensuring that spouses in default meet their obligations.
>
> We agree entirely with this view but we anticipate that imprisonment may be a useful remedy of last resort in certain cases, for example, where a defaulting party of adequate means wilfully refuses to pay and will not divulge the whereabouts of their assets or the nature of their earnings from self employment.[152]

This passage makes it clear that the Law Reform Commission considers attachment of earnings to be a far preferable method of enforcing a court order than applying for a debtor's imprisonment. However, unlike family maintenance cases, attachment is still not available as a method of enforcement in civil debt cases. Indeed, it is a useful reminder at this point that the research for FLAC's 2003 report *An End based on Means* was originally undertaken in response to a then government proposal to introduce attachment of earnings as an alternative method of enforcement to imprisonment in civil debt and fines cases. This proposed legislation never materialised.

150 Question No 290 by Joe Costello, T.D. for Written Answer 29 October 2008 and Question No 608 by Caoimhghin O'Caolain, T.D. for Written Answer, 27 January 2009.

151 Law Reform Commission – *Report on Contempt of Court:* LRC 47/1994.

152 Ibid, page 55; our emphasis added.

It is also clear that the Commission in 1994 considered that imprisonment should be an absolute last resort even in maintenance cases and only where a defaulting party of adequate means wilfully refused to pay. One wonders therefore in 2008 what it would make of the imprisonment of civil debtors who have never once appeared before a court so that their means might be verified. In this regard, it is worth noting that the current Commission's *Third Programme of Law Reform 2008-2014* specifies 'Debt Enforcement and securing interests over private property' as a project under the 'Legal System and Public Law' strand of its agenda. It goes on to state that:

> This project will include an examination of the legal issues surrounding the Instalment Order procedure. The Commission will also examine the attachment of security interests to private property. The Commission is aware that FLAC (the Free Legal Advice Centres) has carried out work on some aspects of this project and will consult with them and other interested parties.[153]

Thus, far from providing an endorsement of the current procedure, the Commission, even in 1994, had serious concerns about imprisonment in maintenance cases. Judging by the inclusion of an examination of the Instalment Order procedure in its new Programme of Law Reform, it was also clearly concerned about the suitability of this debt enforcement procedure in 2008. At the time of writing, the Commission is well advanced in its examination of these issues and is likely to publish a consultation paper by autumn 2009.

Paragraph 76 of the State Response baldly states that the Government has no plans to change procedures in this area despite the clear commitment it had given in its response to the Committee in 1999 to introduce legislation that would end imprisonment, where practicable, for non-payment of civil debt or fines. As the Shadow Report showed, there is no explanation in the State's submissions as to why it did not proceed with the promised legislation.

Inaccuracies identified in the previous State Reports recur in the latest one. For example, the statement made in paragraph 77 that 'the judge may not order an arrest and imprisonment (of the debtor) unless satisfied that the failure to pay was due to wilful refusal or culpable neglect' is incorrect and a critical misunderstanding of the onus of proof under the legislation. Under Section 6 of the Enforcement of Court Orders Act 1940,[154] it is the ***debtor*** who must show that there was not such wilful refusal or culpable neglect in order to avoid a committal. The debtor who does not appear in court cannot satisfy this condition and such orders are frequently made in the debtor's absence as attendance is not compulsory. As the Shadow Report pointed out, and as has been noted several times in this report, hearings are in open court in the debtor's local area and debtors often have a myriad of personal, social and legal problems that discourage attendance. In the debtor's absence, out-of-date financial information supplied by the creditor is often used to assess ability to pay as indebtedness is usually triggered by a change in financial circumstances.

Again, there is no data supplied that attempts to validate the assertion in paragraph 78 of the response that "in many cases, when a person committed for failure to pay a debt or fine is faced with the reality of imprisonment, they do, in fact, make payment", yet

153 *Third Programme of Law Reform Report 2008-2014*, LRC 86-2007, page 11.

154 Amending Section 18 of its 1926 equivalent.

this is presented as fact. This statement again clearly implies that those who do go to prison because they cannot afford to pay serve as useful deterrents to force others to pay.

On the other hand, the Shadow Report pointed out to the Committee that imprisonment can take place 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.

Concerns of the Human Rights Committee

Based on the written information furnished by the State and by non-government organisations, the UN Human Rights Committee met with representatives of the Irish Government to discuss the implementation of the ICCPR in Ireland. In July 2008, the Attorney General and the Secretary General of the Department of Justice, Equality and Law Reform respectively made presentations and responded specifically to concerns raised by members of the Human Rights Committee in relation to Ireland's State Report.

On the question of civil debt and imprisonment, the Attorney General stated that there is no imprisonment for debt in Ireland. He said that imprisonment occurs on an exceptional basis for wilful non-compliance with an order of the court requiring payment of money. He stressed that it is exceptional and can only be enforced when significant protections are addressed including that the court is satisfied that there is a wilful refusal to pay and not an inability to pay. If there is a procedural inadequacy in terms of how the courts make their decision of wilful refusal, this can be judicially reviewed or appealed. Thus, he argued that this procedure should not be categorised as imprisonment for failure to fulfil a contractual obligation.

As is normal practice, Committee members raised questions with the Government representatives on the State's Report. Two members of the Committee, Messrs Iwasawa and Amor, raised their concerns about the State response on imprisonment for debt. Mr Iwasawa suggested that it appeared that refusal to fulfil a contractual obligation amounts to contempt of court for which imprisonment may be imposed and thus wondered how such a system could be consistent with Article 11. He referred to the discrepancy between the numbers supplied in the State Report and the Shadow Report and in particular to the information in the Shadow Report that 94 people were committed a second time in respect of the same debt between January 2002 and September 2006. He also noted the fact that promised legislation had not emerged. Mr Amor shared his fellow Committee member's concerns and further asked if a term of imprisonment served to eliminate the debt.

The Secretary General of the Department of Justice, Equality and Law Reform, as Acting Head of the Irish Government delegation, responded to these concerns. He claimed that the vast majority of people who are sentenced pay at the moment when imprisonment becomes a real possibility and over the years he had found that the courts are careful only to commit people where there is a refusal to pay. He added that the debt usually concerns family maintenance relating to a dispute between partners (though again it must be stated that no figures whatsoever were provided to support this contention). He stated that the position concerning fines was being reviewed to see if civil remedies are

possible. Finally, he insisted that the figure for imprisonment for debt is and always has been minute.

Supplementary information supplied by Government to the Committee by 18 July 2008

On 18 July, the Government provided further supplementary information in response to the questions posed by the two members of the committee as follows:

> Mr. Iwasawa referred to figures provided to him concerning the number of persons imprisoned for contempt of Court arising from failure to comply with a court order concerning a civil debt. As indicated, a distinction needs to be drawn between those committed to prison in total over a period of time and the number actually in prison on any given date, as many settle their affairs as soon as prison is a real threat. Our understanding is that the figures cited by Mr. Iwasawa relate to the total number of committals over almost a 5 year period. The key point, however, is that at any given point in time the number actually in prison is very small indeed. In fact on a recent date just 7 were in prison solely for this reason, which equates to less than 0.5% of the total prison population.
>
> The suggestion that Ireland imprisons for debt is a misunderstanding. No legal provisions entitle a court to do so. Ireland has, as every State does, and is entitled to have, a mechanism for enforcing court orders in the face of the wilful and obstinate refusal to obey same. That legal entitlement is an essential part of the administration of justice and the independence of the judiciary. Furthermore, enforcement of court orders is essential to maintain public confidence in the judicial system, since the administration of justice would be undermined if an order of any court could be disregarded with impunity. 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.

Observations on the supplementary information

The final sentence in this 'supplementary information' contribution repeats the same key inaccuracy evident in the previous observations. If anything it goes even further by implying that the standard of proof in criminal cases applies here. It must, according to this latest explanation, **be proved beyond a reasonable doubt** that the person concerned is able to pay, but is refusing to do so. Quite how it can be shown beyond a reasonable doubt that a person who is not even present in the court and who 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. In any case, this assertion is quite simply legally incorrect. The onus under the Enforcement of Court Orders Acts 1926-1940 is clearly on the debtor, in that Section 6 (c) of the 1940 Act provides that:

> (t)he Justice shall not order the arrest and imprisonment of the debtor under the next preceding paragraph of this section *if the debtor (if he appears) shows*,[155] to the satisfaction of such Justice, that his failure to pay was due neither to his wilful refusal nor to his culpable neglect;

155 Our emphasis added.

In turn, the observation that Ireland, like every other State, is entitled to have a mechanism for enforcing court orders is missing the point. Of course, there must be a method of enforcing court orders. However, to our knowledge, there is not another member state of the European Union that allows the enforcement of a court order requiring repayment of a contract debt using imprisonment as the ultimate sanction, where the court is not required to hear from the debtor prior to the order being made.

Finally, it must be noted here that the supplementary information provided by the State does not address why amending legislation that had been promised had not been introduced and once again, it did not provide any meaningful statistics to back up its assertions on these issues.

Conclusion of the Human Rights Committee, 24 July 2008

Following its review of the information furnished, the UN Human Rights Committee issued its concluding comments on Ireland in July 2008. In Paragraph 18 of the Concluding Comments, the Committee states quite simply in relation to Article 11 that it is concerned that the State party does not intend to amend the laws which may in effect permit imprisonment for failure to fulfil a contractual obligation. It recommends that "The State party (i.e. Ireland) should ensure that its laws are not used to imprison a person for the inability to fulfil a contractual obligation."

General conclusion

Article 11 of the United Nations International Covenant on Civil and Political Rights prohibits imprisonment on the sole ground of a person's inability to fulfil a contractual obligation. The Irish Government's repeated position is that imprisonment in debt cases does not occur directly because of the breach of contract involved in failing to repay a loan according to its terms, but because of the failure to obey a court order directing the repayment of a debt by stages. It is argued by the State that this is a legally accurate distinction, but as the language used in paragraphs 195-197 of the 1998 State Report indicates, the real effects of how this procedure works in practice are so clear that even the State routinely uses the term 'imprisonment for non-payment of debt' in its accounts of the process.

However, it is neither in the spirit of nor in compliance with the Universal Declaration of Human Rights and the more specific conventions and covenants that derive their authority from it to blithely maintain this position when it is clear that an average of more than 200 people a year spend time in prison for 'debt offences' in Ireland and many more narrowly avoid committal for the same reason. Nor is it acceptable that in order to encourage repayment by some who can pay, the State is prepared to send those who cannot pay to prison, in contravention of their fundamental human rights.

In the course of its defence of this procedure to the Human Rights Committee of the United Nations in 1998, the State felt able to assert 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."[156] Nonetheless, although the Irish Prison

156 See page 108.

Service provided FLAC in October 2006 with figures on the number of persons that were imprisoned for 'offences relating to debt' between 2002 and September 2006, it was unable to provide details of the length of sentences ordered or the average sentence served by persons imprisoned despite a further request. In turn, the 2007 State Report maintained that 'in many cases, when a person committed for failure to pay a debt or fine is faced with the reality of imprisonment, they do, in fact, make payment.'[157] These remarks were presented as factual comment but were not backed up by solid detail. Did the State actually have concrete evidence of these trends in both 1998 and 2007 which it failed to produce, or were these 'facts' based merely on a prejudicial belief that the majority of debtors are capable of paying but are trying to avoid doing so until the last minute?

It is indeed ironic that since the 2007 State Report was presented to the Human Rights Committee, the Minister for Justice, Equality and Law Reform, Dermot Ahern, T.D. has for the first time published figures in relation to length of sentence and sentence served by debtors for 2008. To reprise, these indicate that the average length of sentence for debtors was 27 days and the average sentence served was 20 days. These statistics firmly contradict the information provided to the Human Rights Committee on two separate occasions.[158]

Ultimately, FLAC must conclude that the comments made on behalf of Ireland in relation to Article 11 at the various stages of the State Reports referred to above at best betray a lack of understanding as to how the procedures work in practice on the ground. At worst, they constitute a conscious effort to draw a veil over their less satisfactory elements in an attempt to convince the Human Rights Committee that Article 11 is not being breached.

It appears reasonable to suggest that the Human Rights Committee of the United Nations continues to be unconvinced by the explanations provided by the Irish delegation that imprisonment for civil debt does not directly or indirectly occur in Ireland. The Committee notes that a commitment made following the 1998 State Report to end imprisonment related to civil debt by amending legislation has not been honoured. In its conclusion the Committee once again calls upon Ireland to introduce legislation to prevent this practice continuing.

3.3 Ireland's obligations under the European Convention on Human Rights and Fundamental Freedoms

Introduction

The European Convention on Human Rights and Fundamental Freedoms was agreed by the Council of Europe in Rome in 1950 and is generally thought to have drawn its inspiration from the Universal Declaration of Human Rights adopted by the United Nations in 1948. The purpose of the Convention is to set out a list of rights and freedoms that will be guaranteed to all residents of the countries to whom the Convention applies, for example, the right to a fair trial or the right to liberty and security. In turn, the setting up of the European Court of Human Rights (which came into operation in 1959) allows

157 See page 112.

158 Response to Parliamentary Question No 608 by Caoimhghin O'Caolain, T.D. for Written Answer, 27 January 2009.

persons who feel that a signatory State has breached the terms of the Convention to make a complaint (or 'petition') and have that complaint adjudicated upon by a judge of the Court.

Ireland ratified and is bound by the Convention since 26 February 1953. However, until 2003, the Convention had not been incorporated into Irish law, leaving an individual free to make a complaint to the Court of Human Rights but unable to effectively argue the terms of the Convention before a domestic court. Numerous decisions of the superior courts in Ireland up to that point had confirmed that the Convention did not form part of domestic law, insofar as international agreements only create obligations between the states that sign up to them and did not give rights to individuals in their own domestic legal system.[159]

However, heavily influenced by obligations that Ireland had signed up to as part of the Belfast Agreement, the Government incorporated the Convention into Irish law via the European Convention on Human Rights Act 2003.

Section 2 (1) of this Act provides that

> in interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

Section 3 (1) provides that

> subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

The High Court (and on appeal, the Supreme Court) are also empowered to declare any legal provision to be incompatible with the terms of the Convention and this may give rise to an award of financial compensation to the person affected by the incompatible measure.[160] However, a declaration of incompatibility does not affect the validity of the legal provision concerned, although it is generally assumed that the State would remedy any such law rather than face further exposure before the European Court of Human Rights in Strasbourg.

The European Convention and imprisonment in relation to debt

Article One of the Fourth Protocol to the Convention and procedural guarantees

The Convention itself does not specifically prohibit imprisonment for failure to fulfil a contractual obligation. However, Article 1 of the Fourth Protocol to the Convention[161] does provide a very similar wording to Article 11 of the ICCPR, namely that "[n]o one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation." Explanatory reports on this article of the protocol outline 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."

159 See, for example, the well-known case of *Norris v The Attorney General* [1984] IR 36.

160 The first declaration of incompatibility of a domestic law with the terms of the Convention was made by the High Court in the case of *Foy v An t-Ard Chlaraitheoir, Ireland and the Attorney General* [Record No. 2006/33SP] on 14 February 2008. The applicant, who was represented by FLAC, sought a declaration that Sections 25, 63 and 64 of the Civil Registration Act 2004 were incompatible with Section 5 of the European Convention on Human Rights Act, 2003 in that they failed to respect her private life as required by Article 8 of the Convention. At the time of writing, this judgment is under appeal by the State to the Supreme Court.

161 Agreed at Strasbourg on 16 September 1963, it entered into force on 2 May 1968 and was ratified by Ireland on 29 October 1968.

As with Article 11 of the ICCPR outlined above, the same nuances of argument apply. Is a person's liberty deprived at the conclusion of the debt enforcement procedure – described in Section 2 of this report – because of failure to fulfil a contractual obligation or, rather, because of failure to obey a lawful court order? Whatever the answer may be, the practical outcomes may not differ radically, for if the reason for the imprisonment is the failure to pay a debt, it will be contrary to the Convention. If the reason is failure to obey a lawful court order, the imprisonment may also be incompatible as the series of procedural guarantees under the Convention are not generally observed in debt cases.

These procedural guarantees apply not just in criminal cases but also to misdemeanours such as contempt of court. They constitute a set of limits to the punitive power of a State's criminal justice system and cover pre-trial, trial and post-trial stages. How is this relevant to the debt enforcement by instalment process that may result in imprisonment? The penal system is made up of not just the potential punishment that may result from being tried and found guilty of a criminal offence, but also any other institutional device that imposes punitive treatment upon a person. Thus imprisonment that is said to be imposed by the State for contempt of court, as under the enforcement of court orders legislation, must be subject to these procedural guarantees.

This principle has been recognised in key decisions of the European Court of Human Rights as early as 1983, for example, in the case of *Ozturk*,[162] when the Court ruled that the legal status accorded to a particular sanction is but one of the criteria that should be taken into account in order to distinguish regulatory offences from criminal offences. The intention of the sanction must also be considered whether it is punitive, deterrent or simply restorative. In *Ozturk*, the Court ultimately concluded that "[a]bove all, the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 (art. 6) of the Convention, criminal in nature." Nor does the fact that the offence is not considered to be serious or attracts a comparatively minor penalty take it outside the protection of the Convention, as the same decision states: "The fact that it was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of Article 6 (art. 6). There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness."

Articles Five and Six

In addition to Article 1 of the Fourth Protocol, Articles 5 and 6 of the original Convention are also potentially relevant when considering the question of imprisonment for failure to meet the terms of an Instalment Order. In brief, Article 5 (1) provides that "everyone has the right to liberty and security of person" and it goes on to set out cases in which a person may be legitimately deprived of his/her liberty, provided it is done in accordance with a procedure prescribed by law. These include "the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law." Article 6 (1) in turn provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

162 *Ozturk v Germany*, February 21, 1984, European Court of Human Rights - No. 8544/79 - Paras 52 and 53. The applicant was fined for dangerous driving resulting from an accident. Ozturk, a Turkish national, claimed that charging him for the costs of translation was contrary to the due process guarantees, since the imposition of a fine was criminal in nature and translation facilities should have been provided by the State without charge.

Article Five

Those defending the debt enforcement procedure by instalment examined in this report may argue that Article 5 (1) of the Convention is being upheld, as it permits deprivation of liberty for non-compliance with a lawful order of a court. An Instalment Order, it may be argued, is a lawful order of a court which is served on the debtor who may not (or often cannot) comply with it.

However, it is worth examining the nature of the non-compliance by a debtor that should be required by Article 5 (1) to make a deprivation of liberty (or term in prison) lawful. Besides its lawfulness, the procedural fairness shown to the debtor leading up to the making of the order together with the practicality of the order are both core elements that must be taken into account by any rational system of rules. The idea that the Convention would accept that imprisonment can happen even where the subject of the order is incapable of meeting its terms is hard to sustain, given the precise terms of the first article of the Fourth Protocol. Indeed, Article 5 (1) only makes sense if the non-compliance involved results from an active resistance to meeting the obligation, or an astonishing lack of commitment on the part of the debtor, i.e. where it has been established that there has been wilful refusal or culpable neglect. It is therefore crucial in terms of analysing the compatibility of the Enforcement of Court Orders Act 1926 - 1940 with the Convention to examine the procedural safeguards taken to be sure of the nature of the debtor's attitude towards the debt. **In summary, the Act will not be compatible with the Convention unless it is absolutely clear that the debtor purposely refuses to pay.**

Article Six

In turn, it may also be argued by the State that it is honouring Article 6 (1) in that a debtor who fails to meet the terms of an Instalment Order is given a specific opportunity through the Committal Summons to attend a 'fair and public hearing' at which s/he can argue that an order for arrest and imprisonment should not be granted. However, it must be asked, how fair is the lead-up to this potential hearing? Does this hearing conform to fair trial standards? The following fair trial guarantees are recognised and established by the European Convention of Human Rights and Fundamental Freedoms, in addition to other international agreements.[163]

- ***Presumption of innocence***

In the proceedings leading to imprisonment for so-called contempt of court relating to the enforcement of debts, it is the debtor who must show at the Committal Summons hearing that there is a willingness to pay but not the material means to afford to do so. S/he must also show that failure to meet the terms of an Instalment Order was not due to his/her 'wilful refusal' or 'culpable neglect'. This violates the presumption of innocence, which places the burden of proof on the party who alleges an offence, crime or any other unlawful conduct has been committed (Article 6 (2) of the Convention).

- ***Protection of private life of the parties***

The argument has already been advanced in this report that there is no constitutional necessity for debt enforcement proceedings to take place in open court. A judgment has

163 These principles were inspired by very similar articles in the UN International Covenant on Civil and Political Rights, as follows: Presumption of Innocence (Article 14.2), Protection of Private and Family Life (Article 23), Right to Privacy (Article 17), Right to be Informed of Charges (Article 9.2), Right to an Effective Defence, including Legal Advice (Article 14.3), The Right not to be Tried Twice for the Same Offence (Non Bis in Idem) (Article 14.7).

already been given to the creditor. Enforcement is about putting in place arrangements to ensure that the amount of the judgment is repaid and there is no administration of justice taking place at this point that would necessitate a hearing in public from the perspective of the Irish Constitution.[164] Article 6 (1) of the Convention provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing. This principle is in place to protect a defendant from arbitrary abuse of due process behind closed doors. However, the press and public may be excluded from all or part of a trial where the protection of the private life of the parties so requires. Furthermore, the right to privacy (Article 8 of the Convention) protects private and family life from undue interference.

An inability to repay debts often leads to feelings of fear, humiliation and embarrassment on the part of the debtor. As this report has demonstrated, in many cases default was a painful experience out of the control of the debtors concerned who had mostly suffered an adverse change in their financial circumstances. Forcing debtors in these kinds of circumstances to attend court hearings held in public cannot be deemed necessary in a democratic society. In addition, from a practical viewpoint, it seems in many cases to work as a deterrent to participation and therefore impedes the resolution of debt problems. The interests of privacy and the effective management of resolving problems of indebtedness suggest that such enforcement should take place in private.

■ *Right to be informed of charges*

Under Article 6 (3) (a) of the Convention, a person charged with a criminal offence has the right to be informed promptly of the nature and cause of the accusation against him/her. Although debtors in the debt enforcement process are not charged with a criminal offence as such, the potential outcome of non-participation and non-compliance is a prison sentence of up to three months, a similar outcome to a criminal prosecution. However, the findings from the questionnaires in this report reveal that in many instances debtors claimed not to fully understand the proceedings brought against them nor the choices they had at each stage to protect their rights. Abstract and complex legal language poses difficulties for non-lawyers, especially for people who are in a state of great distress and pressure as may be the case with debtors in default. The Convention right to be informed of charges is impaired by both the complexity of the language used on legal documents and insensitivity about the personal situation of debtors.

■ *Rights to an effective defence, legal advice and equal protection of the law*

Article 6 (3) (b) of the Convention in turn provides that everyone 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." Again, although strictly speaking the debtor in the committal procedure is not accused of a criminal offence, the consequence of failure to attend a committal hearing is in all likelihood a prison sentence, the same result as might arise with a criminal prosecution.

The debtor will frequently not have had the benefit of legal advice to make him/her fully aware of the relevance of proceedings leading up to the application for his/her

164 See pages 14-15 for further detail on this issue.

committal. This lack of advice is often the key to why debtors do not appear at the assessment of means stage for the purposes of setting an instalment and is often the main reason why imprisonment results. If debtors in this position had access to legal advice in the first place, it is likely that only those who were genuinely trying to avoid the process would fail to attend, once the potential gravity of the situation is pointed out to them. Many debtors are not aware that they are entitled to apply for civil legal aid and advice, but unfortunately some who have looked for state legal assistance in debt cases have been refused in the past.[165]

Nonetheless, the Legal Aid Board has itself accepted that there is no reason why legal advice should not be available in debt cases subject to the applicant satisfying the means test. It further suggests that legal representation may be available to defend a debt case if the applicant passes the merits test, i.e. if s/he has legitimate grounds to question the validity of the debt or its amount. It also suggests that legal representation may be available in an Instalment Order application where there is merit in seeking to confine the Instalment Order to what is affordable. It is undoubtedly an advantage for a debtor to have a solicitor act or mitigate on his or her behalf at such hearings rather than face such a hearing alone. In this context, it is important to reiterate that money advisors are not lawyers, nor do they have a right of audience in the courts at Instalment Order hearings. As the questionnaires again demonstrate, debtors who may have to appear alone often find the occasion passes them by.

It is important that a solicitor be present for the debtor to try to ensure that any instalment is fair but it is even more critical that a solicitor assist the debtor to prevent a committal. The Legal Aid Board, however, is of the view that legal representation is less likely to be available to defend a debtor at a committal hearing, as the chances of the debtor satisfying the merits test at this stage have diminished, whether or not s/he has appeared at hearings in the process thus far. In brief, the merits test involves an assessment of whether a reasonably prudent person, able to afford their own representation, would do so at their own expense in the applicant's circumstances; and whether a lawyer acting reasonably would advise them to do so.

A further layer in the merits test is added by a provision that an applicant for civil legal aid has to show that s/he has, as a matter of law, reasonable grounds for instituting or defending the proceedings in question, and is reasonably likely to be successful in doing so. If the Board does not agree, it is entitled to refuse civil legal aid. However, another view – and one that this report advances – is that the committal hearing may be an opportunity to seek a variation of the Instalment Order to what is affordable in lieu of an order to imprison and that, therefore, there is merit in such an application, both from the perspective of the debtor and the taxpayer.

Expecting that an often frightened and ill-informed person will appear to defend him or herself properly at this stage may simply be unrealistic. Thus, the fact that legal representation may not be available and that committal proceedings are allowed to continue in the debtor's absence curtails the debtor's right to an effective defence in accordance with Article 6 (3) (c) of the Convention.

165 A survey of MABS offices in June 2005 found that only eleven (out of over 50) offices had referred clients to the Legal Aid Board in the previous 12 months. In three of these cases, the potential applicant was told that civil legal aid was not available in debt cases, even though there is no specific exclusion of debt cases in the Civil Legal Aid Act 1995.

In both *Beet v United Kingdom*[166] and *Lloyd v United Kingdom*,[167] the European Court of Human Rights found that the United Kingdom had breached the terms of Article 5 (1), Article 6 (1) and Article 6 (3) respectively. In both cases, the applicants had failed to pay local taxes and were subject to 'liability orders' in the Magistrates Court as a result, on the basis that their failure to pay was considered to be due to their wilful refusal or culpable neglect. When the applicants then failed to make payments on the liability orders, they were imprisoned. However, in both cases it transpired that the relevant magistrate had failed to meet a regulatory requirement to conduct a financial means enquiry before imposing the liability order. The deprivation of the applicant's liberty was therefore in breach of a procedure prescribed by law under Article 5 (1). In addition, the Court also found that the fact that legal aid was not available when the defendants were faced with the prospect of imprisonment was a breach of the right to representation under Article 6 (3).

In the context of the Instalment Order procedure in Ireland and the ultimate sanction of imprisonment, these are notable precedents. Although the legislation on the enforcement of court orders does not make it compulsory to conduct a means test in which the debtor must participate before an Instalment Order can be imposed, arguably it should be interpreted as a regulatory requirement. Otherwise, the legislation does not make any sense in that it permits the imprisonment of a person for failure to meet the terms of an order which a court has not established that the person can afford to pay.

In turn, although the Legal Aid Board accepts that there is no specific exclusion of debt cases in the civil legal aid legislation, it suggests that it is unlikely to provide civil legal aid to a person at the Committal Summons stage of the debt enforcement procedure. Normally, a person charged with a criminal offence that carries the probability of a term of imprisonment if found guilty will be informed of his/her right to avail of State criminal legal aid services and is unlikely to be denied it. However, criminal legal aid is not available to a debtor faced with a prison sentence for so-called contempt of court. Thus, the civil debtor falls between two stools and may have to face this situation without legal aid, although clearly justice requires that a person faced with the prospect of a prison sentence should have legal representation to defend his/her position.

■ *Right not to be tried twice for the same offence (Non bis in idem)*

After release from prison, the debtor may still be subjected to a new process to recover subsequent arrears on instalments and costs, potentially leading to a further term of imprisonment if s/he is unable again to pay. Although s/he is likely to be in a worse financial and social situation than before imprisonment, the enforcement of court orders legislation may thus tie a debtor into perpetual proceedings for what is effectively the same ongoing failure.

The 'McCann' case [168]

At the time of writing (June 2009), the High Court has recently heard a case brought by a woman who was sentenced to one month's imprisonment by a District Court judge for non-payment of an Instalment Order to a credit union. The debtor in this case had not

166 Application No 47676/99, 1 March 2005, (2005) 41 EHRR 23.

167 Application No 29798/96, unreported, 1 March 2005.

168 *McCann (Applicant) and Judge of Monaghan District Court, The Commissioner of An Gárda Siochana, 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)*, High Court, 13-15 May 2009.

attended the hearing to set the Instalment Order or the hearing to apply for her arrest and imprisonment and was thus sentenced in her absence. These proceedings, brought on her behalf by Northside Community Law Centre (NCLC), involve a challenge to both the constitutionality of the enforcement of court orders legislation and its compatibility with the European Convention. It was argued on behalf of the applicant that the order to imprison her was merely on grounds of her failure to fulfil a contractual obligation, i.e. to pay the debt, that the lack of access to legal advice and representation terms breached her right to a fair hearing and that one month's imprisonment was a disproportionate sanction in the circumstances. Many of the matters referred to in this section in relation to protections under the Convention were expanded upon in considerable detail by Counsel for the applicant. The Human Rights Commission was also joined as a notice party to these proceedings to act as an *amicus curiae* (or friend of the court) in order to give its view on the human rights implications of imprisonment in debt cases. Judgment was reserved and a decision is awaited.

Conclusion

When subject to the scrutiny of basic human rights norms set out in international legal instruments, it is clear that in some areas the Irish legal system still falls short of what is required. How judgment debts are enforced by instalment is an example.

To sum up, the procedures under the Enforcement of Court Orders Acts 1926-1940 suffer from a lack of proportionality between the ultimate sanction of imprisonment for the debtor and any positive outcome for the creditor. Ultimately, the punishment imposed upon the debtor is generally disproportionate to any perceived 'crime' that s/he is alleged to have committed. Although the repayment of debts may be considered to be a key element in any economic system, the means chosen to attain that goal should not compromise fundamental rights or short-change on the procedural guarantees that are the foundation of a proper legal system.

The failure by the State to ensure that legal advice is made available at the earliest opportunity, that an assessment of the debtor's means in which the debtor participates must be carried out prior to making an Instalment Order and that legal representation is available to any debtor facing an application for committal are each fundamental procedural shortcomings that are arguably in breach of several articles of the European Convention on Human Rights and Fundamental Freedoms.

debt enforcement proceedings – statistical gaps

Introduction

The purpose of this section is to look at the statistics published by the Courts Service on behalf of the State in relation to the debt enforcement procedures examined in this report and to comment upon the extent and the effectiveness of the information they provide.

The Courts Service was set up in November 1999, following the passage of the Court Service Act 1998. Prior to this, the administration of the courts had come under the direct supervision of the Department of Justice, Equality and Law Reform. According to its website, the functions of the service are:[169]

- to manage the courts
- to provide support services for the judges
- to provide information on the courts system to the public
- to provide, manage and maintain court buildings
- to provide facilities for users of courts

It publishes an Annual Report complete with a lengthy statistics section outlining the caseload of the respective courts in the Irish legal system. Some of these statistics are quite comprehensive, but as regards figures and background profile for debt enforcement applications in the District Courts, the information is lacking in detail and may even be inaccurate in places. It is proposed here to briefly examine recent Courts Service Annual Reports in terms of the debt enforcement figures provided and highlight what might be perceived as statistical gaps that should be remedied.

Courts Service Annual Reports

Section Two of this report has outlined in some detail the mechanics of the debt enforcement by instalment procedure and related the findings of the 38 questionnaires carried out with clients who have been subject to these procedures. Set out below is a summary of the statistics provided by the Courts Service in relation to these procedures from 2001 to 2007. It is worth reiterating at this point that no matter which court a judgment for a sum of money is obtained in, this particular form of enforcement by instalment must always take place in the District Court.

169 See http://www.courts.ie for section 'About us', last viewed 15/6/09.

Table 4.1: **Courts Service statistics on debt enforcement proceedings**

Year	Examination Orders	Instalment Orders	Committal Orders
2001	7943	9385	5782
2002	8422	10430	5788
2003	9352	11974	6108
2004	6306	11240	5859
2005	5910	10616	5082
2006	—	9325	5930
2007	13459	10842	6425

Requests for clarification from the Courts Service

In May 2006, having looked at the figures then available in the annual reports 2001 – 2005 in relation to Examination, Instalment and Committal Orders, FLAC wrote to the Courts Service seeking clarification around the recording of statistics related to this form of debt enforcement and enquiring whether there was more detailed information available that was not recorded in the Annual Reports. The points raised under various headings are set out below and are included here to give an indication of where gaps might exist in the current system.

In September 2008, further correspondence to the Courts Service with a series of observations and requests for clarification in relation to the figures set out in the 2006 and 2007 Reports was sent by FLAC. The matters raised in this letter are also set out below.

2006 Correspondence

Examination Orders

In relation to Examination Orders, information was requested on how many debtors filed a statement of means and appeared in court to have their means assessed with a view to making an Instalment Order and how many did not. The anecdotal evidence, confirmed in the survey of 38 debtors in this report, is that participation rates are very low (barely around 10%).

Instalment Orders

In relation to Instalment Orders, enquiries included why their number exceeded the number of examinations, when it appears that the making of an Instalment Order must be preceded by an examination. Was this possibly attributable to a number of variations of Instalment Orders being sought?

Variations of Instalment Orders

In relation to variations, the enquiry focused on whether a separate figure was available for such applications. If such information was available, was it broken down into debtors' and creditors' applications respectively? Of particular interest here would be the percentage of applications for a variation made by debtors seeking to review downwards an order they could not afford and which might have been originally made in their absence.

Committal Orders

In relation to committal, it was noted that the figure provided in the Annual Reports refers to Committal **Orders** rather than Committal **Summonses**. FLAC asked whether this could be a mistake as the number is extraordinarily high if it pertains to orders (for example, 6108 in 2003). If it was a mistake and the figure should be summonses, how many of these Summonses resulted in variations of instalment and how many in actual Committal Orders being made?

Further key information sought in the area of committal included:

- In how many cases did the debtor fail to appear, resulting in a Committal Order?
- In how many cases where the debtor appeared was a Committal Order made?
- In how many cases where the debtor appeared did s/he have legal representation?
- How many of these orders resulted in warrants being executed culminating in the imprisonment of the debtor?

The reply from the Courts Service in this instance was brief and to the point. It accepted that "only very basic information is collected in respect of these cases in that there is no distinction made between different types of cases and different outcomes." On the specific question of Committal Summonses possibly being recorded incorrectly as Committal Orders, the reply states that "all of the numbers provided in our report relate to cases disposed of and not to whether the order requested was made or not." Thus, it was clearly accepted that, for example, the 6108 applications in 2003 relate to summonses to apply for arrest and imprisonment rather than orders ultimately granted. Finally, no indication was provided in the reply where more detailed information might be found.

2008 correspondence

On 8 September 2008, a further letter was sent by FLAC to the Courts Service. Previous correspondence had already noted that the number of Examination of Means Summonses was consistently lower than the number of Instalment Order applications in each of the years from 2001 to 2005. It was suggested that this was surprising, given that an application for an Instalment Order should generally be preceded by the issuing of an examination of the debtor's means. It was pointed out that no figure was included at all in the 2006 report for examinations but that a figure was subsequently included for 2007 under the heading 'Summons for attendance of debtor', in effect the same category. However, on this occasion, the figure provided (13,459) exceeded that of the number of instalments (10,482) by almost a quarter, in direct contrast to the years from 2001 to 2005.

The reply from the Courts Service on this issue noted the contradiction, stated that enquiries were ongoing on this matter and promised to revert as soon as possible. As of June 2009 there is as yet no further detail as to how this came about.

This second letter also asks whether further information is now available from the Courts Service on issues such as the number of debtors who respond to the examination

by sending in details of their means, the number who attend subsequent court hearings and the proportion that are legally represented at such hearings and the categories of creditors who bring such proceedings. The Courts Service response once again explains that such statistics are not available but that it estimates from the experience of court officials working in the civil area that about 20% (or one in five) respond to the examination and attend the subsequent court hearing or attend the hearing in response to a Committal Summons. In turn, it estimates that approximately half of the 20% that attend have legal representation.

It is important to stress that this is only an informed guess and may even be, in our view, an over-estimation. Nonetheless, it is salutary that the Courts Service thus accepts that it is likely that four out of every five debtors do not attend a hearing designed to determine their financial ability to repay a debt by instalments or whether they should be imprisoned. If this were true, 80% or so of orders are made without necessarily having the appropriate financial information to hand; a testament to what is essentially a flawed system.

Gaps in the data

There is no information in the Courts Service Annual Reports from 2001 to 2007 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 in the table above and how many orders resulted in actual terms of imprisonment being served.

These are important omissions. This lack of detailed data undermines an informed debate out of which any policy initiative and proposals might emerge. If the State does not document the potential extent of the problem, how can it be receptive to suggestions for reform? In addition, when it comes to justifying these procedures and their outcome before international forums such as the Human Rights Committee of the United Nations, inadequate recording of the process may undermine the legitimacy of the defence of these procedures.

The Courts Service does offer a reason for the lack of data in relation to these particular procedures, in explaining that one of the difficulties is that the processing of civil business in the District Court is "entirely a manual procedure with the consequent result that all statistics have to be collected manually." It is apparent that efforts to develop a 21st-century case management system have been hampered by this particular limitation. The District Court is spread right throughout the country and processes a large amount of business relatively quickly, with 23 districts existing in total (including the Dublin Metropolitan district) together with a further sub-division of these districts into District Court areas and numerous offices.

However, compiling the figures in relation to the examination, instalment and committal procedures for the Annual reports set out above already involves a one-by-one count of paper files in District Court offices countrywide. A more complete trawl should yield the required information and liaison and co-operation with the Gardaí and the Prison Service would also be needed to track cases that end with imprisonment.

Finally, the Courts Service stated in 2006 that it was at present at the initial stages of developing a Civil Case Management System for all the courts including the District Court which will facilitate the collection of appropriate statistics. When this information becomes available, how might it be used? One of the functions of the Courts Service should also be to provide information to the State on trends and developments in the Courts system for the purposes of reforming ineffective procedures. Although such reform is a matter for Government (in particular the Minister for Justice, Equality and Law Reform) and the Houses of the Oireachtas, the Courts Service should play a key role in providing relevant data to enable such reform to be considered.

Debt enforcement proceedings – An analysis of the available figures

Table 4.2: **Courts Service statistics on debt enforcement proceedings**

Year	Examination Orders	Instalment Orders	Committal Orders
2001	7943	9385	5782
2002	8422	10430	5788
2003	9352	11974	6108
2004	6306	11240	5859
2005	5910	10616	5082
2006	—	9325	5930
2007	13459	10842	6425

Notwithstanding the gaps, what information can be gleaned from the statistics outlined in the Annual Reports reproduced above?

Statistics are only provided under the three categories of application set out above. There is no further breakdown provided in the Annual Reports within these figures as to who may have applied for the various orders and who may have been the subject of them. Neither is there a breakdown of numbers from the various District Court offices, as would be the case for family law applications, about which the Courts Service Annual Reports provide a far greater level of detail.

Examination Orders (or Debtor's Summons)

The number of applications for examination increased from 2001 through 2002 and up to 2003, and then fell dramatically in 2004, and fell again slightly in 2005. No figure is provided in the 2006 Annual Report. As noted above, the figure then climbed dramatically for 2007 and the Courts Service is examining why this is the case.

Overall, between 2001 and 2005, the number of these applications appeared to fall by approximately 26%. It is difficult to know to what to attribute this drop. The reduced figure may indicate that MABS, on behalf of clients against whom a judgment had been granted, is managing to reach informal agreements on repayments with creditors without need for recourse to debt enforcement procedures. The debt enforcement by instalment procedure is available to all judgment creditors, regardless of which court the judgment was obtained in, whether High, Circuit or District Court. Thus, there is a one-in-four reduction across the board in the number of creditors using examination as a preliminary means of debt enforcement. As well as the possible effect that MABS may

be having in reducing such applications, the drop may also reflect some disillusionment on the part of creditors, reckoning the process does not always work particularly well for them either. The substantial rise in examination applications in 2007 to a figure that exceeds the number of instalments is far more logical. However, it may be that the figures for examinations from 2001 to 2005 are simply inaccurate for whatever reason, be it recording systems or administrative errors, and cannot be relied upon to draw any conclusions.

Instalment Orders

There is a figure quoted for 11,974 Instalment Orders in 2003, 2622 more than the number of examinations. Again, it is not certain whether these are orders ultimately made or applications for orders, bearing in mind the Courts Service statement that all of the numbers provided in its Reports relate to cases disposed of and not to whether the order requested was made or not.

By 2004, the disparity between the number of examinations and the number of Instalment Orders had risen to 4934 and by 2005 was not much lower at 4706. Given that, as we have pointed out above, the making of an Instalment Order should in general be preceded by an examination of means, it is difficult to explain this discrepancy. As stated, an explanation from the Courts Service is still pending.

It is also worth noting that after a high of 11,974 in 2003, Instalment Orders decreased in the following three years, falling by just over 6% in 2004, by just under 6% in 2005 and by a more dramatic 12% in 2006. This trend was reversed in 2007 with applications increasing by a significant 16%.

Committal Orders

As already noted, the term 'Committal Order' used here is incorrect and this is accepted by the Courts Service. This figure in reality denotes the number of summonses for arrest and imprisonment (or Committal Summonses) applied for in any given year as opposed to the number of orders actually granted on foot of those applications. The figure in relation to actual orders is likely to be smaller; again, because the Courts Service does not record the number of orders separately, there is no discrete figure here.

On the basis that these are summonses rather than orders, it is nonetheless notable that the proportion of Committal Summons applications to Instalment Orders is very high. This proportion seemed to on the decrease from a high of 62% of Instalment Orders resulting in a committal application in 2001 to a 48% ratio by 2005. In 2006, however, the figure rose again dramatically to 64% falling relatively slightly in 2007 to 59%. This may indicate that either compliance with the terms of Instalment Orders is decreasing or that creditors are more inclined to proceed to committal. It may be a combination of these two factors.

Whatever the reasons, the most salutary fact here is that nearly two out of three Instalment Orders in 2006 (including potentially variations of Instalment Orders) resulted in a committal application. When one factors in the disinclination of many creditors to proceed to the committal stage despite breach of the order (for example

acceptance of partial payment is anecdotally commonplace and this is confirmed by our sample outlined in Section 2),[170] it is clear that there is massive non-compliance with the terms of Instalment Orders in the system.

It is also worth noting that there was also evidence of a fall in the number of committal applications up to 2005. For example, from a high of 6108 in 2003, these fell by 4% in 2004 and by a more significant 13% in 2005. However, that trend has also been reversed in 2006 with a 17% increase in the number of applications for committal despite a decrease in the number of Instalment Orders granted in that year. This may indicate some hardening of attitudes by creditors and their legal representatives towards enforcement. Finally, in 2007, there was an increase of 8% in the number of committal applications in 2007, although overall Instalment Orders increased by 16% in that year.

Conclusion

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. The Courts Service accepts that only very basic information is collected in respect of these cases in that there is no distinction made between different types of cases and different outcomes. Even accepting that it is difficult to gather information from paper files across a number of District Court offices, it is vital that the State provides a much more detailed statistical analysis of the rates of participation in a process that can (and does) result in the imprisonment of a substantial number of persons in any one year and the narrow escape of many others. The taxpayer is also entitled to know, not just how many people went to prison for these reasons, but also how long they spent there and what was the cost to the exchequer.

Finally, the Auditor and Comptroller General's office might consider investigating how well these procedures deliver on value for money in 2009.

170 See page 72 for further detail.

conclusions and recommendations

Conclusion

General summary of research findings

The debtors in this study, generally speaking, accepted that the money claimed by their creditors was owed and not one of the 38 defended the original proceedings against them. The vast majority had suffered an adverse change in their financial circumstances due to unemployment, illness or business failure. Many had two or more debts in arrears and were reliant on a Social Welfare payment as their sole or principal source of income when the original legal proceedings in question were brought against them.

In turn, there was evidence of delay, in many cases considerable delay, on the part of participating debtors in seeking assistance when a judgment had been granted against them or where debt enforcement proceedings were taken. The main reasons for such delay were a lack of awareness of the services that were available to help and a fear of being judged. Many debtors found it hard to understand the implications of the legal documentation served upon them at the various stages of the legal and debt enforcement procedures and this contributed to a lack of understanding of their options in addressing the situation. In many instances, this was exacerbated by the stress and fear commonly associated with over-indebtedness.

As a result, many debtors did not attend any hearings at all and the remainder only attended some of the relevant hearings. This led to court orders being made in many cases on the basis of out-of-date financial information. The reasons given for failure to attend included not being aware that attendance was necessary, being too frightened to attend and associated with this, not wishing to attend a hearing in open court. As a general impression, there is little indication in the comments made by those debtors who attended hearings that they understood or were made aware of what the Instalment Order procedure should really be about, which is identifying whether the debtor is capable of making manageable repayments and if so to what extent. Instead, the overriding impression is of people who felt intimidated, shamed and in some cases, criminalised.

Those who did attend generally had no legal representation and were uncertain about the procedures that would apply and how to present their case. Most found the process daunting and nerve-wracking, though in some cases not as bad as they had imagined. Those debtors who reached the final stage in the procedure where warrants to execute Committal Orders were lodged in the local Gárda station generally found the Gardaí helpful. In a majority of these cases, advance notice of an imminent arrest was given by the Gardaí and the debtor was referred to services which might help in avoiding a committal to prison.

Significantly, a number of creditors who brought debtors right through the process and obtained Committal Orders did not ultimately insist on the debtor's imprisonment when it finally became clear, generally through the intervention of a MABS money advisor, that there was a genuine inability to make the instalment payments that had been ordered.

Contrary to the view sometimes put forward on behalf of the State, that sentences arising out of this procedure are short and that many sentenced make payment on or shortly after committal, each of the debtors who served sentences in our sample served the full sentence that was ordered, ranging from two weeks to the maximum three months allowed under the legislation. Each debtor imprisoned found the experience extremely traumatic and humiliating with long-term after effects to both physical and mental health apparent.

The general opinion of the respondent debtors was that this form of debt enforcement was difficult to comprehend and that the odds were stacked against the debtor. Some complained that the creditor had acted too quickly in bringing legal proceedings and should have engaged in more meaningful negotiations around affordable repayments, although the intervention of a money advisor seemed in many cases to improve the situation and led to more sustainable arrangements being put in place. Some suggested that a mediation process prior to legal proceedings should be obligatory. Many proposed that the documentation used to bring legal proceedings be simplified, highlighting where the debtor can get assistance, in terms of access to both legal advice and money advice. A significant number felt that a court hearing in public was not an appropriate place to deal with these matters as it further intimidated already fearful debtors and discouraged their attendance. Finally, imprisonment was broadly considered to be wholly inappropriate in debt cases. It was thought particularly unfair that the debtor still owed the money after his or her release from prison.

■ *General conclusion on the need for reform in debt enforcement law*

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. Given the State's active encouragement of credit over the past decade in particular and given the aspiration of many to be prosperous and to be seen to be prosperous, it is inevitable that over-indebtedness will have resulted for some, either due to life events or over lending/over borrowing.

Some may feel that the debtors featured in our survey were to a fair extent 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. Of course there is some evidence in the questionnaire responses of human failure; 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.

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 not only leads to disproportionate sanctions such as imprisonment but may also be economically questionable from the perspective of the taxpayer, when the costs of these processes and their long-term effects are taken into account.

It is clear too from the responses in this report that litigation in relation to consumer debt generally carries a pronounced inequality of arms between creditor and debtor. The consumer is practically always the defendant. S/he by and large cannot afford private legal advice/representation; legal aid in debt cases has been practically non-existent to date. In any case, the defendant is often without a recognisable legal defence, for example, where payment at the rate set out in a loan agreement is no longer objectively possible, generally because of deteriorating financial circumstances. Thus, where the existence of a debt is not contested, an alternative process is needed which facilitates a practical restructuring of the debtor's finances at the earliest possible juncture, not 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 sample interviews in this report.

To achieve this, the State must take far stronger measures to confront the reality of over-indebtedness than simply pointing in the direction of the Money Advice and Budgeting Service as the stock response to each enquiry for assistance in relation to debt. **Not only should MABS be sufficiently resourced to do its work and adequately publicised to enable people in debt to understand what it does, complementary services must also be put in place, including enhanced legal aid and advice services and comprehensive programmes of financial education.**

In addition, the entire infrastructure around debt recovery should be modernised. 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.

The comparative ease in the provision of credit in recent years (up until the current credit crisis) and the costs of that credit, particularly to consumers on low incomes, should also be reviewed by the Financial Regulator (or its successor) with a view to ensuring that into the future, credit is both responsible and affordable. In particular, credit providers involved in risk-based lending at above market interest rates, should be more effectively regulated in terms of interest rates and other applicable charges than they are at present.

This is not a very radical agenda but simply a call for common sense measures. In this context, it is instructive that many strands of the credit industry with whom FLAC has engaged as well as members of the legal professions, An Garda Síochána and the judiciary share the view that the present system is not working well. One salient fact is also incontrovertible. **The levels of credit extended to consumers in Ireland grew enormously over the past fifteen years whilst the legal system in the area of debt**

enforcement has by and large stood still since the 1940s, almost 70 years ago.[171] One might understand the State's reluctance to tinker with a system that is working well in an unchanging environment. However, it is clear to FLAC that the debt enforcement system is malfunctioning and that the consumer credit environment has vastly altered.

With a small measure of foresight, it would not have been difficult to predict that where credit consumption increases dramatically, the legal system should be adapted to cope with the increase in personal indebtedness that will inevitably result. It is also clear that periods of economic prosperity never last forever and a small open economy such as Ireland's is vulnerable to external economic shocks over which it has no control. It is plain too that membership of the European Union carries with it ceding control over aspects of fiscal policy that in normal circumstances might have been used to cool an overheating economy. With these factors in mind, Ireland should have taken the opportunity to modernise the infrastructure in relation to debt recovery in a similar manner to other European States long before the tide turned.

Instead, as we have begun what even the most optimistic commentators have accepted will be a sustained period of economic recession and many claim amounts to a full blown depression, the system of debt enforcement in Ireland remains as unfit for purpose post as pre-boom. As noted in this report, it is very difficult to obtain comprehensive and reliable statistics on debt default in Ireland. However, a range of figures have emerged from a variety of sources in the course of 2008 and the first half of 2009 that are of mounting concern. None of these alone prove there is a debt crisis but taken together, the signs are not good. A snapshot of some of these indicators is as follows:

- Household debt in Ireland increased by 12% from 176 billion in 2006 to 197 billion in 2007 according to the Central Statistics Office.[172]
- According to Goodbody Stockbrokers, by the end of 2008, the average household was borrowing €158 for every €100 earned. In 1995, this figure was €50 borrowed for every €100 earned. Almost €200 million in unpaid debts was pursued through the courts in 2007, twice as much as in 2003.[173]
- *Stubbs Gazette* (which publishes details of court judgments involving debt and is owned by Business Pro) saw a rise of 30% to 40% in the number of debt cases brought in 2008 from 2007.[174] The first quarter of 2009 saw a 36% jump in the value of unregistered debt judgments up to €45 million.[175]
- The number of people imprisoned in Ireland for debtor offences increased from 201 in 2007 to 276 in 2008, a rise of over 37%.
- The number of applications in the High Court for the repossession of dwellings increased by 103% in 2008 over 2007 and the number of orders that were subsequently granted represented a 118% increase in 2008 over 2007.[176]

171 For example, the amount of credit extended in Ireland in respect of residential mortgages as of December 2003 was €54,614 million. By March 2006, less than two and a half years later, this had increased to €100,082 million, an increase of approximately 83%. In terms of other personal credit, €11,330 million had been loaned by December 2003 but this had risen to €14,953 million by March 2006, an increase of approximately 32% over the same period.

172 As reported by Barry O'Halloran, *Irish Times*, Finance Section, 14 May 2008.

173 As reported by Louise McBride, *Sunday Independent*, Business Section, 6 July 2008.

174 As reported by Paul Kelly, *Irish Examiner*, 13 May 2008.

175 As reported by Laura Noonan, *Irish Independent,* 6 April 2009.

176 From figures provided by the Courts Service, February 2009.

- The active caseload of the Money Advice and Budgeting Service (MABS) grew by 7,079 (or 43%) in the three year period from the first quarter of 2006 to the first quarter of 2009. The average amount owed by clients presenting at MABS services grew from just over €6,990 to €13,700 over the same period. The increase in new clients grew from an annual figure of 11,630 in 2006 to 16,600 by the end of 2008.[177]
- At the end of April 2009, the Live Register (those signing on for social welfare payments or credits) stood at 388,600, an increase of 94% in comparison to April 2008. The Standardised Unemployment Rate was 11.4%, the highest figure since August 1996.[178]
- In 2008, FLAC received 9244 telephone enquiries to its information service, a 53% increase over 2007. The number of debt-related queries doubled between the first and the fourth quarters of 2008.[179]

In the final section of *An End based on Means*, published in May 2003, FLAC called for a root-and-branch review of the existing debt enforcement system in the following terms:

> 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.

Six years on, it is striking that such a call must be reiterated. The belief that change was required was evident then – in both debt/money advice sectors and the credit industry – and is even more pronounced now. It is unfortunate that it has to be repeated at what may be a less opportune but arguably even more critical moment, when increasing levels of unmanageable debt begin to see yet more people in financial difficulties appearing before the courts.

It is also clear that reform of the law on debt enforcement has attracted wider attention and concern in the interim. 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.[180] At the time of writing (June 2009), three separate cases concerning the imprisonment of debtors under the enforcement of court orders legislation have been heard by the High Court in recent weeks, with one of these involving a challenge to both the constitutionality of the legislation and its compatibility with the European Convention.[181]

In England and Wales, there is a far more comprehensive array of legal measures to deal with over-indebtedness. Nonetheless, the effectiveness of these procedures continues to be monitored by the State. For example, on 5 September 2007, the Civil Law and Justice division of the Ministry of Justice published a consultation paper entitled *'The debt claim process: helping people in debt to engage with the problem'* in order to assist Government with

177 From a presentation made by MABS National Development Ltd to the Joint Oireachtas Committee on Social and Family Affairs on levels and trends in personal debt in Irish society, 29 April 2009.

178 From the website of the Irish National Organisation of the Unemployed (INOU), May 2009.

179 From *FLAC News*, Volume 19, No 1, January- March 2009.

180 See pages 9 and 11 of Third Programme of Law Reform, 2008-2014.

181 See pages 10-11 of this report.

any proposed changes on the system of handling debt problems.[182] In January 2008, a further consultation paper was published by the same division proposing changes to the Administration Order system, which the credit industry and the debt advice sector alike agree was badly in need of overhaul.[183] Thus, although the legal infrastructure for dealing with problems of over-indebtedness in England and Wales has its critics, there is a commitment to keep procedures under review, to remove what is no longer appropriate, update what is no longer working and to engage in public consultation on proposed changes.

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 LRC's consultation paper due in the autumn, the six-month 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.

182 See http://www.justice.gov.uk/publications/cp2207.htm last viewed 15/6/09.

183 See http://www.justice.gov.uk/publications/cp0108.htm last viewed 15/6/09.

recommendations

Overview

As with *An End based on Means* in 2003,[184] FLAC proposes a number of recommendations to conclude this 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 this 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 our surveys 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 of these is the power to make decisions on capacity and willingness to pay in the absence of the debtor and without up-to-date 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. If the recent constitutional and European Convention challenge to imprisonment for debt under the enforcement of court orders legislation is successful, the State's hand may be forced.[185] Even if this does not occur, 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

184 See *An End Based on Means*, Section 11, pages 112-126.

185 See pages 125-126 for more detail of the *McCann* case.

subject of an existing order of the same type.[186] 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.

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.

In summary therefore, the principal recommendations arising from this report are 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. Adopting an alternative approach to resolving problems of over-indebtedness;
8. Improving information gathered by the State on debt-related legal proceedings and research on the long term costs of over-indebtedness.

1. Improved access to information for defendants in debt cases

One of the recurring findings from the survey was that debtors did not know what was involved in the debt enforcement process. The archaic wording in much of the legal documentation; the fact that some borrowers may have left school at an early age and many may lack basic literacy skills; taken together with the panic that overtakes many people in debt; all suggest a need for clear and unambiguous information in plain language. This would also facilitate understanding by those in debt whose first language is not English.

The website of the Courts Service includes the following commitment:

> Everyone who attends court presents with a different set of circumstances, a varying degree of understanding and a personalised set of needs. We recognise that access

186 For example, one of the debtors had a number of Instalment Orders in operation simultaneously against him and another was served with an application for committal for non-payment of instalments when he was already in prison for the same reason.

> does not stop at the level of physical access to and within buildings. We are conscious that access to information, the understanding of court processes and inclusion in court proceedings need to be provided in an atmosphere of equality. We are engaged in a major programme of improvements and enhancements to improve facilities across a wide variety of areas including court buildings, publications and our website.[187]

When held up to the laudable commitment to equality set out in this quotation, it is apparent that many of the court documents examined in the course of this study fall short in terms of delivery, particularly in facilitating access to information, understanding of court processes and inclusion in court proceedings. We have seen repeatedly in the responses to our questionnaire that debtors struggled to understand the language used in court documents and frequently were not aware of the options that were open to them and the consequences of the proceedings in train against them.

There is a heavy onus on the State therefore to ensure that the utmost is done to ensure a proper understanding of procedures for those who often do not have the resources to access the services of a private solicitor and may meet difficulty and delay accessing one from the Legal Aid Board. The provision of user-friendly information is vital at every stage of the procedures described in this report and is especially critical at the beginning of this process. A clear understanding at this stage of what may occur unless the debtor addresses the situation with the creditor may help to prevent further time consuming and expensive enforcement steps, from the debtor's, the creditor's and ultimately from the State's point of view.

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.[188] 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.

187 See http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/6917A1B7B53513BB80256E5400691BC1 under heading 'Accessibility - Providing facilities for all court users' (last viewed 15/6/09).

188 Such a booklet could be drafted and agreed by a combination of FLAC, MABS, the Law Society, the Courts Service and representatives of the credit and debt collection industries.

2. Access to advice and assistance for persons in debt

The role of MABS

Introduction

It is clear from the questionnaires that at the various stages of the Instalment Order process, the intervention of a money advisor frequently led to arrangements for affordable payments being made and prevented further or continuing debt enforcement proceedings. In some instances, creditors accepted phased offers of repayment that had been rejected when offered by the debtor. On other occasions, Instalment Orders were breached by the debtor but the creditor agreed to take a lesser payment when a money advisor presented financial evidence of inability to pay. Most crucially in six cases, creditors in possession of Committal Orders decided not to follow through with the arrest and imprisonment of the debtor once a financial statement from a money advisor made it clear that the problem lay in incapacity to pay rather than a lack of willingness to do so. Without a third party to concentrate the minds of both debtor and creditor in these cases, a term of imprisonment costly to the State, counter-productive for the creditor and personally disastrous for the debtor – and any dependants – would have been the most likely outcome.

Money advice as a method of resolution

The findings of the questionnaires suggest that in general terms, money advice works. It is also clear, however, that many debtors contacted MABS very late in the process. Specifically, 21 out of 38 only contacted MABS after the creditor had sought their arrest and imprisonment or after a Committal Order had been obtained and a warrant to execute that order was in process. Four debtors only contacted MABS having served a term of imprisonment. It is also apparent that the earlier a person has access to money advice, the better the prospects of reaching an accommodation with the client's creditors. In turn the trauma of debt is reduced, fruitless legal proceedings are minimised and arguably greater savings to the State result.

The essence of good money advice is that it is preventative and gets to people before their situation deteriorates, with all the negative consequences that can ensue for the debtor and his/her dependants, creditors and society in general. Early access to money advice depends upon the debtor's knowledge of the existence of such services and his/her willingness to avail of them. A person in debt may simply be unaware that MABS is there to help. Clearly, the creditor to whom the money is owed can also play a vital role in ensuring that the debtor becomes aware of MABS. However, there is no obligation on a creditor to inform a debtor of the existence of such services. It is notable that the Financial Regulator's recently adopted *Code of Conduct on Mortgage Arrears*,[189] a code which obliges mortgage lenders to pursue alternatives to legal action prior to bringing actions for repossession against borrowers, provides that the lender must refer a borrower in arrears for guidance to his local MABS service or appropriate alternative, but only where circumstances warrant it. Such vague wording could clearly be used by any given lender to decide not to refer a client in arrears to MABS in any given case, thereby defeating the purpose of the exercise in the first place.

189 Issued with effect from 27 February 2009.

The success of the money advice process also depends to a considerable degree on the extent to which creditors decide to engage with it and there is a key difficulty here. The lack of willingness of one creditor, for example, to accept *pro rata* payments and to insist upon suing the client can throw a repayment plan into chaos. There is already anecdotal evidence as the credit crunch and the recession begin to seriously bite that some creditors are taking a harder line with people in debt and refusing to negotiate with money advisors working on their behalf. In reality, there is nothing at present to prevent a creditor from ignoring the representations made by a money advisor and pursuing legal action, even against a person in debt who is clearly unable to pay.

At the time of writing (June 2009), the MABS/Irish Banking Federation (IBF) 'Operational Protocol on Working together to Manage Debt' has recently been launched.[190] This protocol sets out the ground rules that will be used in cases of debt arrears from the time that a bank customer in arrears approaches MABS for assistance. This is a welcome development in that it provides some degree of certainty for such clients as to how their case will be dealt with and the likelihood that legal action against that client will be avoided. However, the procedures set out in the protocol only bind the 12 principal banks. Other groups of creditors – the credit unions, utilities, mobile phone companies and sub-prime lenders to mention but a few – are not covered by what is a voluntarily agreed protocol.

At what is clearly a critical period for the increasing numbers of people in debt and a service under huge pressure to assist them, the status accorded to MABS is a vital reflection of its role in dealing with creditors and working with other State agencies whose remit also involves interaction with indebted people. The State has consistently expanded MABS funding and services over the past 15 years. This commitment of taxpayer's money should be reflected in an obligation on creditors to refer persons in debt to MABS and to engage in meaningful negotiations with money advisors on affordable repayments prior to considering legal action. A number of participating debtors in our study made offers of payment on their own initiative but these were in many instances rejected. When the same offer was subsequently made on the debtor's behalf by a money advisor, it was generally accepted. This is proof, if proof were needed, that a third party presenting verifiable financial information can achieve an accommodation and prevent unnecessary legal proceedings.

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.

[190] Launched by the Minister for Social and Family Affairs, Mary Hanafin T.D., at the IBF offices on 3 June 2009.

2.3 **If debt enforcement is to remain within the jurisdiction of the courts,[191] 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 offices have developed waiting lists in 2008 and 2009 as the demand for services grows. Even in a climate of spending cutbacks, 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.**

■ Financial and community education

It is apparent in the use of credit over the past decade in particular, that some of the choices (where choice existed) made by Irish consumers indicate both a lack of understanding of the comparative costs of credit and low levels of financial education. In addition to the expensive credit offered by existing licensed moneylenders, the entry into the market of then largely unregulated high-cost credit providers, such as sub-prime mortgage lenders and international credit institutions offering expensive personal loans, worsened this situation.[192] As over-indebtedness spiralled, many money advisors were too busy engaging in crisis management to focus sufficiently on the community education aspect of their work. However, although only one community education officer is employed nationally in MABS to co-ordinate strategy in this area, valuable work has been done, some of it in conjunction with the Financial Regulator.

Although the credit crunch may have taken the pressure off in this area, it is still a critical part of any economy where credit is widespread that consumers are armed with sufficient information and understanding of the system and their needs within it to be in a position to make an informed choice, rather than entering into expensive credit agreements that in many cases have proved to be unsustainable.

191 See pages 161-165 for proposals to put in place an alternative body to deal with debt rescheduling.

192 See pages 38-39 on over-borrowing and over-lending and pages 39-42 on irresponsible lending.

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 put in place 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.

The role of Civil Legal Aid services

Introduction

The somewhat minimal role played by the Legal Aid Board in debt cases in Ireland up to now has been analysed in this report.[193] Debt-related cases are within the Board's mandate under the Civil Legal Aid Act 1995. All applications for legal aid are subject to a financial means test and it is clear that any applicant would firstly have to satisfy this test.[194] Thereafter, the Board is entitled to apply a 'merits test' to an application for legal aid and this involves assessing the strength of the applicant's case from a legal perspective.[195]

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 LAB 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 Centre and Money Advice and Budgeting Service 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.

Access to initial legal advice and representation in debt cases

Twenty-five of the 38 debtors in our study did not contact MABS for assistance when debt enforcement proceedings were first brought against them and they did not apply for legal advice or legal aid either. Indeed, only two of the 38 contacted the Legal Aid Board at any point in the course of debt enforcement.

It is frequently assumed in consumer debt cases that the money is owed and there is no legal defence to any claim. However, this is by no means always true. The amount being claimed by the creditor may be incorrect. Equally, there may have been a breach by the creditor of the requirements of consumer protection legislation such as the Consumer Credit Act 1995 and the agreement may thus be unenforceable.

193 See page 49 and page 57 for further details.

194 Civil Legal Aid Act 1995, Financial eligibility - Section 29.

195 Civil Legal Aid Act 1995, Criteria for obtaining legal aid – Section 28 (2).

Even where a debt is admitted, the debtor may have made a fair offer of payment based on his/her current finances and may require the assistance of a solicitor to vindicate that offer. There may still be a need for legal representation at a debt enforcement application to ensure a fair hearing and a reasonable outcome and to satisfy the requirement of access to justice. A debtor may also need comprehensive legal advice in order to navigate the complex enforcement system and ultimately to avoid the penalty of jail.

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 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 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 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.

Access to advice and/or representation at debt enforcement hearings

Where a judgment has been obtained by a creditor and that creditor proceeds to apply for an Instalment Order, there is nothing to prevent the debtor applying for legal services to defend his/her position. However, FLAC is aware of instances where debtors have been refused legal aid in these circumstances, either informally or formally.[196] An informal refusal typically arises where a potential applicant is told by a staff member at a law centre that legal aid is not available in matters relating to debt enforcement. Thus there is no record of any application being made and accordingly no avenue of appeal. A formal refusal may result from the current application of the merits test by the Law Centre concerned. This may be appealed to the Appeals Committee of the Board but that appeal is unlikely to be successful.

Money advisors may prepare material to assist debtors with court cases but they do not have a right of audience in the courts. Although money advisors will routinely send financial statements into courts in an attempt to ensure that their clients are treated fairly, there is no obligation on court staff to submit these nor on judges to take them into account.

196 See page 49 for further details.

It is also clear that those debtors in our study who did appear without legal representation at court hearings generally found the experience nerve-wracking. Many did not appear at hearings at all. The lack of access to an advocate to speak on their behalf or to explain the legal process is likely to have been a factor here. In summary, the perception of potential clients (and sometimes of Legal Aid Board staff) that civil legal aid is not available for proceedings that enforce a court judgment to pay a debt is a major gap in affording access to justice.

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.

Applications for committal

Although the Legal Aid Board accepts that there is no specific exclusion of debt cases in the civil legal aid legislation, it suggests that it is unlikely to provide civil legal aid to a person at the Committal Summons stage of the debt enforcement procedure. Normally, a person charged with a criminal offence that carries the probability of a term of imprisonment if found guilty will be informed of his/her right to avail of State criminal legal aid services and is unlikely to be denied it. However, a debtor faced with a prison sentence for so-called contempt of court, unable as opposed to unwilling to meet the terms of an Instalment Order, is not encouraged to apply for criminal legal aid. Even where such an application is made, it is far from clear that it will be successful. Thus, the civil debtor falls between two stools and may have to face this hearing without legal representation, although justice may require that a person faced with the prospect of a prison sentence should have an advocate to defend his/her position and receive a fair hearing.

Taken together with the fact that many debtors will not appear at such hearings without legal representation, with all the consequences that may follow, the State's failure to provide legal aid may lead to situations where there will be a breach of a person's basic human rights.

2.15 If a debtor is trying to address his/her financial problems and keep 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 offers of payment in debt cases

A debtor served with proceedings in a District Court debt case may chose not to oppose the case. The debtor may admit liability and in that case, may consent to judgment being granted against him or her. An Instalment Order may be put in place as part of or following the signing of this consent.

In practice, this option is rarely exercised. There may be a number of reasons for this. Firstly, the defendant may not have read the summons or having read it, may not have understood that this option exists. Lack of access to appropriate advice may be a factor. Secondly, the exercise of this option seems to be dependent upon the goodwill of the solicitor for the creditor. The solicitor must draft the consent form to accept an affordable instalment and must file the relevant sworn statements (or affidavits) with the relevant District Court office. Our study shows that of the ten debtors who made offers of payment following the receipt of the original legal proceedings, nine were rejected. When similar offers were subsequently made by a money advisor on behalf of a debtor in some of these cases, they were accepted.

There is a golden opportunity being spurned here to arrive at a reasonable and affordable instalment arrangement at the point at which legal proceedings are initiated. It was clearly originally envisaged that the exercise of the consent option would prevent any further and unnecessary proceedings taking place. However, the key element missing is an objective assessment of the debtor's ability to pay and a simple mechanism to put the consent in a concrete format. The creditor or their solicitor must agree to the proposal before it can be put in place.

3.1 Where a debtor is liable for a debt and is sued but is unable to pay in one payment, s/he should then with the assistance of a legal advisor or money advisor be entitled to consent to judgment and make a proposal on instalment repayments. The proposal should be based on verifiable information, in the form of a comprehensive financial statement of the kind already used by money advisors. If the creditor proposes to accept 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.[197] 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.[198]

197 In the United Kingdom, a very similar system is in operation and the power to adjudicate on appropriate repayments is devolved to court officials who are provided with a 'Determination of Means guidelines' to assist them with this task. For more detail on this procedure, see FLAC's report *An End based on Means* (2003), page 70.

198 This proposal is very similar to the Administration Order system in operation in the United Kingdom where the opportunity is taken to look at finances in their totality instead of potentially allowing several sets of legal proceedings to be brought against the same debtor. The drawback with the Administration Order for some time in the UK has been the low maximum level of arrears that applies (£5,000 sterling) in order to make an application. Recent research enquiries reveal that after many years of lobbying, the Department of Justice in the UK is proposing to increase this limit initially to £15,000 with provision for further increases in the future. Equally, the requirement that there must at least one existing judgment against the applicant is also likely to be removed allowing the procedure to be more pro-active where there is clear evidence of financial difficulty.

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

Service of legal documents

The use of draft summonses

Over half of the debtors in our study reported receiving draft summonses before they received the actual official stamped summonses. It would appear that these draft summonses are designed to threaten legal proceedings rather than have to bring them. However, this seems to have led in some cases to uncertainty as to whether a debtor had been sued or not and confusion and distress when further documents were served. Some persons in debt are already confused enough without a further layer of confusion being added.

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.

Effective service

A number of debtors in our study claimed not to have been served with relevant documentation at various stages of the procedures examined in this report. While we accept that this may not have been the reality in every case and that stress, poor memory and even wishful thinking may have played a part, there was sufficient evidence in this small sample to cause concern.[199]

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.

Notification of judgment

There may often be a considerable time gap between the service of original legal proceedings in a debt case and the beginning of debt enforcement action against a debtor following a judgment. Thirteen of the 38 debtors in the study claimed not to have received notification that a judgment had been obtained against them. As the report shows, a creditor is not strictly obliged by law to serve the judgment papers on a debtor. However, failure to notify the debtor of the judgment may lead the debtor to believe that the problem has gone away and may result in a failure to deal with it.

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 assistance can be got.

199 See, for example, a specific case outlined on pages 79-80.

Reform of the debt enforcement by Instalment Order procedure

Introduction

If the basic structure of the current Instalment Order procedure is to remain largely the same, then several changes to the Enforcement of Court Orders Acts 1926–1940 in the form of an amendment Act should immediately be introduced that would increase the effectiveness of that system and reduce the potential need for applications for a debtor's imprisonment. In tandem with these changes, alterations to the District Court rules and relevant court documentation would make this debt enforcement procedure more accessible, especially for unrepresented defendants. For example, it is of great concern that a number of debtors reported that they were not aware that they should attend hearings even though they had been served with relevant summonses. It points once again to the limitations in understanding existing documentation and to the need for very clear explanatory information to be provided with all legal documents, stressing the need to appear at each and every hearing in this procedure, coupled with straightforward information setting out where independent assistance can be obtained.

The following recommendations are presented in the order of the different stages of the procedure as already set out in Section Two.[200] In brief, these are the examination of means to set an Instalment Order, the service of that Instalment Order and the possibility of the debtor looking for a variation of it, the application for a Committal Order to imprison the debtor where the Instalment Order is breached, the service and execution of the Committal Order and the possibility of an appeal.

Examination of means and setting of Instalments

A key finding of this study is that a significant majority of debtors surveyed did not send in their financial details to the court at the examination of means stage. Nor did they attend the hearing to determine their capacity to pay by instalment unless they had sought help from MABS. Put simply, access to money advice seems to facilitate the reaching of settlements; lack of money advice hinders them.[201]

It is also clear that the fact that this hearing takes place in public is a major deterrent. As stated in the introductory chapter of this report, the transparent administration of justice does not depend on a public enforcement procedure in these cases.[202]

It is also evident that where Instalment Orders are made in the absence of the debtor and in the absence of sufficient **up-to-date** information about the debtor's financial circumstances in their totality, the Order is unlikely to be complied with. That in turn will result in further summonses and orders for committal and ultimately in some cases in unnecessary terms of imprisonment.

200 See page 52.

201 For example, 11 became clients of MABS prior to the examination of means. Nine cases were settled informally (all nine settlements at this point were Social Welfare recipients) and two instalment orders were set, one of which was agreed in advance). Of the 25 who were not MABS clients, there were no settlements, 25 Instalment Orders were made and only two debtors attended the hearing.

202 See page 14-15.

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.**

Where an Instalment Order is made

Many of the debtors in this study claimed not to be aware of the consequences of failing to comply with the Instalment Order. Given these potential consequences, this is a significant information gap. In turn, the level of knowledge in the study that Instalment Orders could be varied by making an application at any time to the relevant court was also very low.

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 their 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.**

Where a committal is sought

The standard Committal Summons confines itself to informing the debtor that his/her arrest and imprisonment is being sought for failure to comply with an order for payment. It completely omits any reference to the debtor's right and the judge's power to look for a variation at this critical final stage in the procedure. Nor does it make it

clear that arrest and imprisonment should only take place if the debtor is able to pay, but is unwilling to do so.

With each of the 16 committal applications in the study, the debtor was not present to attempt to show why an order of imprisonment should not be made. Many had not appeared at any stage of the proceedings and so the court had no information to hand on why instalments had not been paid. The mere absence of the debtor is an insufficient basis upon which to decide that there has been wilful refusal or culpable neglect to pay the instalment and that imprisonment is therefore justified.

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 his/her 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 variation 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.[203]

4.13 As with the Instalment Order application, there is no constitutional necessity for these 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.

Service of Committal Order

Even after the Committal Order is made, a debtor can still avoid imprisonment by paying the amount of outstanding instalments and court fees. If debtors are to discharge the arrears and costs due to prevent their imprisonment, it makes sense to allow sufficient time for this to happen.

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.

203 This is the approach taken by the Enforcement of Judgments Office (EJO) in Northern Ireland in relation to debt cases. It should also be reiterated that the EJO in Northern Ireland deals with such matters in private and this is far more likely to encourage debtors to come and give an account of their circumstances in person.

Appeals

Many debtors are not aware of the possibility of appealing a Committal Order from the District Court to the Circuit Court. The findings of the survey support this view, with only one of the 14 debtors knowing at this point that there was a right of appeal. Two of the others said that they were subsequently informed by their money advisor of their right to appeal.

The right of a person to appeal an adverse finding is a fundamental principle in the Irish legal system. It is remarkable that this right is not clearly indicated on the Committal Order, especially given that the debtor faces a term of imprisonment and that many Committal Orders are granted without the debtor ever having appeared before a court to explain his/her position.

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.

Information for debtors attending hearings

A number of debtors who attended hearings but who did not have legal representation made the point that there was no one in court on the day to provide them with advice or assistance, to direct them where to sit or how and when to address the court. This can lead in some cases to a debtor missing the opportunity to put forward to the court details of his/her financial position and other mitigating circumstances, even though s/he has turned up to give an account of his or her situation.

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. Removal of imprisonment as an option in debt cases

A total of 16 Committal Orders were made out of the total 38 cases in our study. In all 16 cases, the debtor **was not present** at the committal hearing and thus could not attempt to show why an order of imprisonment should not be made. As the onus in the legislation is very clearly on the debtor to show that the failure to meet the terms of the Instalment Order is neither due to his/her 'wilful refusal' or 'culpable neglect', it is plain that if the debtor is not present or represented, this onus cannot possibly be discharged. Nonetheless, only five of the 16 orders ultimately resulted in a term of imprisonment being served. Six orders were withdrawn by the creditors concerned following negotiation with MABS, resulting in affordable payments being put in place. Full payment was made in two cases through borrowings. Three cases were successfully appealed to the Circuit Court.

Each of the five persons imprisoned were social welfare recipients at the time of their incarceration. In these cases, imprisonment for failure to meet the terms of an Instalment Order was a jail sentence imposed on people who were unable to pay a contract debt. This outcome and the procedures that lead up to it must be tested against both the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms. It is clear from the views expressed by the United Nations Human Rights Committee in response to Ireland's most recent State Report that it is concerned about Ireland's laws and practices on debt-related imprisonment and their compliance with Article 11 of the ICCPR.[204] In relation to the European Convention, these procedures certainly appear to be incompatible and risk the violation of the fundamental human rights of some of the most vulnerable people in Irish society. As a result of the incorporation of the Convention into domestic law in 2003, the High Court (and on appeal, the Supreme Court) are empowered to declare domestic legal provisions to be incompatible with the terms of the Convention and this may give rise to an award of financial compensation to the person affected by the incompatible measure.[205]

Creditor representatives make the point from their perspective that if imprisonment is to be removed as a potential sanction in debt enforcement cases, it must be replaced with an alternative method of enforcement. It is difficult to disagree with this point of view given the lack of willingness of some debtors to make repayments. Attachment of Earnings Orders (AEO) are the norm in the overwhelming majority of European countries and are already available to enforce maintenance orders to support spouses and/or children in Ireland. A previous Government commitment to also introduce legislation providing for AEOs in civil debt cases was never acted upon.

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.[206]

204 See Section 3, pages 116 for a detailed treatment of these questions.

205 At the time of writing, judgment is awaited in the *McCann* case, a challenge to the constitutionality of the Enforcement of Court Orders legislation and its compatibility with the Convention; see pages 125-126 for further detail

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

Improving access for creditors to information on existing debt enforcement proceedings

A number of the debtors in the study were sued by more than one creditor and some were subject to two or more Instalment Orders simultaneously. The responses to the questionnaires suggest that if the debtor does not appear at the first Instalment Order hearing, it is likely that out-of-date financial information will be used to assess the ability to pay by instalments. This increases the risks of non-compliance with the order. The chances therefore that subsequent order/s will be adhered to in respect of the same individual are even more remote. In effect, as multiple debts become more common, it is clear that many of these applications are pointless and may even be described as counter-productive. They may increase the pressure on a debtor who in many cases is already in serious distress and diminish the likelihood that the debtor will engage in resolving his/her financial difficulties.

Access at an early stage to money advice and legal advice for persons in debt should certainly help to provide a clearer picture of the financial situation to creditors at an earlier stage. However, the likelihood of pointless debt enforcement applications being brought is also increased by a lack of access to information on existing orders or proceedings in train. Although private firms such as Business Pro (which owns *Stubbs Gazette*) record and provide information on both registered and unregistered judgments (in return for a fee), their service in the Republic of Ireland does not extend to enforcement proceedings. Contrast this with the situation in Northern Ireland where the Enforcement of Judgments Office (EJO) provides creditors (again for a fee) with up-to-date information on a debtor's position in terms of both judgments and enforcement proceedings, using its own databases.[207] Where a creditor can see that further applications stand little chance of yielding any concrete result, it is unlikely that they will be brought given the legal and administrative costs involved, at least until the financial circumstances of the debtor improve.

Should the current legal infrastructure for dealing with debt enforcement cases remain largely the same, it is likely to function more effectively where creditors have access to current information on not just the debtor's financial position, but also existing legal and enforcement proceedings against him or her.

6.1 The State should examine the option of setting up a database containing such information, in order to ensure that the courts and court offices are used appropriately in the area of debt enforcement.

Consolidated Instalment Orders

Most of the debtors in the survey had more than one debt in arrears. In the current economic situation in Ireland, it is likely that increasing numbers of debtors will come before the courts with multiple debts, leading to more than one judgment being obtained. In these cases, there is a danger that the debtor concerned may be the subject

206 Please see FLAC's report *An End based on Means* for a detailed view of the critical issues from a consumer perspective, in particular, the recommendations on pages 118 – 122.

207 See further detail on the EJO in Northern Ireland in *An End based on Means,* pages 82-83.

of repeated applications for Instalment Orders by creditors holding judgments, with the first in line potentially claiming the residual income of the debtor to the exclusion of the others.

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.[208]

7. Improving information gathered by the State on debt-related legal proceedings and research on the long-term costs of over-indebtedness

Introduction

Detailed and reliable statistics in the realm of legal and enforcement proceedings related to debt in Ireland are difficult to obtain. A topical example of this at the time of writing relates to the recent increase in mortgage repossession cases. Newspaper articles on this subject have often been accompanied by statistics provided in response to specific requests for information by journalists from the Courts Service. However, it is instructive that there is no statistics section that may be consulted on the Court Service website and its Annual Reports are short on specific detail in relation to mortgage repossession proceedings. It is worth contrasting this with the information available from the Courts Service Northern Ireland, which publishes quarterly figures on actions for possession in relation to mortgages and their outcomes, with an explanation of the type of orders that may be granted and a breakdown of the orders granted.[209]

In relation to the debt enforcement by Instalment Order procedure examined in detail in this report, it is also clear that there is a sizeable statistical gap in the statistics recorded by the Courts Service and this has been examined in some detail in Section Four of this report.[210]

Examination of Means and Instalment Orders

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.**

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

209 See www.courtsni.gov.uk Statistics and Research Section, Mortgages: Actions for Possession heading (last viewed 15/6/09).

210 See pages 127-133.

- **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.**

Equally, although it may be outside the remit of the Courts Service, it would also be useful to know how many of these debtors went to MABS in order to get advice on how to deal with these applications, why those debtors who did not attend choose not to do so and how many people had access to legal advice before deciding whether or not to attend.

Applications for committal

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.

7.2 This is a serious omission and should be remedied immediately. The following information under this heading would also be desirable:

- **The profile of the creditors issuing Committal Summonses.**
- **The number of such applications that specifically involve consumer debt cases.**
- **The percentage of debtors who attend and fail to attend at the committal hearing.**
- **Of those who attend, the percentage that 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.**

As with examination applications and Instalment Orders, it would also be helpful if information was available on how many debtors went to MABS in order to get advice on how to deal with a committal application, why those debtors who did not attend chose not to do so and how many people had access to legal advice before deciding whether or not to attend.

Imprisonment

Although there appears to be no official figure of the number of Committal Orders, figures are now available on the number of persons imprisoned each year as a result of failing to comply with a court order in relation to payment of a debt. Until 2009 this was

as far as the statistics seemed to go until the Minster for Justice, Equality and Law Reform, Dermot Ahern, T.D., provided for the first time, to FLAC's knowledge, details of the average length of sentence ordered and average length of time served by debtors in 2008.[211] At 27 days average sentence and 20 days average served, these figures appear to contradict the State's routine assertion that the time spent by debtors in prison is quite short as many make payment either on committal or shortly afterwards.[212]

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.

Research on long-term health effects of over-indebtedness

The tangible costs to the State of persisting with procedures that are essentially adversarial and punitive – the court costs, the Garda time, a prison stay – have been speculated upon in this report and some attempt should be made by the State to quantify them for the information of the taxpayer. However, the potential long-term side effects of over-indebtedness generally on the health and well-being of debtors, their dependants and other relatives is also an important question for our society to consider.

The responses to some of the questions in Part Nine of the questionnaire give at least an indication that these effects continue on even after the financial problems may have been sorted out, whilst the damage that can be done to mental and physical health, morale and relationships during a debt crisis is clear from those extracts.[213] Quite apart from the suffering for those affected, who knows how this human cost translates into a financial cost in the long run that has to be borne by the State and the taxpayer?

Dr Richard Ahlstrom, now of the University of Mid-Sweden, speaking at the MABS annual conference in 2000, noted that at societal level "over-indebtedness is costly in terms of high expenses related to the conduct of advisory services, legal proceedings, loss of tax payments and costs for social welfare and healthcare."[214] He cited an array of research material that established "that socio-economic problems are risk factors for mental disorders." He also provided detail of three studies, including his own, that considered the problem of health and over-indebtedness from an epidemiological perspective, i.e. that looked at the causes and factors that gave rise to debt related illness and how they might be controlled.

His own study assessed the health and quality of life of 230 over-indebted persons in Sweden against the norm across a range of health dimensions and concluded that there was an average 35% reduction in the indebted group. Based on this, he suggested that the life situation of over-indebted individuals and their families may represent a new and dramatic challenge to public health and social policy decision-making. He is currently engaged in a further research study on the emotional impact of severe debts on the individual.

211 Response to Parliamentary Question No 608 by Caoimhghin O'Caolain, T.D. for Written Answer, 27

212 See Section Three for further detail on this issue.

213 See pages 21-23 for more details of the observations of debtors in this respect

214 Over-indebtedness and costs to society' Ahlstrom R., pages 47-55. Report from MABS annual conference, 'Debt – Whose problem is it anyway?', Tralee, 31 March - 2 April 2000.

It is ironic that Dr Ahlstrom's paper was delivered at a conference in 2000 entitled 'Debt – Whose problem is it anyway?' at a time when the consumer credit boom was in full swing. The answer to the question posed at that conference may be much clearer now. This question of the interaction between over-indebtedness and ill health is likely to come into sharper focus for our society as current economic difficulties see more people struggling to keep control of their finances and increasing numbers coming before the courts or being threatened with legal proceedings.

7.4 A state-funded research study in Ireland to investigate these potential links 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

Introduction

Making constructive changes to the existing system that will encourage a more pro-active approach to resolving cases of over-indebtedness and will reduce the number of cases ending in committal applications being made should be undertaken immediately by the State. For the time being, this may have to suffice. However, all the evidence suggests that an alternative approach to resolving cases of over-indebtedness is long overdue. By taking enforcement out of open court and into a specialist forum charged with assessing ability to repay in a non-recriminatory atmosphere and with the least possible embarrassment to the debtor, a quicker and more satisfactory resolution of these problems should be achieved.

Although it is beyond the scope of the procedures directly examined in this report, it should also be pointed out that the bankruptcy legislation in Ireland – the Bankruptcy Act 1988 – is largely unused and is entirely unsuitable in cases of chronic consumer over-indebtedness. Given the extent of the recent consumer credit boom in Ireland, it is unfortunately likely that a modernised bankruptcy option may be the only long term solution in a limited number of cases, where the debts of the individual are substantial and the situation hopeless in the long term.[215] This is a subject that FLAC intends to return to in the near future.

Given the predominantly negative response by debtors to the involvement of the courts in the debt enforcement by instalment process, coupled with the findings outlined at the various stages of Part Six of the questionnaire that creditors also turned their backs on adjudications where they were impractical and potentially counter-productive (in particular where Committal Orders had been obtained), there would appear to be a lot to be gained by taking an alternative approach.

215 Consumer bankruptcy or debt settlement schemes are now widespread throughout Europe and across the world and are a standard response to chronic over-indebtedness in societies where extensive use of credit has become the norm.

Finding a solution outside the courts

It is evident from the findings of the questionnaires that it would be preferable in many cases for creditors as well as debtors to avoid legal proceedings where possible in consumer debt cases. For example, six out of the 16 committal orders obtained by creditors in this study were effectively withdrawn, despite the time and money that was put into making applications and obtaining such orders. Instead, affordable instalment payments were ultimately put in place when it belatedly became apparent that the debtor was a 'can't pay' as opposed to a 'won't pay', a conclusion that could have been arrived at far earlier with a more pro-active system focused on encouraging engagement and assessing ability to repay.

Fundamentally, a busy District Court sitting in public is not the place for a decision to be made on a debtor's ability to repay a debt by instalments. Indeed, it is worth pointing out that that the current Instalment Order procedure would be likely to completely collapse if debtors did what they are supposed to do under the current system, i.e. send in details of their income and appear at each subsequent hearing designed to assess repayments. If every debtor did so and each case was properly examined on its merits, the court might well still be in session by late evening, especially in urban areas. In a very real sense therefore, the current system depends for its survival on the non-appearance of debtors, a fundamental contradiction in terms.

A number of the debtors interviewed in this study believed that not enough was done by the creditor to reach an accommodation prior to legal proceedings being served, despite the general insistence of the credit industry that many efforts are made to communicate with borrowers in trouble before legal action is taken as a last resort. Perhaps, much of this effort may be in vain when it is apparent that many debtors feel, rightly or wrongly, that the odds are stacked against them, in particular if their life is collapsing around them due to the pressure of debt. The various strands of the credit industry might consider spending less energy on pre-legal debt collection and more time on trying to convince borrowers who clearly have financial problems to avail of independent money advice, with a view to putting a sustainable plan for phased repayment in place. In this regard, it is worth noting that of the 38 debtors in the study, all of whom eventually became clients of MABS, only three were referred by creditors and many accessed money advice far too late.

It is evident that many of the people interviewed in this study felt a great deal better and took more effective action when they had accessed money advice. With the relief of a third party to talk with and put their financial information forward, many were prepared to tackle their indebtedness and agree to embark on affordable repayments, thus avoiding unnecessary and in many cases fruitless litigation continuing. Thus, a person who might be regarded as a difficult case from the perspective of a creditor – for example, agreeing repayments then reneging on them often on a number of occasions – can become more reliable with the assistance of a third party to make realistic as opposed to unsustainable proposals.

The key is getting the debtor to engage and not to 'cut and run'. It is in the long-term interests of our society that this happens at the earliest possible stage, as the opportunity to examine the totality of a person's financial difficulties becomes more difficult further down the line. How can this be best achieved? This study generally indicates that money advice works well and it is FLAC'S experience that the credit industry is generally reasonably well disposed to MABS, although this is by no means universal. An alternative structure that enshrined a money advice approach, with an overseeing authority operating in private that would supervise and if necessary enforce agreements would be one way to proceed.

A potential model: Debt Rescheduling and Mediation Service

There follows 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. 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.

Settlement after legal proceedings are brought

A person may refuse or neglect to consult with MABS or to engage in mediation or negotiation concerning repayments, or having done so, may fail to reach an accommodation. On the other hand, there may be a question that the debt is owed at all or that the amount claimed is incorrect. Where legal proceedings prove necessary for whatever reason, any defendant in a debt case should have access to legal advice on a means-tested basis to verify that the debts are due and owing and to understand the consequences of these proceedings. As has been noted, it is clear from the interviews that many of the debtors found the legal documentation difficult to read and understand. Access to legal advice at an early stage should help to reduce this confusion.

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 Debt 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.

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Consumer Credit Directive, Council Directive 87/102/EEC as amended by Council Directive 90/88/EEC

Directive Council Directive 2008/48/EC of the European Parliament and Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 97/102/EEC.

International:

Charter of the United Nations (1945)
Universal Declaration of Human Rights (1948)
European Convention on Human Rights and Fundamental Freedoms (1950)
International Covenant on Civil and Political Rights (1966)

Acts (Ireland):

Bankruptcy Act 1988

Bunreacht na hEireann 1937

Central Bank and Financial Services Authority of Ireland Act 2004

Civil Legal Aid Act 1995

Civil Registration Act 2004

Consumer Credit Act 1995

Consumer Protection Code, Financial Regulator, August 2006

Court Service Act 1998

Courts (No 2) Act 1986

Courts (Supplemental Provisions) Act 1961

Courts and Courts Officers Act 2002

Debtors (Ireland) Act 1872

District Court Rules

Enforcement of Court Orders Acts 1926-1940

European Convention on Human Rights Act 2003

Markets in Financial Instruments and Miscellaneous Provisions Act 2007

Bills:

Fines Bill 2009 (No 18 of 2009), introduced on 16 April 2009, Sponsored by Minister for Justice Equality and Law Reform, currently (June 2009) at second stage referred to Select Committee 14 May 2009.

Fines Bill 2007 (No 4 of 2007), introduced on 26 January 2007, sponsored by Minister for Justice, Equality and Law Reform, withdrawn on 28 May 2009 by Minister of State at the Department of the Taoiseach, Pat Carey T.D.

Acts (Other countries):

[South Africa] Credit Act No 34/2005

Table of cases

Ireland:

Berryman v Governor of Loughan House [1993] 3 IR 573

Cafferkey v Campbell [1928] IR 44

Foy v An t-Ard Chlaraitheoir, Ireland and the Attorney General [Record No. 2006/33SP] on 14 February 2008

Grimes v Wallace, High Court, unreported judgment, Barron J, 4 March 1994

McCann (Applicant) and Judge of Monaghan District Court, The Commissioner of An Gárda Siochana, 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), High Court, 13-15 May 2009

Norris v The Attorney General [1984] IR 36

ECHR:

Beet v United Kingdom Application No 47676/99, 1 March 2005, (2005) 41 EHRR 23

Lloyd v United Kingdom Application No 29798/96, unreported, 1 March 2005

Ozturk v Germany, February 21, 1984, European Court of Human Rights - No. 8544/79

Websites

Central Statistics Office:	http://www.cso.ie/
Courts Service of Northern Ireland:	http://www.courtsni.gov.uk/
Courts Service:	http://www.courts.ie/
European Coalition for Responsible Credit:	http://www.responsible-credit.net/
Financial Regulator:	http://www.ifsra.ie/
Irish Banking Federation:	http://www.ibf.ie/
Irish Credit Bureau:	http://www.icb.ie/
Irish National Organisation of the Unemployed:	http://www.inou.ie/
Irish Penal Reform Trust:	http://www.iprt.ie/
Irish Statute Book:	http://www.irishstatutebook.ie/
Legal Aid Board:	http://www.legalaidboard.ie/
MABS (Money Advice & Budgeting Service):	http://www.mabs.ie/
Oireachtas:	http:/www.oireachtas.ie/
Stubbs Gazette (Business Pro):	http://www.businesspro.ie/
UK Ministry of Justice:	http://www.justice.gov.uk/

APPENDIX ONE

RESEARCH QUESTIONS AND METHODOLOGY

APPENDIX ONE

RESEARCH QUESTIONS AND METHODOLOGY

Research questions

Over the course of over a decade working with the Money Advice and Budgeting Service (MABS), it has become apparent to FLAC that many indebted people do not participate in the legal process around debt collection or engage with their creditors when legal proceedings are brought against them. Further, when faced with the enforcement of those judgments against them, particularly through the examination of means and Instalment Order procedure,[216] many debtors choose to avoid appearing in public in a court, culminating in many cases to further protracted court applications and in some cases in committal to prison.

This study thus endeavours to gauge the level of participation of a cross-section of MABS clients in debt enforcement proceedings and to enquire into the reasons where a failure to participate is apparent.

It has also become apparent that many clients only turn to MABS for assistance with their difficult financial and legal position well down the road in the process of enforcement or even at the eleventh hour seek help in a crisis situation.

Thus the study sets out to enquire at what point people sought the assistance of MABS or other relevant agencies, where there was an apparent delay what the reason for it was, and who initially referred the client to MABS.

MABS is 100% funded by the State. Thus, the Government, on behalf of the taxpayer, has decided on an increasing basis that a dedicated money advice service is desirable to assist people in financial difficulties. How well is the service doing its job and what obstacles are put in its way that impede its ability to do its job effectively?

Thus, it is proposed to gauge the effectiveness of MABS as an intervention in debt cases and the reaction of creditors to MABS becoming involved in negotiations on behalf of a client when legal proceedings or debt enforcement proceedings following a judgment have begun.

It is believed by many that people who get into arrears with credit agreements or other forms of debt are in some way feckless and the authors of their own misfortune. Equally, some are of the view that failure to respond to legal documentation is evidence of a lack of willingness to pay as opposed to incapacity to do so and the law must continue to be tough on such default. The opposing view is that a sizeable majority of people in debt are under serious pressure and stress, not just in terms of finance but equally in relation to issues such as health and family relationships, and require a sympathetic and rehabilitative approach.

216 See Section 1, pages 12-13 for a full description of this procedure.

The study aims to gauge the indebted person's personal circumstances and that of their partners and dependants as well as the amount of overall indebtedness and the factors that gave rise to that indebtedness, in order to determine which, if either of these perceptions is the more accurate.

Persons subject to the debt enforcement system have rarely, if ever, been given a voice to articulate their feelings about the system and processes that have such a significant impact on their lives at so many different levels. Equally, their view about what they would change and why has not been explored.

The study facilitates debtors to talk about their own personal experience of the debt enforcement system, the effect this had on them and their dependants and whether and how they believe that system could be improved.

Methodology

Reprise of the legislation

Although FLAC's previous report on debt enforcement issues, *An End based on Means,* provides a good amount of detail on the debt enforcement by instalment procedure, it was necessary to provide a more detailed summary of the relevant legislation and the current court procedures implementing it as an essential pre-requisite to examining the effect of these procedures on individual debtors.

Statistical Analysis

Having looked at the process itself in some detail, it was also necessary to examine the number of people notionally affected by it and for that purpose to examine what statistical information the State could provide on these procedures, principally from the Courts Service Annual Reports and the Annual Reports of the Irish Prison Service. It was then necessary to critically evaluate the quality and extent of that statistical information in relation to these procedures to gauge whether it provides an adequate basis for an examination of their effectiveness and the potential for law reform that might arise.

Obligations under International law

The procedures being examined can and, in a number of cases do, result in the imprisonment of the debtor. It was therefore also necessary to examine to what extent they comply with international human rights standards, in particular the European Convention on Human Rights and Fundamental Freedoms and the United Nations International Covenant on Civil and Political Rights (ICCPR). The reports of the Irish government to the UN Human Rights Committee (HRC) justifying the continuation of these procedures were also subject to scrutiny under this section.

Questionnaires

In order to assess the level of participation and experience of debtors in the legal process, it was decided to approach MABS to source clients for in-depth interviews. This approach had a number of immediate advantages. FLAC has had an ongoing working relationship with MABS over a period of years in terms of the provision of second-tier legal support and training. Money advisors would have an existing and/or past client base to approach and some of the information required for the questionnaire could be gleaned from an existing structured file. The client base would be likely to be broadly representative of people with serious debt problems, given that MABS is 100% funded by the taxpayer and is in effect the State's only dedicated money advice service, receiving referrals from a wide range of sources including the credit industry, legal professionals, the Courts Service, Citizens Information Centres, welfare services and a wide variety of non-governmental organisations.

FLAC wrote to the staff and management committee of every MABS service in the country inviting their participation. Ultimately a total of 30 services were in a position to co-operate in the project. FLAC designed a draft questionnaire for potential clients and then held consultation meetings in its office with money advisors representing the services concerned. It was agreed that each service would attempt to source two clients to interview and a final questionnaire was drafted taking into account the comments of the money advisors involved. The questionnaires (60 in total) were numbered and sent to the services together with a consent and strict confidentiality form. Ultimately, 39 interviews were carried out of a target 60. One of these questionnaires was invalid as a judgment had not been granted against the debtor in question so there was no enforcement process.

Many money advisors reported back subsequent reluctance on the part of clients who had originally signalled a willingness to participate. It is speculated that this was due to a variety of potential factors. Firstly, there would be many clients who have moved on with their lives and would not wish to revisit what was a difficult period in their life. Some were petrified at the very idea of talking again about their experience. Others looking at the scope and length of the questionnaire decided to opt out having initially agreed to conduct the interview.

It is important to stress that this is not a scientifically selected representative sample of MABS clients. However, the services from which the clients are drawn come from a very wide area up and down the length and breadth of the country, comprising 28 different MABS outfits from Donegal to Waterford, from Dublin to Kerry and many points in between. Of the 30 services who agreed to participate in the project, 19 services returned one questionnaire; eight services returned two and one service managed to interview three clients. No questionnaires were returned from two services that were unable to find clients who would agree to participate.

APPENDIX TWO

QUESTIONNAIRE FOR THE STUDY

Debt Project

Questionnaire

May 2006

FLAC (Free Legal Advice Centres)
13 Lower Dorset Street
Dublin 1

t: 01-874 5690
f: 01-874 5320

e: info@flac.ie
w: www.flac.ie

Part 1

Information about the individual client who was the subject of legal proceedings

Objective – to build up a picture of the individual client at the time proceedings were taken

Reference:
(to avoid use of name and address)

marital status

- Single – no children ☐
- Single – with children ☐
- Married/cohabiting – no children ☐
- Married/cohabiting – with children ☐

nationality

- Irish ☐
- European ☐
- Non-European ☐

first language

- English ☐
- Irish ☐
- Other ☐

labour force status

- Employee ☐
- Farmer ☐
- Retired ☐
- Home duties ☐
- Self-employed ☐
- Unemployed ☐
- Ill or disabled ☐
- Social welfare/Part-time worker ☐

gender

- Male ☐
- Female ☐

age of client

- State age ☐

Part 2

Information about the household profile within which each individual client lived at the time proceedings were taken

Objective – to build up a picture of households in which debtors subject to legal proceedings reside

household size

- Number of adults ☐
- Number of children ☐

composition

- One person ☐
- Couple (including married and cohabiting couples) ☐
- Couple with children ☐
- Couple with other persons ☐
- Couple with children and other persons ☐
- Lone parent with children ☐
- Lone parent with children and other persons ☐
- Two or more family units ☐
- Non family households ☐

Location size

- Open country ☐
- Village (200-1,499) ☐
- Town (1,500-2,999) ☐
- Town (3,000-4,999) ☐
- Town (5,000-9,999) ☐
- Town (10,000 or more) ☐
- Cork City ☐
- Limerick City ☐
- Galway City ☐
- Waterford City ☐
- Greater Dublin (city and county, including Dun Laoghaire) ☐

main income source of client

- Wages/salary ☐
- Self-employed ☐
- Farming ☐
- Private pension ☐
- Unemployment benefit / assistance ☐
- Other social welfare payment ☐
- Investments ☐
- Other (Please specify: _____) ☐
- ☐

gross income of client

State amount (weekly / monthly / annual):
Please circle the payment interval you are using.

net income of client

State amount (weekly / monthly / annual):
Please circle the payment interval you are using.

gross income of partner (if any)

State amount (weekly / monthly / annual):
Please circle the payment interval you are using.

net income of partner (if any)

State amount (weekly / monthly / annual):
Please circle the payment interval you are using.

child benefit (if any)

State amount (monthly):

tenure type

- Owner/purchaser (private) with mortgage ☐
- Owner/purchaser (private) without mortgage ☐
- Tenant/sub-tenant (private) ☐
- Owner purchaser (local authority) ☐
- Rent-free ☐
- Tenant/sub tenant (local authority) ☐
- Living with relatives ☐
- Homeless ☐

Ref:

Part 3

Information about the general financial circumstances of the household

Objective – to build up a picture of the financial position of the households in question at the time legal proceedings were taken and the background to this

number of debts at time of the proceedings

Please input the APPROXIMATE amount of total debt

	Debts	Arrears
Housing loans		
Rent		
Utilities		
Telephone		
TV licence		
Maintenance		
State debts (e.g. refuse charges, revenue debts)		
Fines		
Credit cards		
Bank loans		
Overdrafts		
Moneylending loans		
Hire Purchase		
Hire/lease		
Credit Union loans		
Local (family/friends)		
Medical debts		
Good or services		
Business debts		
Other (Please specify: _____)		

Were these commitments overall a **burden** to you?

Yes – a heavy burden	☐	No – not a burden	☐
Yes – somewhat	☐	No opinion	☐

reason for arrears

Which of the following (if any) would you consider the **reason(s) why the arrears arose**? Where appropriate, please feel free to state more than one. Please indicate where possible whether there was an **income drop and/or an expenditure increase** associated with the arrears.

Please tick the box where appropriate.

	reason?	**income drop?**	**expenses increase?**
Illness	☐	☐	☐
Accident	☐	☐	☐
Unemployment	☐	☐	☐
Loss of overtime	☐	☐	☐
Demotion	☐	☐	☐
Business failure	☐	☐	☐
Unavailability of current account	☐	☐	☐
Unavailability of affordable credit	☐	☐	☐
Over extension of credit by lender(s)	☐	☐	☐
Ongoing low income	☐	☐	☐
Family events	☐	☐	☐
Budgeting difficulties	☐	☐	☐
Over-borrowing	☐	☐	☐
Over-spending	☐	☐	☐
Not seeking advice	☐	☐	☐
Addiction	☐	☐	☐
Change of tenure status	☐	☐	☐
Change in household size	☐	☐	☐
Relationship break-up	☐	☐	☐
Death in the family	☐	☐	☐

Ref:

reason for arrears (cont'd)

	reason?	income drop?	expenses increase?
Cost of living increases	☐	☐	☐
Fines	☐	☐	☐
Not aware of entitlements	☐	☐	☐
Other (please specify: _____)	☐	☐	☐

Please feel free to elaborate if you wish to expand about the reasons why arrears arose.

Part 4

Information about the actual debt that was the subject of legal proceedings

Objective - to categorise both the specific debt in question, the specific creditor taking the proceedings and establish liability for/attitude towards it

category of debt

- ☐ Credit card, store card or charge card
- ☐ Bank loan
- ☐ Housing loan
- ☐ Rent arrears
- ☐ Credit sale
- ☐ Goods or services
- ☐ Credit Union loan
- ☐ Hire Purchase agreement
- ☐ Leasing agreement
- ☐ Utility bill
- ☐ Overdraft
- ☐ Moneylender's loan
- ☐ Loan from family/friend
- ☐ Other (Please specify: _____)

category of creditor

- ☐ Bank
- ☐ Finance house (i.e. hire purchase or leasing agreement)
- ☐ Credit Union
- ☐ Utility company
- ☐ Friend or relation
- ☐ Building Society
- ☐ Credit card, charge card or store card provider (e.g. MBNA, Tesco etc)
- ☐ Moneylender
- ☐ Provider of goods or services
- ☐ Other (please specify: _____)

amount claimed by the creditor

Was the amount claimed by the creditor...

- ☐ Owed by you solely in full
- ☐ Owed by you & another person jointly (e.g. a spouse or guarantor) in full
- ☐ Not owed by you at all
- ☐ Owed by you solely in part
- ☐ Owed by you & another person jointly (e.g. a spouse or guarantor) in part

Ref:

defence of claim

Did you defend the claim against you?

Yes ☐ No ☐ N/A ☐

If so, did the court decide the debt was

Owed in full ☐ Owed in part ☐

attitude to repayment

Would you describe your attitude to repayment as

Wouldn't pay ☐ Couldn't pay ☐

Could pay but needed more time to pay ☐ Other (please specify: _____) ☐

Part 5

Information about what happened in relation to the debt including when and why action ceased and to get a general picture of the client's awareness of the services available to assist them

Objective – to find out general details about the process and the debt in question i.e. when it stopped, why it stopped, whether and when advice was sought and if so the outcome of this

enforcement stage

Stage reached in enforcement before process stopped. Please tick appropriate box.

Examination Summons	☐	Instalment Order	☐
Committal Summons	☐	Variation of Instalment Order	☐
Committal Order	☐	Imprisonment	☐
Release from prison	☐		

reason process ceased

- Creditor agreed to instalment proposals put forward through MABS ☐
- Creditor agreed to instalment proposals put forward through an agency other than MABS ☐
- Creditor agreed to instalment proposals put forward by self ☐
- Creditor agreed to write off debt without further payment ☐
- Money borrowed to pay remaining amount of the debt ☐
- Received gift/charity to pay remaining amount of the debt ☐
- Process completed (up to imprisonment and subsequent release) ☐
- No contact made and creditor gave up pursuing debt short of imprisonment ☐
- Other (please give details _____) ☐

advice & assistance

Did anyone suggest/refer you for advice/assistance, at any stage, from any of the following sources with respect to the particular debt? If someone referred you, please state whom.

More than one box may be ticked here.

Ref:

	Yes	Referred by whom
Court office	☐	
Private solicitor	☐	
MABS	☐	
St Vincent de Paul	☐	
Citizens Information Centre	☐	
Legal Aid Board law centre	☐	
Free Legal Advice Centres	☐	
Friends/relatives	☐	
Trade Union	☐	
Employer	☐	
Credit Union	☐	
Other creditor or their representative	☐	
Community / Medical services	☐	
Warrant officer / Gardaí	☐	
Other (please specify: _____)	☐	

Did you **actually seek advice/assistance** at any stage from any of the following sources with respect to the particular debt? More than one box may be ticked here.

Court office	☐	Private solicitor	☐
MABS	☐	St Vincent de Paul	☐
Citizens Information Centre	☐	Legal Aid Board law centre	☐
Free Legal Advice Centres	☐	Friends/relatives	☐
Trade Union	☐	Employer	☐
Credit Union	☐	Other creditor or their representative	☐
Community / Medical services	☐	Warrant officer / Gardaí	☐
Other (please specify: _____)	☐		

At what stage if any did you seek advice/assistance?

Before going into arrears	☐	In arrears but before legal proceedings	☐
After receiving summons re legal proceedings	☐	After judgment but before enforcement	☐
After enforcement but before instalment	☐	After instalment but before committal	☐
After committal	☐	Not at all/not at any stage	☐

How would you describe the advice/assistance received?
More than one box may be ticked here.

	Very helpful	Helpful	OK	Unhelpful	Very unhelpful
Court office	☐	☐	☐	☐	☐
Private solicitor	☐	☐	☐	☐	☐
MABS	☐	☐	☐	☐	☐
St Vincent de Paul	☐	☐	☐	☐	☐
Citizens Information Centre	☐	☐	☐	☐	☐
Legal Aid Board law centre	☐	☐	☐	☐	☐
Free Legal Advice Centres	☐	☐	☐	☐	☐
Friends/relatives	☐	☐	☐	☐	☐
Trade Union	☐	☐	☐	☐	☐
Employer	☐	☐	☐	☐	☐
Credit Union	☐	☐	☐	☐	☐
Other creditor or their representative	☐	☐	☐	☐	☐
Community / Medical services	☐	☐	☐	☐	☐
Warrant officer / Gardaí	☐	☐	☐	☐	☐
Other (please specify: _____)	☐	☐	☐	☐	☐

Please feel free to elaborate if you wish to expand about the advice sought.

Ref:

Did you **delay** in seeking advice/assistance?

Yes ☐ No ☐ N/A ☐

If you did delay, **what was the main reason** for this?

Potential options (please tick appropriate box):

Felt I could sort it out on my own ☐ Unaware of services that were there ☐

Potential cost involved ☐ Fear of being judged ☐

Other (please specify: _____) ☐

Part 6

Detailed information on specific stages of the debt recovery process and the response and state of knowledge of the debtor

Objective – To get specific information about the level of the client's participation at the various different stages of debt enforcement process

Note for interviewers:
There are basically seven (7) possible stages of the legal process in relation to obtaining judgment and using this kind of debt enforcement that may need to be checked under this section. These are:

- Initial Summons
- Examination (i.e. Debtor's Summons)
- Committal Summons
- Committal Order
- Notification of decree/judgment
- Instalment Order
- Variation of Instalment Order

The best way to begin this section is to confirm at the outset the enforcement stage that was reached in relation to this particular client (For this purpose refer back to the first question in Part Five).

You will then identify how many of the areas below that you will have to cover. It is also important to remember that much of this information may also be on an existing or past file that the money advisor can access in order to save time and inconvenience. Each relevant stage might be introduced by showing a sample of the relevant document before asking questions that relate to it as follows:

1. initial summons

	Yes	No	N/A
Do you recall whether you received a **draft or warning summons** in advance of the actual summons?	☐	☐	☐
If you did, did you understand at the time it was only a draft?	☐	☐	☐
Do you remember receiving the **actual initial summons** itself? If not, go to next applicable section. - Note for interviewer: a sample Civil Summons Bill or Civil Bill can be shown to the client as a reminder	☐	☐	☐
Did you understand the document?	☐	☐	☐
Did you understand your options as a result?	☐	☐	☐
Did you know you would be liable for legal costs as well as the debt itself?	☐	☐	☐
Did you defend the claim against you?	☐	☐	☐

Ref:

	Yes	No	N/A
Did you respond to the document by contacting the creditor or the creditor's solicitor?	☐	☐	☐
Did you make some offer of payment at this point as a result?	☐	☐	☐
If so, did you receive a response to your offer?	☐	☐	☐

If you did not respond to the document, can you explain why not?

Have you any other comments about receiving the initial summons?

2. notification of decree / judgment

	Yes	No	N/A
Did you receive a letter notifying you that judgment had been obtained? If not, go to next part if applicable.	☐	☐	☐
Did you understand the letter?	☐	☐	☐
Did you understand your options?	☐	☐	☐
Did you respond to the letter?	☐	☐	☐
Did you make any offer at this point?	☐	☐	☐
Did you receive a response to your offer?	☐	☐	☐

Did you find out about the judgment from another source? If 'yes', please specify: _____	☐	☐	☐
Were you aware that the existence of the judgment might affect your credit rating?	☐	☐	☐

3. examination (i.e. debtor's summons)

	Yes	No	N/A
Do you remember receiving the Debtor's Summons? If not, go to next part if applicable. Note for interviewer: A sample of the Debtor's Summons can be shown to the client as a reminder	☐	☐	☐
Did you understand your options?	☐	☐	☐
Did you make an offer at this point?	☐	☐	☐
Did you receive a reply?	☐	☐	☐
Did you respond to the summons?	☐	☐	☐
Did you send in details of your financial circumstances to the court?	☐	☐	☐
Did you attend any associated court hearing?	☐	☐	☐
Did you borrow money to clear the debt?	☐	☐	☐

4. instalment order

	Yes	No	N/A
Do you remember receiving the Instalment Order? If not, go to next part if applicable. Note for interviewer: A sample of an Instalment Order can be shown to the client as a reminder	☐	☐	☐
Did you understand your options?	☐	☐	☐
Did you realise this was a court order?	☐	☐	☐
Did you ignore it?	☐	☐	☐
Did you borrow money to clear the debt?	☐	☐	☐
How much was the Instalment Order for? Please give details:	☐		
Did you pay the Instalment Order in full?	☐	☐	☐

Ref:

Please give details of payments made under the Instalment Order and the amount of arears that built up.

Note for interviewers: The object here is to find out how the client dealt with the order – did s/he make a number of payments and then stop, did s/he part-pay the order, did s/he never pay any instalments, how much were the arrears, how long did the creditor wait before taking action, etc.

5. committal summons

	Yes	No	N/A
Do you remember receiving the Committal Summons? If not, go to next part if applicable. - Note for interviewer: a sample of a Committal Summons can be shown to the client as a reminder	☐	☐	☐
Did you understand that you could go to prison?	☐	☐	☐
Did you understand your options?	☐	☐	☐
Did you borrow money to clear the debt as a result?	☐	☐	☐
Did you ignore the summons?	☐	☐	☐
Did you attend the committal hearing?	☐	☐	☐

6. variation of instalment order

	Yes	No	N/A
Did you ever apply to vary the Instalment Order made by the court?	☐	☐	☐
Did you know that you could apply to vary the Instalment Order at any time?	☐	☐	☐
Did you know that you could apply to vary it at the committal hearing?	☐	☐	☐
Did you know that the judge could vary the order at the Committal hearing?	☐	☐	☐

7. committal order

	Yes	No	N/A
Do you remember receiving Committal Order? If not, go to next part if applicable. - Note for interviewer: a sample of a Committal Order can be shown to the client as a reminder	☐	☐	☐
Did you read it and understand it fully?	☐	☐	☐
Did you understand your options?	☐	☐	☐
Did you appeal and Committal Order?	☐	☐	☐
Did you know that you could appeal the Committal Order?	☐	☐	☐
Did you borrow money to clear the debt	☐	☐	☐
Did you ignore the order?	☐	☐	☐

Ref:

Part 7

Views of the client about their experience of attending court hearings or if s/he did not, the reasons for not doing so.

Objective – To get the client's view of the process including the reasons for non-attendance

court attendance

Did you attend the court hearings to which you were summonsed? (Tick appropriate box)

All ☐ Some ☐ None ☐ N/A ☐

For those you did not attend, **why did you choose not to attend?**
Note for interviewer: This is an open question for the client to answer as s/he sees fit. Some potential options are set out below.

Some potential options:

Was not aware that I should attend ☐

Was too embarrassed/frightened to attend ☐

Did not want to go to an open court hearing ☐

Did not understand what was going on ☐

Did not feel that I should have to pay ☐

N/A ☐

Other (please specify: _____) ☐

For **those you did attend**:

Were you legally represented? Yes ☐ No ☐

If not, were you accompanied by any other person? Yes ☐ No ☐
For example, a money advisor or a relative.

Please specify: _____

Were you on your own? Yes ☐ No ☐

How would you **describe the experience?**
Note for interviewer: This is an open question for the client to answer as s/he sees fit. Some potential options are set out below.

Some potential options

Was treated with courtesy and got a fair hearing ☐

Was not treated with courtesy and did not get a fair hearing ☐

It was okay but it all happened too quickly ☐

N/A ☐

Other (please specify: _____) ☐

Do you **feel you understood** what was going on?
Note for interviewer: This is an open question for the client to answer as s/he sees fit. Some potential options are set out below.

Some potential options:

Yes - completely ☐

Yes- to some extent ☐

Not very well ☐

Not at all ☐

N/A ☐

What could have been done to **improve the experience** from your point of view?
Please elaborate in your own words or indicate if not applicable: N/A ☐

Ref:

Part 8

Information on the actual arrest and committal itself and the subsequent release from prison of the debtor.

Objective – To focus on how the arrest and committal was carried out and whether this has brought the matter to an end

arrest warrant

What was the length of time between Committal Order and execution of warrant?

Please state length of time, i.e. number of days, weeks or months

Do not know/recall ☐ N/A ☐

Were you contacted by the Gardai in advance of your arrest?

Yes ☐ No ☐ Don't recall ☐ N/A ☐

Did you or someone on your behalf **borrow money** to clear the debt as a result?

Yes ☐ No ☐ Was unable to ☐ N/A ☐

If you did, **from whom did you borrow?**

Please state source of credit N/A ☐

imprisonment

Which prison were you brought to? N/A ☐
Please state name of prison

How did you find the attitude of the Gardai towards you?

Good ☐ Bad ☐ Okay ☐ N/A ☐

How long did you spend in prison?
Please state length of time

Do not recall ☐ N/A ☐

Was this the full period ordered by the judge?

Yes ☐ No ☐ N/A ☐

If not, what was the reason for your release?

Please specify, e.g., debt was paid by a friend or relative or prison was over crowded

N/A ☐

If you went to prison, did you have to make childcare arrangements?

Yes ☐ No ☐ N/A ☐

Please specify details:

experience in prison

Please elaborate about your experience in prison, if you wish:

latest developments

What, if anything, has happened with the debt since?
Please elaborate or indicate if not applicable: N/A ☐

Part 9

Your overall experience and feelings about the process/system as a whole

Objective – To allow the interviewees to talk about the effect of the process on themselves and their dependants

understanding of process

Overall, was the **legal documentation** involved in the process understandable to you?

Yes ☐ No ☐ No opinion ☐

Please feel free to elaborate

Overall, were you personally **aware of your options and the consequences** at all stages?

Yes ☐ No ☐ No opinion ☐

Please feel free to elaborate

Were the **court officials** (clerk, judge etc) helpful to you?

Yes ☐ No ☐ No opinion ☐

Please elaborate if you wish:

How did going through this process affect you?
Please elaborate if you wish:

Did going through the process **affect other household members** and if so, how?
Please elaborate if you wish:

Ref:

views & suggestions

Please describe, if you wish, your **general views on the process of debt enforcement?**
Please elaborate if you wish:

Finally, would you like to suggest from your experience improvement(s) to the system that could be made (if any)? Please elaborate:

Thank you for your co-operation in answering all these questions.

APPENDIX THREE

A NOTE ON THE MONEY ADVICE AND BUDGETING SERVICE (MABS)

APPENDIX THREE

A NOTE ON THE MONEY ADVICE AND BUDGETING SERVICE (MABS)

MABS services

The Money Advice and Budgeting Service (MABS) began as five pilot projects in 1992, primarily to assist people in financial difficulty as a result of moneylending. Since then, however, MABS has become the principal response of the State to the problems of over-indebtedness generally. The funding and development of the service has progressively increased, with a budget of almost €18 million allocated nationally in 2008. In 2005, almost 27,000 people across the country used the MABS service, compared with less than 18,000 four years before in 2001. The number of new clients grew from 11,630 in 2006 to 16,600 by the end of 2008. MABS now employs a staff of 250 in 53 independent companies delivering services in 65 different locations across the country.

Each service is a not-for-profit company limited by guarantee with a management committee comprised of representatives of local statutory and voluntary organisations. The Department of Social and Family Affairs co-ordinates and provides the funding for the service and a national advisory committee (NAC) made up of relevant stakeholders provides advice to the Minister on the operation and development of the service. A Money Advice and Budgeting Service National Development Ltd (MABSndl) company was set up in 2004 to provide technical support to money advice staff and a national telephone helpline was launched in late 2007.

Although the work of MABS has been universally praised by successive Ministers for Social and Family Affairs, successive promises to introduce legislation to establish it on a statutory basis did not materialise. However, it is hard to disagree with the words of the late former Minister for Social and Family Affairs, Seamus Brennan T.D., in 2006:

> MABS has been an extremely positive development in the whole area of debt management in Ireland in the last 13 years or so. The challenge for the future is to develop a strategy to prevent over-indebtedness and inform people before they reach crisis point, as well as continuing to meet the needs of those who find themselves in immediate financial difficulties.[217]

MABSndl

The Money Advice and Budgeting Service National Development Ltd (MABSndl) has been in place since 2004, performing very valuable work in supporting the work of money advisors nationally in the areas of technical support, social policy, communications, community education, training and technology. It also houses the MABS telephone helpline established in 2007. It was speculated for some time that MABSndl was the forerunner of a national agency that would co-ordinate the work of a service that has clearly demonstrated its worth and necessity in a society where over-indebtedness has become increasingly commonplace.

In May 2006, the late Minister Seamus Brennan also stated:

> It has always been envisaged that MABS would be shaped by the needs of local communities and work in partnership with local voluntary and statutory organisations. Local knowledge is invaluable to the MABS service and I want to see this continued. But I also see the need for a more streamlined national structure with a central leadership.[218]

It was envisaged that such a national agency, were it to be established, might not only co-ordinate the delivery of money advice services across the country but might also be allocated sufficient resources and personnel to provided comprehensive training, research and development facilities and legal, financial, welfare and community education expertise to money advisors countrywide. It was also hoped that it would examine the underlying causes of debt and the obstacles to the resolution of problems of indebtedness in Ireland as well as propose and advocate for appropriate reforms.

The budget of October 2008 dictated that MABS services would henceforth come under the umbrella of the Citizens Information Board (CIB), itself a statutory body. The CIB (formerly Comhairle) is responsible for supporting the provision of information, advice and advocacy on a wide range of social and civil services and is similarly funded by the Department of Social and Family Affairs. At the time of writing (June 2009) it is not clear exactly what implications this will have for the future development of money advice in Ireland.

APPENDIX FOUR

This appendix contains samples of relevant court documents mentioned throughout the report:

- Civil Summons
- Examination of Means (Debtor's Summons)
- Statement of Means form
- Instalment Order
- Application to vary Instalment Order
- Order Varying Instalment Order (Variation Order)
- Application for debtor's arrest and imprisonment (Committal Summons)
- Order for arrest and imprisonment (Committal Order)
- Warrant to enforce Order for arrest and imprisonment

No. 39.2

O.39, r.2

CIVIL SUMMONS FOR A DEBT OR LIQUIDATED MONEY DEMAND

(excepting proceedings instituted in pursuance of the Consumer Credit Act, 1995

District Court Area of District No.

Between

.....
.

of .....
in the County of .....

(description of Plaintiff)

Plaintiff

-and-

.....
..

of .....
in the County of .....

*(and court area and district aforesaid)

(description of Defendant)

Defendant

The Plaintiff's claim is to recover against you, the Defendant, the sum of £ for

Amount due £
Costs (if paid within ten days) £ _____

(A) IF YOU DISPUTE THE CLAIM, and wish to defend the proceedings. then, YOU

ARE HEREBY REQUIRED

(i) not later than 7 days before the under-mentioned date of sitting of the Court to detach and complete the two Notices of Intention to Defend attached to this civil summons and to give or send by post one of them to the District

Court Clerk at
.....

and the other to the Plaintiff or Solicitor for Plaintiff,
(ii) AND TO APPEAR at the sitting of the District Court for the hearing of

civil proceedings to be held at

.....

in court area and district aforesaid on the day of 19
at a.m./p.m. to answer the said claim.
(B) IF YOU PAY THE CLAIM AND COSTS stated above to the Plaintiff or Solicitor for Plaintiff within 10 days after the service upon you of this civil summons, all further proceedings will be stayed, you need not attend court and you will avoid further costs.

(C) IF YOU ADMIT THE CLAIM and desire time for payment, you should call to the office of the Plaintiff's Solicitor within 10 days after the service upon you of this civil summons and sign a consent.

(D) IF YOU DO NOT ACT IN ACCORDANCE WITH (A), (B), OR (C) ABOVE you will be held to have admitted the claim and the Plaintiff may, without further notice to you, lodge an affidavit of debt in the District Court Office, obtain judgment and proceed to execution for the full amount claimed and costs.

Dated this day of 19
Signed .....
Plaintiff or Solicitor for Plaintiff
of

To

of

the above defendant

NOTICES OF INTENTION TO DEFEND as in Form 41.1

*Delete where inapplicable

No. 53.1

O.53,r.3 (1)

ENFORCEMENT OF COURT ORDERS ACT, 1926

Section 15 (1)

SUMMONS FOR ATTENDANCE OF DEBTOR

District Court Area of District No.

..... Creditor

of .....

and

..... Debtor

of .....

WHEREAS by Order of the ..... Court dated day of 19

it was ordered and adjudged that the above-named creditor do recover against the above-named debtor the total sum of £ , (for debt) and the sum of £ for costs and expenses, together with interest at the rate of % per annum (on the said sums) (on the debt only, exclusive of costs and expenses) until the same shall be satisfied,

AND WHEREAS the creditor claims that the said Order has not been complied with and that there is now due and owing by the debtor to the creditor on foot of the said Order the total sum of £ ,

AND WHEREAS the creditor has duly applied for the issue of this summons,

YOU ARE HEREBY REQUIRED to attend at the sitting of the District Court

to be held at ..... in the court area and district aforesaid

on the day of 19 at a.m./p.m. for examination as to your means.

AND YOU ARE FURTHER REQUIRED not less than one week before the date of the said sitting to detach the form of Statement of Means attached hereto and, having completed same, to give or send such form to the Clerk of the District Court

at .....

Dated this day of 19

Signed .....

Clerk of the District Court

To the above-named Debtor

of .....

..... detach here .....

(Statement of Means Form No. 53.3 to be added)

Record Number .....

No. 53.3

O.53,r.4 (1)

ENFORCEMENT OF COURT ORDERS ACT, 1926

Section 15 (1)

STATEMENT OF MEANS

..... Creditor
..... Debtor

As required by the summons served on me in the above-named proceedings, I now lodge the †following statement of my means and I say that, to the best of my knowledge and belief, the particulars given therein are accurate and true.

Income (earned and unearned): £ per week/month/year (gross) £ (net)

* Means by which such income is earned or the source from which it is derived:
Assets (if any):
Persons) for whose support I am legally or morally liable: (state names and ages)
I am/I am not at present making payments on foot of other Court Orders.
(if you are, please give details including reference numbers):
Other liabilities and outgoings:

Dated this day of 19 .
Signed .....
(The above-named Debtor)
of .....

To the District Court Clerk
at .....

* PLEASE NOTE THAT IF YOU ARE UNEMPLOYED/IN RECEIPT OF ANY SOCIAL WELFARE ASSISTANCE OR BENEFIT 1T IS MOST IMPORTANT IN YOUR OWN INTERESTS THAT YOU BRING WITH YOU YOUR UNEMPLOYMENT CARD/SOCIAL WELFARE CARD AND PRODUCE IT TO THE COURT.

†Where necessary, more detailed particulars may be given on a separate sheet.

Record Number.....

No. 53.5

O.53,r.6 (1)

ENFORCEMENT OF COURT ORDERS ACTS 1926 AND 1940 INSTALMENT ORDER

District Court Area of District No.

..... Creditor

..... Debtor

WHEREAS proof has been given of the due service upon the Debtor of the summons

herein dated day of 19 ,

AND WHEREAS the Debtor *[(has failed to lodge a statement of means in accordance with the said summons) (or, has failed to attend for examination this day in accordance with the said summons) (or, has refused to submit himself/herself for cross-examination by or on behalf of the Creditor) (or has attended for examination this day in accordance with the said summons and has tailed to satisfy the Court that he/she is not able to pay the sum of £ in one sum or by instalments)]. Upon hearing what was offered this day on behalf of the Creditor and the Debtor respectively. and being so requested by the Creditor, the Court hereby orders that the above-named Debtor

..... of .....

in court area and district aforesaid do pay to the Creditor the sum of £ being the balance due for debt, costs, expenses and interest pursuant to the Judgment, Decree or

Order of the

Court dated the day of 19 together with the sum of £ being the costs of these proceedings in manner following, that is to say:—

*[(by instalments of £ each, the first of such instalments to be paid on the) (in one payment to be paid on)]

Dated this day of 19 .

Signed .....

Judge of the District Court

NOTE:- The Court has power to vary the terms of the above Order relating to the manner in which the above debt and costs are to be paid by substituting payment by instalments for a single payment or by altering the amount or times at which instalments are to be paid. A party who requires such variation should consult a solicitor or the District Court Clerk.

*Strike out words in square brackets not applicable

Record Number

No. 53.6

O.53,r.7 (1)

ENFORCEMENT OF COURT ORDERS ACTS 1926 AND 1940

SUMMONS TO VARY AN INSTALMENT ORDER

District Court Area of District No.

..... Creditor
..... Debtor

You are hereby required to attend at the sitting of the District Court to be held at

.....

on the day of 19 , at .m. upon the hearing of an application on

behalf of the to have an Order dated the day of 19 ,

made in this matter by the District Court sitting in the said court area, varied as provided by section 5 of the Enforcement of Court Orders Act, 1940, or for such other relief as to the Court in the circumstances may seem meet, and for the costs of this application.

Dated this day of 19 .
Signed .....
Judge of the District Court or

Clerk of the District Court or

Peace Commissioner

To

of

the above-named

Record Number

*Delete whichever inapplicable

No. 53.7

O.53,r.7 (3)

ENFORCEMENT OF COURT ORDERS ACTS 1926 AND 1940

ORDER VARYING INSTALMENT ORDER

District Court Area of District No.

..... Creditor

..... Debtor

WHEREAS by an Order dated the day of 19 made by the Court sitting at ..... for the District Court Area of

District No. the above named Debtor was ordered to pay the sum of and the sum £ of costs, by instalments of £ each, the first of such instalments to be paid on the day of 19 ,

AND WHEREAS proof has been given of the due service upon the Debtor of the said Instalment Order and the said Order is still in force,

NOW upon application made this day by the in respect of the said Instalment

Order and upon proof of due service of the summons herein dated the day

of 19 ,

THE COURT hereby varies the said Order dated the day of 19 , and directs that on and from the day of 19 , the sum £ of being the balance of the said debt and costs remaining unpaid, (together with the sum of being the amount for interest which has accrued thereon to the date hereof) and £ , the costs of this application, be paid by the Debtor in instalments £ of each the first of such instalments to be paid on day of 19 .

Dated this day of 19 .

Signed .....

Judge of the District Court or

Clerk of the District Court or

Peace Commissioner

Note:-The date from which the variation is to have effect must not be later than the date of this Order.

*Delete whichever inapplicable

Record Number

No. 53.8

O.53,r.8 (1)

ENFORCEMENT OF COURT ORDERS ACTS 1926 AND 1940

SUMMONS

(On application for arrest and imprisonment)

District Court Area of District No.

.....

Creditor

.....

Debtor

You are hereby required to attend at the sitting of the District Court to be held at ..... on the day of 19 at .m. upon the hearing of an application on behalf of the Creditor for an Order for you arrest and imprisonment for your failure to comply with an Order for payment made against you on the ..... day of ..... 19..... or for such other relief as to the Court in the circumstances may seem meet, and for the costs of the application

Dated this day of 19 .

Signed .....

Judge of the District Court or

Clerk of the District Court or

Peace Commissioner

You are hereby required to attend at the sitting of the District Court to be held

at ..... on the day of 19 at .m. upon the

hearing of an application on behalf of the Creditor for an Order for your arrest and imprisonment for your failure to comply with an Order for payment made against you

on the ..... day of ..... 19 ..... or for such other

relief as to the Court in the circumstances may seem meet, and for the costs of the application.

Dated this day of 19 .

Signed .....

Judge of the District Court (or)

Clerk of the District Court (or)

Peace Commissioner

To

of

the above-named Debtor.

Record Number

No. 53.9

O.53,r.8 (3)

ENFORCEMENT OF COURT ORDERS ACTS 1926 AND 1940

Section 6

ORDER FOR ARREST AND IMPRISONMENT

District Court Area of District No.

..... Creditor
..... Debtor

WHEREAS by an order for payment (instalment order) dated the day of 19 made by the Court sitting at ..... for the District Court Area of ..... , District No. the above-named Debtor was ordered to pay the sum of £ (being the balance due for debt and costs pursuant to the Judgment/Decree/Order of the Court dated the day of 19) and for costs £ by instalments of £ each, the first of the said instalments to be paid on the (day after service thereof) (day

of 19),

AND WHEREAS the Debtor has failed to comply with said order for payment,

AND WHEREAS application was made this day by the Creditor for an Order for the arrest and imprisonment of the Debtor for his/her said default and failure to comply with said Order for payment,

AND WHEREAS upon proof of due service of said Order for payment upon the Debtor on the day of 19 and of due service upon the Debtor of the summons herein dated day

of 19

AND WHEREAS the Court is satisfied that there is now due and owing on foot of the said Order the sum of £ being the amount of instalments which have accrued due and are unpaid at the date of this order together with the further sum of £ being the costs of this application, making in all the sum of £

AND WHEREAS it appears to the Court that the said Debtor has failed and neglected to pay the said instalments, and has not shown to the satisfaction of the Court that such failure to pay was due neither to his/her wilful refusal nor his/her culpable neglect.

NOW IT IS HEREBY ORDERED that the said Debtor for his/her said default and failure to pay the said instalments be arrested and committed to prison at there to be imprisoned for the period of from the date of his/her arrest unless he/she, or someone on his/her behalf, shall sooner pay to the District Court Clerk at or to the Governor of the said prison for the said Clerk, or to the under-mentioned Superintendent of the Garda Siochana for said Clerk the sum £ of being the amount of all instalments of the said debt and costs which have accrued before, and are unpaid at, the date of this Order, and a further sum of £ being the costs of this application, making in all the sum of £ .

Dated this day of 19 .
Signed .....
Judge of the District Court.

No. 53.10

O.53, r. 8 (4)

ENFORCEMENT OF COURT ORDERS ACT, 1940

Section 6

*WARRANT TO ENFORCE ORDER FOR ARREST AND IMPRISONMENT

THIS TO TO COMMAND YOU to whom this warrant is addressed to arrest the

Debtor. the said .....
of .....
and to lodge him/her in the prison at .....
there to be imprisoned for a period of .....
pursuant to the above Order unless the said debtor or someone on his/her behalf shall
sooner pay to the District Court Clerk at .....

or to you for the said Clerk or to the Governor of the said prison for the said Clerk the sum of £ , being the amount of all instalments of the said debt and costs which have accrued before and are unpaid at the date of the above Order and a further sum of £ , being the costs of the above application, making in all the sum of £ .

Dated this day of 19 .
Signed .....
Judge of the District Court.

To the Superintendent of the Garda Síochana,

at

and his/her assistants

*To be added to Form 53.9

Record Number