



***SUBMISSION TO THE LAW REFORM COMMISSION***

***BY***

***NORTHSIDE COMMUNITY LAW CENTRE IN COLLABORATION  
WITH NORTHSIDE CITIZENS INFORMATION SERVICE***

***ON***

***PERSONAL DEBT MANAGEMENT AND DEBT ENFORCEMENT***

***FOLLOWING***

***A COMMUNITY CONSULTATION***

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## **Foreword**

Northside Community Law Centre (NCLC) is an independent community based legal centre. We work to protect and develop the legal, social and economic rights of individuals and groups. Northside Community Law Centre provides free information, advice and representation to individuals and group's who otherwise would not be able to access legal services and we work to empower the community through education, research and campaigns. Northside Community Law Centre is providing its service for 35 years in Dublin North East and Dublin North Central. Northside Community Law Centre believes in the dignity of each individual member of society. We are committed to working with the community for the creation of a just and tolerant society.

Northside Citizens Information Service (NCIS) has been serving the community for the past 10 years. NCIS was first opened in April 1999 and since then the number of people using the service has steadily increased. NCIS now deals with an average of 20,000 queries a year through outreach clinics, presentations and on-site information provisions, from the full-time clinic in Northside Citizens Information Centre Coolock and the part-time centre in Beaumont, Dublin. Northside Citizen Information Service strives to provide relevant information to all citizens in a caring and dedicated high quality service that is free, independent, accessible and confidential. NCIS aims to set out all available options and advocate on behalf of all citizens when necessary to enable them to realise their due rights and entitlements.

Northside Community Law Centre and Northside Citizens Information Service have experienced a fourfold increase in the number of personal debt related inquires in 2009 compared to the year 2008 and this is likely only a snapshot of the real levels of personal debt exposure in the wider economy, underscoring the depth of the crisis now facing a considerable proportion of the Irish population. Accordingly, Northside Community Law Centre and Nortside Citizens Information Service believe that a review of relevant legislation, on foot of the Law Reform Commission Consultation Paper, should be initiated by the legislature as a matter of urgency.

## **Acknowledgements**

Northside Community Law Centre (NCLC), in collaboration with Northside Citizens Information Service (NCIS), wishes to acknowledge the highly constructive contribution made by the local and national community groups present at the Community Consultation held on this matter at Northside Civic Centre on 30<sup>th</sup> November 2009. Accordingly we wish to thank Mr Michael Culloty of the Money Advice and Budgeting Service (MABS) and Mr Culloty's colleagues from the Dublin area MABS branches and the Traveller MABS. We also wish to thank Ms Jennifer Roche (Ruhama), Mr Kevin Baignam and Mr Bob Jordan (Threshold), Mr Paul Ginnell (European Anti Poverty Network), Ms Rowena Higgins (Coolock-Artane Credit Union), Ms Alex Klemm (TASC) and Mr Martin O' Connor (PACE). We also wish to thank Ms Patricia Rickard-Clarke and Mr Joseph Spooner of the Law Reform Commission of Ireland whose guidance throughout the consultative process was invaluable.

## **Introduction**

In a recent and timely Consultation Paper on Personal Debt Management and Debt Enforcement, the Law Reform Commission (hereinafter the Commission) has undertaken the herculean task of examining the laws governing insolvency and procedures pertaining to the enforcement of personal debt in Ireland. This was combined with a highly insightful and instructive examination of broader issues surrounding the laws themselves incorporating, *inter alia*, theories pertaining to actual and expected consumer behaviour and the tenor of the regulatory environment for financial institutions in Ireland in recent decades. The Commission has suggested that many of the social policy matters it has raised do not, strictly speaking, come within its remit and should be reserved for organisations primarily dealing with social policy issues. Nevertheless, the matters which were raised in relation to the regulation of the financial services industry in Ireland and theoretical and actual patterns of consumer behaviour are highly relevant and serve to put the legal rules into clear context. This submission will not recount the contents of the Consultation Paper in its entirety. We have summarised the Consultation Paper elsewhere and this may be made available to any interested parties upon request. The immediate concern of this submission will be to examine some of the key proposals put forth within the Consultation Paper recommending relevant reforms and will then outline the views of Northside Community Law Centre, incorporating those expressed by the local and national interest groups present at the recent Community Consultation.

## **Context**

The level of personal indebtedness in Ireland at present, particularly amongst the middle classes and working class combined with soaring unemployment has produced a situation which is nothing short of a societal personal debt emergency. By implication, this crisis has unveiled the archaic nature of Irish insolvency laws and some personal debt enforcement procedures, exposed, in particular, in the case of *McCann v Judges of*

*Monaghan District Court & Ors.*<sup>1</sup> Aspects of the legislation relating to personal debt enforcement date back to the 1920s while the primary legislation governing personal insolvency is traceable to the 1980s, predating the consumer credit society firmly established during the “Celtic Tiger” economic climate of the 1990s and early 2000s. Consequently, the need to reform much of the law in these areas is long overdue and this may now be a prime opportunity for the legislature to do so on foot of the recommendations of the Law Reform Commission.

The main recommendations of the Commission concentrate on the establishment of a non-judicial debt settlement system into Irish law either as a prerequisite or substitution for court procedures in most circumstances with regard, however, to the requirement to respect the right of access to the Courts protected under the Constitution of Ireland. The Commission has suggested that these reforms would be substantially achieved through root and branch reform of the existing bankruptcy legislation. The Commission has also recommended a radical overhaul of personal debt enforcement procedures. These recommendations include alteration of individual enforcement mechanisms, the extent of reliance upon these, the court procedures governing them and the possible introduction of new types of enforcement mechanisms altogether. The choice of the most appropriate enforcement mechanism in each individual case is also proposed to transfer away from creditors and to a new Debt Enforcement Authority. The Debt Enforcement Authority would also serve to divest personal debt enforcement procedures of their traditionally judicial orientation as far as possible, recognising that most debt disputes are essentially an administrative matter with no legal issues arising as such. It is also suggested that perhaps the Debt Enforcement Authority might govern or oversee non-judicial debt settlement prior to any moves to enforcement stage.

This submission will now turn to examine some of the key recommendations and invitations for submission in the Commission Consultation Paper on Personal Debt Management and Debt Enforcement.

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<sup>1</sup> [2009] IEHC 276.

**Section 1**  
**Non Judicial Debt Settlement**

The Bankruptcy Legislation and Non Judicial Debt Settlement

The Commission has proposed the establishment of a non-judicial debt settlement system where non-judicial engagement between debtors and creditors would not be entirely voluntary but instead a statutory requirement, possibly as a prerequisite or substitution for court procedures. In support of this position, the Commission has clearly demonstrated that the *Bankruptcy Act 1988* (the 1988 Act) is in need of fundamental reform as part of an overall reconfiguration of the Irish debt settlement system. It has been suggested that Irish bankruptcy legislation is hopelessly outmoded in light of the present structure of the consumer credit economy, is punitive in nature and not conducive to the rehabilitation of bankrupts back into the real economy. Effectively, this has meant that Irish debtors have been left without a realistic or viable personal insolvency regime, exemplified by the traditionally extremely low uptake in pursuing bankruptcy protection under the 1988 Act.

*Recommendations from Community Consultation*

A general discussion of the tenor of Irish personal insolvency and over-indebtedness took place at the Community Consultation. Following from the Community Consultation, Northside Community Law Centre submits that it supports, in principle, the recommendation from the Commission that a statutorily based, holistic non-judicial debt settlement system should be established which should include root and branch reform of the *Bankruptcy Act 1988*. This reform should co-opt a rehabilitative philosophy ensuring that debtors are afforded an opportunity to participate in a new “earned start” system of debt settlement along the lines pertaining on the European Continent, particularly of the types operating in Sweden and France. Such a system should primarily encompass a non-judicial orientation but also contain judicial elements where necessary and appropriate. In

particular, Northside Community Law Centre supports the introduction of a 5 year maximum threshold for repayment of a debt before a debtor might subsequently be discharged. Northside Community Law Centre also supports the introduction of so called “zero sum proposals” to creditors within the new debt settlement system. More generally, Northside Community Law Centre submits that a holistic approach to non-judicial debt settlement, as proposed by the Commission, is entirely appropriate.

### The Role of Mediation

Currently, under Irish law, the choice to engage in non-judicial debt settlement is entirely voluntary. This procedure is usually initiated by MABS on behalf of a debtor and does not normally arise as a result of a creditor request. Consequently, the system, as currently structured, can lead to the creditor initiating court procedures sooner than may be appropriate or necessary. Accordingly, this raises the spectre of mediation and/or other forms of alternative dispute resolution, assuming a more central role within a new system. The Commission has thus suggested that mediation be afforded a pivotal role within a revised debt settlement system. Some observations arose in relation to this matter within the Community Consultation, particularly as to whether mediation between debtors and creditors should be a compulsory element of such a system.

### *Recommendations from Community Consultation*

At the Community Consultation, the question as to whether mediation between the debtor and creditor/s should be compulsory within a new statutorily based non-judicial debt settlement system was discussed. Concerns have been raised that making mediation compulsory within the new system may prompt freedom of choice concerns. It is also suggested that attempts to get a disputing creditor/s and debtor at the same table with a view to negotiation may not be possible in circumstances where the relationship of trust and confidence has firmly broken down between the parties. Pursuing this point, even if it were possible to force hostile parties to the negotiating table through a statutory obligation, it would be entirely questionable as to whether a viable settlement could

emanate from such a climate of mistrust. Conversely, it must be recognised that there is undoubtedly considerable scope, at least, for alternative dispute resolution which might or might not embody mediation, to operate effectively for both creditors and debtors in the majority of circumstances if such a system is administered and handled correctly. Accordingly, there should be a strong onus on the parties to at least attempt alternative dispute settlement which may or may not encompass mediation, in the first instance. As an aside, it must also be recognised, as was highlighted at the Community Consultation, that the Commercial Court frequently directs parties to engage in mediation on a mandatory basis so the whole notion of the centrality of mandatory mediation to settling debt is not necessarily alien to the psyche of creditors or debtors.

Additionally, it must be flagged, as the Commission has pointed out, that indebted individuals typically owe debts to more than one single creditor. Consequently, if alternative dispute resolution is to form a central plank in a non-judicial debt settlement system then if a dispute arises between a debtor and a single creditor, there should follow an attempt to ascertain whether the debtor owes any other debts and contact all creditors with a view to collective settlement. This would inevitably result in a higher success rate from the settlement process and would prevent inefficient allocation of time within the system and a minimisation of costs, through the economies associated with a collective settlement arrangement. As a central element of a new debt settlement system, Northside Community Law Centre submits that non-judicial engagement, of one kind or another but with a preference for mediation wherever possible, should be compulsory between the parties in the first instance in the majority of cases. Additionally, the non-judicial process should not be exhausted automatically if it fails or is not possible in the first instance. Northside Community Law Centre also submits that the now multifaceted nature of indebtedness and the proliferation of creditors enjoying separate agreements with a single debtor mean that if non-judicial debt settlement is to be successful, it would be necessary to draw as many creditors as possible around the negotiating table.

### The Role of MABS

The Commission has examined the issue of debt counselling within the Consultation Paper and has pointed to the very positive role which MABS has played in this area since 1992. In particular, the role of MABS in provision of debt counselling services to individuals who find themselves in debt difficulties has been lauded. It is noted by the Commission that availing of debt counselling with MABS is entirely voluntary and no statutory framework exists to force individuals to engage in debt counselling as a prerequisite to debt settlement with a creditor. In Chapter 5 of the Consultation Paper, the Commission does suggest, however, that debt counselling might constitute a “central role” in a new proposed debt settlement system. The Commission has also recommended that the role of mediator in a debt settlement process might be carried out by Money Advisors. By extension, the Commission has also invited submissions as to whether Money Advisors should act in a dual role as both mediators and administrators of any agreements in a reconstituted debt settlement system or whether administration should be mostly undertaken by a third party.

#### *Recommendations from Community Consultation*

In the first instance, the role of Money Advisors will be addressed. Although all Money Advisors in Ireland are not necessarily exclusively employed by MABS, a substantial proportion of them are. In addressing the question of debt counselling during the Community Consultation, it was suggested that Money Advisors in the employ of MABS may not currently be the most appropriate persons to act as mediators in a new debt settlement system. The view was expressed that MABS has been engaged in an advocacy role since its establishment and, as an explicit policy, has always sought to articulate the interests of hard pressed individual debtors rather than taking a completely neutral stance in a debt dispute. In sum, the traditional policy of MABS has been to safeguard the individual debtor’s interests as far as possible.<sup>2</sup> By implication, if MABS advisors were not engaged as mediators in a new debt settlement system, it would be difficult to argue

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<sup>2</sup> See, e.g. Open in conjunction with Society of St Vincent de Paul and MABS, *Do the Poor Pay More?* - [http://www.mabs.ie/publications/research\\_papers/Do%20the%20Poor%20Pay%20More%20\(OPEN\).May2005.pdf](http://www.mabs.ie/publications/research_papers/Do%20the%20Poor%20Pay%20More%20(OPEN).May2005.pdf) – Last Accessed 14<sup>th</sup> January 2010; MABS, *Fuel Poverty: A Local Perspective* [http://www.mabs.ie/publications/reports/Fuel%20Poverty\\_Finglas%20MABS\\_March2005.pdf](http://www.mabs.ie/publications/reports/Fuel%20Poverty_Finglas%20MABS_March2005.pdf) – Last Accessed 14<sup>th</sup> January 2010

that they should assume the role of administrator of these agreements either. However, obviously this view would not preclude the engagement of private Money Advisors not affiliated to MABS to assume the roles proposed by the Commission. Nevertheless, whether these private practitioners exist in sufficient numbers to achieve the critical mass required in order to make such a system workable would need to be evaluated in more detail. In particular, the independence and impartiality of such practitioners would need to be ensured.

Although it has been suggested that debt counselling should be central to a reconfigured system, a question then arises over whether this should be mandatory or simply “strongly encouraged”. This question was raised for consideration within the Community Consultation. It is suggested that mandatory debt counselling may be counterproductive in that the process may become devalued if compulsory and viewed as a kind of empty formula by some individuals who may simply be interested in “going through the motions” rather than accepting a meaningful responsibility for their debt. Where debt counselling is made compulsory there may also be implications for the overall quality of the service. The debt counselling system may become degraded as it becomes overburdened and service quality could be affected unless it is adequately resourced. Accordingly, sufficient resources would need to be made available in order to ensure that a debt counselling service can operate effectively and with integrity.

In light of the foregoing, Northside Community Law Centre submits that MABS Money Advisors may not be the most appropriate persons to act as mediators or administrators in a non judicial debt settlement system due to the traditional debtor advocacy role of MABS, though scope would exist for private practice Money Advisors to do so. More generally, the manner in which debt counselling might become central to the process should be considered very carefully in order to ensure that appropriate resources and structures are in place to facilitate this. Debt counselling should be strongly encouraged but not compulsory unless requisite resources can be made available. It is noted that in Sweden debt counselling has previously been compulsory but this was abandoned as the debt counselling system became overburdened.

#### The Role of Financial Education

In its Consultation Paper the Commission pointed to the role which financial education plays in Ireland currently, the providers of same and suggests that rates of financial education could be increased. The Commission does acknowledge, however, that advocating for increased rates of financial education is essentially a social policy matter and not strictly an issue within the remit of the Commission.

*Recommendations from Community Consultation*

Even though lobbying for increased financial education is not seen by the Commission as falling within its remit, arguably this matter is a crucial factor to consider as a key element of any future holistic non-judicial debt settlement system. The role of financial education was also repeatedly emphasised within the Community Consultation. Accordingly, Northside Community Law Centre submits that the Commission should emphasise the importance of financial education within its final report in the context of its discussion on reconstituting the Irish debt settlement system more generally.

## **Section 2**

### **Individual Enforcement Mechanisms**

A pivotal element of the Commission Paper dealt with an examination of individual enforcement mechanisms routinely sought and utilised by creditors at debt proceedings in the Courts. It was highlighted by the Commission that certain types of enforcement mechanisms are over-utilised while not very effective while others are under-utilised where there is potential for their increased utilisation to prove more effective. Northside Community Law Centre broadly agrees with the contentions of the Commission and these will not be recounted in their entirety here. However, the perspectives emanating from the Community Consultation in relation to individual debt enforcement mechanisms will be set out.

#### **Priority Debts**

A matter which arose at the Community Consultation for consideration in the context of the Consultation Paper is the question of priority debts. Within the realm of private debt exclusively, the question arises as to whether certain debts should take precedence over others. This is really a question over the different types of debt obligations which an individual has with their creditors

#### ***Recommendations from Community Consultation***

It was suggested at the Community Consultation that the realities of each individual's life should be taken into account when ascertaining which debts should be prioritised.

Northside Community Law Centre submits therefore that a priority scheme should exist between certain debts; in particular a priority scheme should be established between mortgage, rent, utilities, etc with mortgage/rent payments possibly taking precedence in a hierarchical scheme. The test for determining the structure of such a scheme should be as subjective as possible with regard to each individual debtor's personal circumstances. Such a requirement might not be too onerous if it could be in some way incorporated into

a non-judicial debt settlement system where all creditors could be made aware of their position regarding the ability of the debtor to repay their debt relative to the other debt obligations owed by the debtor.

### Attachment of Earnings Orders

In the Commission Paper, it is questioned as to whether it might be appropriate to encourage the use of “attachment of earnings” orders where debts could be extracted from earnings at source in relation to conventional debt obligations. At present, this type of order most usually arises within the realm of family litigation.

### *Recommendations from Community Consultation*

Arising from the Community Consultation, emphasis was placed upon the advantages which attachment of earnings orders might afford the debtor if they were to become more widely utilised within the conventional debt settlement system and the relative ease with which they might administered. Notwithstanding this, Northside Community Law Centre respectfully submits that the Commission should exercise extreme care in the manner in which it proposes to recommend a more widespread introduction of attachment of earnings orders. A key issue for consideration would be the circumstances where it might be appropriate to implement an attachment of earnings order. For example, should such an order only be granted upon the request of MABS as part of a non-judicial debt settlement process or, alternatively, would the Courts/new Debt Enforcement Authority retain the exclusive ability to make an attachment of earnings order at enforcement stage?

The main difficulty perhaps with a proposed Debt Enforcement Authority or Court awarding an attachment of earnings order in an arbitrary fashion might be the possible consequences this would have upon the employee-employer relationship, particularly in an already fraught economic climate including, but not necessarily limited to, an increased suspicion on the part of an employer as regards an employee who is involved in cash handling duties for example. This may ultimately impact upon the privacy rights of the debtor and could prompt employers to breach the explicit and

implicit confidentiality clause at the heart of the employee-employer relationship. Ultimately, it could mean a heightened level of control exerted by an employer upon the life of an employee experiencing debt. In sum, there could conceivably be indirect knock effects within the employment relationship on foot of a widespread use of attachment of earnings orders. This is combined with a concern over the possible costs which might be indirectly imposed on employers through administration of such a scheme. Within the Commission Paper, the question over minimum income levels in the context of attachment of earnings orders is also raised. This issue was discussed within the Community Consultation and it was suggested that any attachment of earnings order should take account of minimum income levels to ensure that persons would not be pushed below the “dignity” line as opposed to simply the poverty line. In this context, it was suggested that individuals should be afforded the requisite income to live with dignity and not just for mere survival purposes. Such a regime should also lay heavy emphasis on early debt settlement to ensure that individuals are not levelled with debt indefinitely during their careers.

In light of the foregoing, Northside Community Law Centre submits that there is certainly scope, in principle, for a more widespread use of attachment of earnings orders but that the exact mechanics of implementation is a key factor to consider. The often delicate employer-employee relationship should be considered and not put under undue pressures as a result of attachment of earnings orders which may ultimately result in either implicit or explicit breaches of employment legislation. Additionally, Northside Community Law Centre submits that, should attachment of earnings orders come to be utilised in a more widespread fashion, an inflation index linked formula embodied in the “dignity line”<sup>3</sup> test of impoverishment and of minimum income levels is entirely appropriate. Northside Community Law Centre recognises that this test theoretically has the potential to become far too subjective to be effective if it is not transposed appropriately and that complex calculation methods might need to be introduced into new legislation or into any amendments of pre-existing legislation. Northside Community Law Centre contends, however, that an appropriate formulation of the dignity line test is

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<sup>3</sup> This dignity line test of impoverishment has been utilised in a number of different contexts. See *e.g.*, European Commission Recommendation on Active Inclusion - <http://ec.europa.eu/social/BlobServlet?docId=612&langId=en> – Last accessed 20<sup>th</sup> January 2010.

entirely possible and points out that extremely intricate calculation schemes and methods already exist in many other areas of law, most notably within social welfare legislation.<sup>4</sup> Northside Community Law Centre also submits that there should exist an opportunity for a debtor to object to the implementation of attachment of earnings orders thus such orders, whether by a Debt Enforcement Authority or the Courts, should not be implemented arbitrarily. Northside Community Law Centre also submits that where attachment of earnings orders are to be implemented, that there should be a defined time period governing discharge with a maximum ceiling of 5 years in order to ensure that debts do not follow individuals throughout their careers indefinitely. While, the points raised here merely represent aspects of the manifold issues which may arise in relation to attachment of earnings orders, Northside Community Law Centre is confident that competent legislative drafting would be sufficient to formulate a viable test in order to establish such orders more widely outside the realm of family law.

### Garnishee Orders

It has been suggested in the Commission Paper that Garnishee Orders tend not to be widely utilised and are most usually sought in circumstances where the creditor is a financial institution.

### *Recommendations from Community Consultation*

In the Community Consultation, it was suggested that there may be considerable scope for garnishee orders to become more widely utilised in light of the possible ease with which funds can be “garnisheed”. However, it was cautioned that garnishee orders should not be considered a solution for debt in all circumstances. Northside Community Law Centre submits that it may be desirable for the use of garnishee orders to be encouraged instead of less appropriate enforcement mechanisms with regard to the circumstances of individual debtors and/or that they could be feasibly combined with other types of enforcement mechanisms. A test of appropriateness and proportionality in the particular

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<sup>4</sup> See, e.g. , Schedules in the *Social Welfare (Consolidation) Act 2005*

circumstances of each case should, however, be incorporated into any consideration in awarding a garnishee order. Perhaps it should also be borne in mind that the actual effectiveness of garnishee orders may be severely circumscribed where there are no funds or insufficient funds flowing into a bank account. In addition, debtors should not be forced below the dignity line in circumstances where their bank account has been garnisheed. Privacy and control issues in relation to the garnisheed bank account may also conceivably arise for consideration in this context.

### Execution Against Goods

In the Consultation Paper, the Commission has examined the execution against goods regime which is seemingly a popular enforcement mechanism with creditors. However, the Commission has explained that while this mechanism is a preferred option for many creditors, it tends to have quite limited effectiveness overall. In particular it has been found that the system suffers from the problems typically associated with information asymmetries which exist between debtors and Court officials charged with implementing the execution order. It was intimated by the Commission that the costs of running the system in relation to execution against goods likely outweighs the benefits associated with the system. There were also questions raised over the ambiguities which can be associated with what items may be seized and what items should be protected from the procedure. It is suggested by the Commission that any future reform of the system might engender a scheme where execution against goods might form part of an overall enforcement process incorporating other mechanisms and not usually utilised as a sole method of enforcement in and of itself.

### *Recommendations from Community Consultation*

The issue of execution orders was raised in the Community Consultation. It was pointed out that quite frequently when officials arrive to seize goods the debtor may claim that certain of the goods are not their own but relatives or friends property. The truthfulness of these anecdotal claims in individual cases is not of concern here, but rather the way in

which such claims then compromise the procedure and that the official then often leaves empty handed, prompting considerable waste and inefficiency in the system. At the same time, there were concerns expressed over situations where the relevant officials have identified goods belonging to a debtor and move to seize them. In the Community Consultation it was suggested, and this is flagged in the Consultation Paper also, that certain classes of goods might be exempt from seizure. It was suggested that tools, implements and goods which might be relied upon by individuals in the course of their trade, business endeavours or occupation should not be open to seizure. A reformulation of the definitions of items which are necessary in the course of trade, business or occupation will likely be required in view of the fact that working arrangements and classes of implements necessary to carry out same have significantly broadened in more recent decades.

Similarly, a car should be exempt from seizure if it is in any way necessary for an individual in the course of their employment, business, trade or occupation which it usually is due to the relatively underdeveloped public transport system<sup>5</sup> across the State, particularly, though not exclusively, in rural and semi-rural areas. Most items within the family home which are necessary for the enjoyment of a standard of living which allows people to live with dignity should similarly be exempt from seizure. The actual level of payback from the liquidation of such goods is highly questionable in any event.<sup>6</sup>

Accordingly, Northside Community Law Centre submits that the emphasis should be taken off execution against goods as an enforcement mechanism, in and of itself, and supports the contention of the Commission that it might be combined with one or more other enforcement mechanisms whereby it would be triggered if other methods are unsuccessful. Northside Community Law Centre also submits that certain classes of goods should be definitely exempt from seizure, particularly goods in the family home necessary to allow persons to live above the dignity line, a car in most circumstances and

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<sup>5</sup> By Continental European standards. For example, Dublin has recently ranked 30<sup>th</sup> out of 30 European capital cities in terms of the standard of public transport facilities. See, *Economist Intelligence Unit European Green Cities Index*, [http://w1.siemens.com/press/pool/de/events/corporate/2009-12-Cop15/European\\_Green\\_City\\_Index.pdf](http://w1.siemens.com/press/pool/de/events/corporate/2009-12-Cop15/European_Green_City_Index.pdf) - Last Accessed 14th January 2010.

<sup>6</sup> See, generally, Keating & Donnelly, "Reforming the Law on Debt Enforcement and the Role of the Sheriff" (2009) 16(8) *Commercial Law Practitioner* 163.

any relevant tools, goods and other implements necessary for persons in the carrying out of their trade, business or occupation.

### Instalment Orders

In its Consultation Paper the Commission has highlighted that the current regime for regulating instalment orders has not traditionally been effective with inherent procedural ambiguities, from the perspective of debtors, having been contained within the regime. These ambiguities, particularly in relation to the interplay of instalment orders, committal orders and appropriate procedures were exemplified, *inter alia*, in the case of *McCann v Judges of Monaghan District Court & Ors*<sup>7</sup> (hereinafter *McCann*). These ambiguities may be alleviated somewhat following the recent enactment of the *Enforcement of Court Orders (Amendment) Act 2009* (hereinafter the 2009 Act) in response to the findings in *McCann* which seeks to clarify the procedural issues surrounding instalment orders and their interplay with committal orders.

### *Recommendations from Community Consultation*

No serious issues were raised, in principle, to the widespread use of instalment orders at the Community Consultation. This mirrors the attitude of the Commission in its Consultation Paper that these enforcement instruments retain an inherent credibility, despite the difficulties with procedure and language which has surrounded them. Accordingly, Northside Community Law Centre submits that instalment orders are an effective way of achieving debt discharge but that the creditors and the Courts should be urged to tread carefully when seeking such orders. Again, Northside Community Law Centre submits that the Commission should recommend that debtors do not get pushed below the dignity line in the wake of an instalment order having been granted. Northside Community Law Centre also submits that the Commission should encourage the legislature to implement further reforms of the process, specifically that debtors should be served with all of the information that they need by the creditor in relation to the

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<sup>7</sup> [2009] IEHC 276

process, though moves toward this have at least been forthcoming within the 2009 Act. Northside Community Law Centre also supports the contention by the Commission that suspended instalment orders might be combined with other orders to create a more holistic environment for debt discharge.

### Imprisonment on civil debt

The pertinent issue of imprisonment for default on a civil obligation was raised within the Consultation Paper. The Commission made reference to the recent case of *McCann* involving, *inter alia*, a constitutional challenge to ex s. 6 of the *Enforcement of Court Orders Acts 1926 & 1940* (hereinafter the Principal Act). With particular reference to ex s. 6, in *McCann* it was found by Laffoy J that insufficient procedural safeguards were in place for debtors when creditors seek to enforce debt, particularly with regard to rights to representation, avoidance of arbitrariness, clear provision of information and fairness of procedures where proceedings carry the threat of imprisonment. Accordingly, ex s.6 of the Principal Act was deemed repugnant to Articles 34, 38, 40.3 and 40.4.1 of the Constitution.<sup>8</sup> With regard to the circumstances of the plaintiff in this case, it was found that the District Court of Monaghan lacked jurisdiction to make a committal order against the plaintiff in 2005. An order of *certiorari* was granted, quashing the committal order.

In reaching this conclusion, Laffoy J, *inter alia*, expressed forceful and clear sentiments regarding the threat of imprisonment in circumstances where a debtor's failure to pay was due to inability, with particular reference to the sentiments of Costello J in *Heaney v Ireland*.<sup>9</sup> In this vein, it was suggested by Laffoy J that imprisonment of a debtor who fails to discharge a debt, primarily due to the absence of appropriate safeguards within the provision<sup>10</sup> to allow for fair procedures, specifically those that would ensure a judge can identify whether or not failure to pay the debt is due to inability or otherwise was, "not rationally connected with the objective [of discharging a debt]...is arbitrary, unfair and not based on rational considerations. It is an unreasonable and unnecessary interference with the debtor's right to personal liberty". Additionally, it was

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<sup>8</sup> *Bunreacht Na hÉireann*, Constitution of Ireland 1937.

<sup>9</sup> [1994] 3 IR 593

<sup>10</sup> Ex s. 6 of the Principal Act

found that the lack of a mechanism to allow a debtor to re-enter an application against an order for arrest and committal after that order is made, “infects the provision with arbitrariness and unfairness”.

Due to the availability of other legal remedies, Laffoy J did not find it necessary to make an explicit finding of contravention of the European Convention on Human Rights (hereinafter ECHR), nevertheless Laffoy J seemed to give a strong implicit indication that had no other legal remedy been available she would likely have found a contravention of ECHR, especially Article 1 Protocol 4 and Article 6. Under these provisions the ECHR is unequivocal, prohibiting imprisonment on foot of default on a contractual (civil) obligation.<sup>11</sup> Concurrently, where proceedings resemble, or are analogous to, criminal proceedings, the provisions of Article 6<sup>12</sup> demand that all procedures associated with such criminal proceedings be respected. Laffoy J partly relied on the case of *Saadi v United Kingdom*<sup>13</sup> to support her analysis within the judgment and which, arguably, encapsulates the whole tenor of the applicability of the ECHR toward the issue of imprisonment, particularly under Article 1 and Article 6. Accordingly, Laffoy J posited, with regard to the case of *Saadi*, that liberty restrictions should only be utilised where, “less severe measures have been considered and found to be insufficient to safeguard the individual or public interest”.

Taking into account the findings in *McCann*, the Commission in its Consultation Paper has invited submissions as to whether the logic of non-imprisonment, as an undue interference on liberty with questionable payback for society in both economic and social terms, should also be extended to debtors who are unwilling or negligently failing to repay debts rather than just those experiencing an inability to pay, which is intuitively defensible. These matters were discussed at the recent Community Consultation.

### *Recommendations from Community Consultation*

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<sup>11</sup> “No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation,” Article 1 Protocol 4 ECHR.

<sup>12</sup> Articles 6.1, 6.2 & 6.3 (c) ECHR

<sup>13</sup> (Unrep., 29<sup>th</sup> January 2008)

At the Community Consultation the question was posed as to what was the most appropriate method for dealing with debtors who are wilfully refusing or have negligently failed to pay back a debt to the creditor. The views evinced suggested that imprisonment is not regarded as a necessary component of the debt enforcement process. It was suggested that criminalising people who find themselves over-indebted may be inappropriate primarily because of the information asymmetries which might exist between the enforcement authorities, the creditor and the debtor as to why exactly the debtor is refusing to pay or has negligently failed to pay. Criminalising persons who negligently fail to repay debt was greeted with particular unease at the Community Consultation as it is often the case that such persons may typically be some of the most impoverished persons in society, possibly lacking in education including an ability to comprehend financial transactions and the legal import which they often engender.

Elaborating on this latter point, while a debtor in these circumstances may have originally been granted a loan (possibly on questionable grounds i.e. sub-prime) with relative ease by a creditor, it may actually be the case that the debtor honestly does not fully comprehend the import of keeping up regular repayment of their debt and ensuring that it is given the appropriate priority (in the eyes of the current law and of creditors) in their personal financial affairs. It is recognised that this analysis risks attracting the counter-argument that ignorance of the law is not an appropriate defence,<sup>14</sup> however, it can be argued on strong moral grounds that it may well be an appropriate defence in light of the limited education of the most impoverished persons in society who concurrently tend to include, proportionally, some of the most over-indebted persons in society. As an appendage to this analysis, over-indebtedness frequently accompanies other types of societal and family based difficulties including, but not limited to, domestic violence, increased rates of marital breakdown, impoverishment of children and anti social behaviours such as petty crime. Where an over-indebted individual is facing this plethora of issues, it may be easier to rationalise how a debtor might be seen to negligently fail to honour debt obligations.

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<sup>14</sup> “Ignorance of the law excuses no man: Not that all men know the law, but because ‘tis an excuse every man will plead, and no man can tell how to refute him” – Taken from a reputable quotation by John Selden (Jurist) 1584 – 1654.

In relation to those debtors who are simply refusing to honour an obligation on debt and where it can be positively established that this is not by virtue of potentially mitigating factors, it was pointed out at the Community Consultation that 1) such a class of debtor is extremely rare in any case but that 2) in the minority of cases where this might arise the debtor could legitimately feel that the creditor with which they are dealing has not behaved appropriately toward them or may suspect that the creditor has breached elements of the loan agreement or may feel that they have been wronged as a taxpayer for the failings of financial institutions etc. While these are legitimate concerns, it is recognised that they could not provide a viable legal defence to non payment of debt.

Northside Community Law Centre submits that, overall, the principles of restorative justice,<sup>15</sup> in preference to imprisonment in the majority of such cases, might be more desirable with regard to the economic and social costs associated with imprisonment. Consequently, community service, for example, may be a far more appropriate enforcement mechanism in these circumstances. Northside Community Law Centre submits that a factual distinction usually exists between debtors who negligently fail to pay debts and those who are simply unwilling to do so. By implication, this should then also translate into a legal distinction between these two groups. Imprisonment of persons who negligently fail to pay debts should be strongly discouraged and, in fact, possibly should not be possible at all in the vast majority of these circumstances. In relation to these classes of debtors, a meaningful inquiry should first be conducted as to why these debtors have negligently failed to pay a debt in individual cases and if sufficient mitigating circumstances may have existed which might help to explain this. Principles of restorative justice, particularly community service, should be most usually utilised to deal with this class of debtor where necessary and appropriate. Northside Community Law Centre submits, however, that the threat of imprisonment should be maintained against debtors who are simply unwilling to pay a debt, that incarceration should only be implemented as a last resort and utilised primarily as a motivator to encourage engagement between the debtor and creditor/s. Accordingly, in the final analysis while the threat of imprisonment should be used to encourage debt settlement

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<sup>15</sup> The reference to principles of restorative justice here refers primarily to community service and similar types of measures.

from debtors unwilling to pay, in practice imprisonment should remain possible but be discouraged in deference to other measures such as community service in the first instance.

### Procedural Issues and Language

Within the Consultation Paper, the Commission refers to the difficulties for debtors associated with the language of court documents relating to debt enforcement mechanisms and the differing procedures which can exist, to some extent or other, between the Courts.

### *Recommendations from Community Consultation*

At the Community Consultation, the fairly technical nature of serving court documents and the language of same was not delved into to any major extent. These matters can be difficult to comprehend for persons with little or no experience in dealing with legal issues and proceedings, and indeed, can cause analogous difficulties even for those working within the legal profession. It was clear in the Community Consultation, however, that terms such as “garnishee orders” and *feri facias* needed to be explained. These were thus obviously not self explanatory and surely indicative of the issue the Commission raised in the Consultation Paper in relation to the language difficulties associated with Court documents which can cause severe difficulties for debtors.

Northside Community Law Centre thus submits that the Commission is entirely accurate in its analysis regarding the wording of certain enforcement mechanisms and court documents coupled with divergences in procedures between the Courts. Northside Community Law Centre fully supports the suggestion that the language associated with enforcement orders be fundamentally simplified while the procedures surrounding these also be harmonised and simplified, as far as practicable, between the Courts.

### Miscellaneous: s. 62 Housing Act 1966

As already emphasised herein, a substantial proportion of over-indebted persons typically derive from the lower socio-economic groups in society. Many of such persons reside in social housing units, usually renting these under a lease with the Local Authority. Northside Community Law Centre has been concerned for some time with the operation of s. 62 of the *Housing Act 1966* (the 1966 Act) which affords a Local Authority quite wide ranging discretion in terminating a lease at will with no procedural recourse available to an Authority tenant.<sup>16</sup> This lack of fair procedures available to an Authority tenant in circumstances where there is an eviction in progress but a dispute as to the facts of the case has been positively found to be at variance with relevant provisions of the European Convention on Human Rights.<sup>17</sup> Of particular concern in the context of debt is where a tenant falls into arrears on rent repayments to the Authority. Under the lease it will be stipulated that failure to pay rent may result in the removal of the tenant and the Authority will enjoy the discretion to carry out such an eviction at will under s. 62 of the 1966 Act with a distinct lack of procedural fairness associated with such removal. Although this matter may not, strictly speaking, come within the discussion of the Commission Consultation Paper, which is primarily oriented toward the issue of private debts, it is respectfully suggested that this anomaly, as an aspect of indebtedness, has the potential to exacerbate an already precarious situation for many of the most vulnerable persons in society and could conceivably lead to increased rates of homelessness.

#### *Recommendations from Community Consultation*

This matter was briefly discussed at the Community Consultation. It was pointed out that while theoretically there is certainly an anomaly in the law, in practice the Local Authorities do not generally currently display ruthlessness in dealing with this matter and do attempt to reach an amenable agreement with the tenant wherever possible. Nevertheless, Northside Community Law Centre submits that this matter should be afforded at least a cursory examination in the final report, if only as a means of flagging

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<sup>16</sup> See, e.g., the discussion in Kenna, *Housing Law and Policy in Ireland* (Clarus Press, Dublin 2006) 83; Irish Human Rights Council, *Policy Statement on Section 62 of the Housing Act 1966 for the Recovery of Possession of a Local Authority Dwelling* (March 2009).

<sup>17</sup> See, e.g., *Donegan v Dublin City Council & Ors* [2008] IEHC 288; *Dublin City Council v Gallagher* [2008] IEHC 354

this potentially serious legal issue, reflecting a lack of procedural fairness enshrined in the law within this particular manifestation of indebtedness.<sup>18</sup>

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<sup>18</sup> See, e.g., *Pullen & Ors v Dublin City Council & Ors* (Unrep) High Court Irvine J 13<sup>th</sup> December 2008, this case is currently under appeal to the Supreme Court and thus *sub judice* but at the High Court the case involved the interplay of s. 62, findings of procedural unfairness and contravention of the European Convention on Human Rights.

### Section 3

#### **Debt Enforcement Office**

In its Consultation Paper, the Commission has outlined the current inefficiencies and difficulties associated with litigating debt issues primarily through the Courts. It has been suggested by the Commission, *inter alia*, that debt litigation through the Courts, particularly in the Lower Courts, routinely embodies a wholly administrative tenor in that no defence is normally available to the debtor in such proceedings, that creditors frequently seek inappropriate enforcement mechanisms due to a high non-appearance of debtors in court often resulting in a debt dispute returning before the Courts multiple times on the same matter. Consequently, the Commission has suggested that this situation may ultimately serve to demean the integrity of the legal system itself. These problems are likely only to be exacerbated in the coming months when it is suspected by Northside Community Law Centre that the personal debt crisis may reach a critical tipping point. Conceivably, this may serve to cause a backlog within the legal system which could be disastrous for the functioning of the Courts system generally.

In light of all of this, the Commission has recommended the establishment of a Debt Enforcement Office, in line with some of the best practice models utilised on the European Continent and the United Kingdom, with particular reference to the Swedish, Northern Irish, Dutch and French models. The exact contours of these systems will not be repeated here but suffice to repeat that, generally speaking, they involve a Debt Enforcement Authority assuming primary responsibility for the enforcement of debt and the prerogative to choose the most appropriate enforcement mechanism, though usually with some recourse available to the Courts. It can also be a feature of such Authorities that they may monitor or administer non-judicial debt settlement prior to moving to the enforcement stage. There are distinctions in the way these Authorities are funded, for example, it is highlighted that the Swedish model is publicly funded while the French model is primarily one of privatised enforcement based on an explicit commission structure for officials.

The Commission has recommended the establishment of a similar Debt Enforcement Office (EO) in Ireland and encourages lessons to be taken from the Swedish

and Northern Irish models, in particular, in its construction. The Commission has, *inter alia*, emphasised the importance of debtor disclosure which would be key to the success of a prospective Irish EO. This is set against the context that there has generally not existed a culture of full debtor disclosure in debt disputes in the Courts, leading to the pursuit of inappropriate enforcement mechanisms by creditors. The Commission has invited suggestions as to how best debtor disclosure is to be achieved but has tentatively proposed that this might be achievable through a hybrid approach used between the comparator European states. In line with these, debtor disclosure would be strongly encouraged on a voluntary basis as far as possible, possibly in private, but that this could be combined with so called “data sharing” between various State agencies and the EO with regard to an individual debtor’s circumstances. The Commission has also invited suggestions as to how exactly the EO should be funded.

#### *Recommendations from Community Consultation*

Northside Community Law Centre welcomes the undertaking by the Minister for Justice, Equality & Law Reform to establish a Debt Enforcement Authority in advance of the Final Report of the Commission. Northside Community Law Centre awaits with interest the proposed structures which will underpin this Authority. The proposed Irish EO was discussed at the Community Consultation. There was considerable support for the notion that the EO would be responsible for administering both the non-judicial elements of debt settlement and, failing this, the enforcement stage if necessary. Accordingly, it was suggested that perhaps the EO should be named a Settlement Office (SO) instead of an EO as recognition of its possible dual role. However, it was suggested that before an SO could proceed with the enforcement stage, it should have a court judgement at its disposal first. It was also posited that the powers of the SO should not be excessively wide ranging and that it should be concerned with the best possible outcome for both debtors and creditors. Respect for the privacy rights of the debtor was also seen as a key factor in encouraging debtor participation and that it should occupy a centrality in terms of any activities conducted by an SO. There was considerable opposition to the idea of a privatised debt enforcement regime similar to the one pertaining in France with the main

concerns revolving around the notion of league tables for officials who are paid on an incentivised basis. This might be seen to de-humanise the process.

Northside Community Law Centre submits that a prospective new debt handling authority should have input into both the debt settlement and enforcement stages of the process and should be named a Settlement Office (SO). This role could include recommending or encouraging debt counselling for the debtor. The powers of the SO should be broad but not excessively wide ranging and recourse should be available to the Courts where necessary and appropriate. Northside Community Law Centre submits that debtor disclosure is undoubtedly extremely important and that data sharing has considerable potential to be a very effective means of gathering information on the debtor. However, the classes of bodies which are authorised to collaborate with an SO should be clearly defined with regard to the privacy rights of debtors. Extending the emphasis on privacy rights, Northside Community Law Centre fully supports the contention of the Commission that there should be much heavier emphasis against requiring debtors to disclose information, such as means, in public enforcement proceedings, where these have been commenced, and that as much information as is necessary should be gathered by the SO through data sharing. The SO should also ensure that where a debtor is party to non-judicial debt settlement or enforcement proceedings with the SO, that it should be ensured that all of the creditors are attached in “class action” type proceedings, similar to those pertaining in relation to the liquidation and examinership of companies under the *Companies Acts 1963-2009*. This would serve to expedite claims as quickly and efficiently as possible, allowing the debtor to discharge all of their debts at the earliest possible opportunity. In terms of the funding of such an office, it is recognised that the prevailing economic climate in Ireland at present would not be conducive to any arguments to establish an entirely publicly funded SO but that avoidance of the exclusively private model in France is encouraged. It is submitted by Northside Community Law Centre that the funding mechanisms employed by the Northern Irish Debt Enforcement Authority might be examined as a possible appropriate funding model for a Republic of Ireland SO.

Northside Community Law Centre would also like to submit an alternative suggestion to the Commission. It is submitted that there may be scope to secure funding

for a prospective SO by way of annual donations/contributions from licensed finance houses operational in Ireland. This is viewed by Northside Community Law Centre as producing a possible threefold effect. Firstly, an overall annual contribution to fund the SO would pale in comparison to the resources currently expended by creditors in pursuing debtors through the courts, thus representing overall cost savings and efficiency gains within the financial system. Secondly, as a result of a direct financial interest in settlement procedures, creditors might be far more willing to engage with an SO administered scheme of non-judicial debt settlement and enforcement where creditors themselves have a vested interest in maximising returns from the operation of the system. Thirdly, this would serve the purpose of acting as recognition by creditors of their responsibilities to the Irish taxpayer arising from the recent financial and banking crises, and possibly somewhat assisting a return to normality within the financial system itself. It is recognised by Northside Community Law Centre that this measure would require much further analysis and, in particular, a guarantee that such an arrangement would not impinge upon the independence or impartiality of the SO. Nevertheless, such concerns might be overcome if an intermediating agency channelled all contributions to the SO, perhaps even an already existing State agency or government department.

## Conclusions

In conclusion, following from the Community Consultation held by Northside Community Law Centre, in collaboration with Northside Citizens Information Service, on 30<sup>th</sup> November 2009 and with regard to the above, Northside Community Law Centre submits the following to the Commission:

- Non-judicial debt settlement should be afforded a centrality in a reconstituted debt settlement system. This should be achieved on a statutory basis and should involve substantial amendment of the *Bankruptcy Act 1988* because, in its current form, the 1988 Act is entirely unsatisfactory as a means of governing personal insolvency and over-indebtedness more generally. Mediation should play a key role in non-judicial debt settlement though perhaps not necessarily be compulsory in all circumstances. Nevertheless, mediation should be strongly encouraged. Other methods of non-judicial engagement should also be examined.
- MABS Money Advisors may not be the most appropriate persons to act as mediators in a new debt settlement system due to the traditional debtor advocacy role which MABS has played.
- Financial education within a rehabilitative regime will be important to the success of any new settlement system.
- Access to the Courts should be left open though only in defined circumstances and in line with constitutional obligations.
- In regard to individual enforcement mechanisms, there is scope for prioritising debts with regard to a debtor's individual circumstances and perhaps this could be incorporated into the non judicial debt settlement aspect of the system.
- There is scope for increasing the use of garnishee orders but only where it would be appropriate and necessary with regard to the debtor's circumstances. Minimum income levels along with privacy and control issues would need to be afforded particular consideration in this context.

- The system governing execution against goods should be amended to incorporate safeguards against the seizure of household items, cars in most circumstances and any tools or goods used for trade, business, occupation or employment purposes.
- Instalment Orders are generally effective but they could certainly be potentially combined with other enforcement mechanisms. The procedures surrounding instalment orders should be made as clear as possible for the debtor, in the spirit of the 2009 Amendment Act, and also that minimum income levels should be maintained where instalment orders are granted.
- Attachment of earnings orders could be quite an effective enforcement mechanism but a number of heavy qualifications and considerations would need to attach to the implementation of such orders, particularly surrounding the often delicate nature of the employee-employer relationship and whether knowledge of an employees debt issues would exacerbate that delicate relationship and/or prompt breaches of confidentiality. Minimum levels of income with regard to the dignity line should be adhered to in this context.
- The language surrounding enforcement mechanisms should be normalised i.e. made entirely understandable in plain English and there should be a harmonisation and simplification of procedures, as far as practicable, between the Courts, or preferably a delegation of most procedures to a Debt Authority.
- The proposed Irish Debt Enforcement Office (DO) should be named a Settlement Office (SO) in recognition of its possible holistic orientation toward debt settlement. The SO could have responsibility not only for the enforcement stage of debt disputes but also perhaps oversee or administer non-judicial debt settlement proceedings, including recommending debt counselling for a debtor.
- The powers of the SO should be broad but not excessively wide ranging so as to impinge on fundamental rights enshrined in legislation and the Constitution. In particular, while data sharing should certainly be utilised, the categories of agencies with which this could occur should be clearly defined and not be too numerous. Recourse should be left open to the Courts in defined circumstances throughout the settlement process, at the prerogative of either the debtor or

creditor. Funding for an SO could conceivably be secured from annual contributions from finance houses.

- The privacy rights of debtors should be respected throughout all stages of the settlement process and also at enforcement stage, should this arise. This would undoubtedly instil increased confidence in the system and ensure optimum levels of debtor participation.