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## **‘Bankruptcy Light’?—The English Debt Relief Order, Bankruptcy Simplification and Legal Change**

**Iain Ramsay\***

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\* Professor of Law, Kent Law School, University of Canterbury, UK. This is one part of a larger comparative study “The New Poor Person’s Bankruptcy: A Qualitative Comparative Study”. Thanks to Laura Binger for research assistance, and to Joe Spooner and Toni Williams for comments. This chapter is based on the paper delivered at the *Festschrift* for Jay Westbrook at the University of Texas, February 2, 2018. Among Jay’s many accomplishments was his pioneering work in promoting the comparative study of consumer bankruptcy in the late 1990s and his enthusiastic encouragement of younger scholars in this field. His empirical research with Elizabeth Warren and Teresa Sullivan provided the starting point for European research on individual bankruptcy. My empirical studies in Canada were inspired by *As We Forgive our Debtors*, their seminal empirical analysis of US consumer bankrupts.

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“ *The U.S. Code’s days as a paragon may be waning. One particular trend of note is the development of special regimes for low-income, no-asset filings, such as the U.K.’s debt relief order.*”<sup>1</sup>

## 1. Introduction

Many over-indebted individuals have few assets, no repayment capacity, and may be unable to afford access to bankruptcy in those jurisdictions which require individuals to pay for access.<sup>2</sup> These are the ‘No Income: No Asset’ debtors or ‘Low Income, Low Asset Debtors’<sup>3</sup>. The World Bank identifies the treatment of this group as a pressing international policy problem<sup>4</sup> and the IMF has recommended the introduction of simplified procedures for this group in its structural adjustment work

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<sup>1</sup> E Warren, J Westbrook, K Porter, J Pottow, *The Law of Debtors and Creditors, Text, Cases and Problems* (7th ed) 320.

<sup>2</sup> See e.g. R Mann, ‘Making Sense of Nation-Level Bankruptcy Filing Rates’ in J Niemi, I Ramsay & W Whitford (eds) *Consumer Credit Debt and Bankruptcy; Comparative and International Perspectives* (Oxford, Hart, 2009) 243-44. German studies suggest that perhaps 80 percent of individual bankrupts are *nullinsolvenz* (J Heuer, 2016), incapable of making any payments under the six-year waiting period for discharge, while in Sweden approximately 40 percent of debtors on five-year restructuring plans have no repayment capacity but must wait for five years for a discharge. I Ramsay, *Personal Insolvency in the 21<sup>st</sup> Century; A Comparison of the US and Europe* ch 5. For Canada see S Ben-Ishai and S Schwartz ‘Bankruptcy for the Poor? (2007) 45(3) *Osgoode Hall LJ* 471. A recent Australian study identifies a group of low income individuals who have lost employment for whom bankruptcy may not provide a fresh start. See P Ali, L O’ Brien & I (Ian) Ramsay, ‘Bankruptcy and Debtor Rehabilitation: An Australian Empirical Study’ (2017) 40 *Melbourne L Rev.* 688, 712-716, 733-734. In France, about 45 percent of individuals processed by the Overindebtedness Commissions are channelled to *rétablissement personnel* since they have no repayment capacity or assets. See Banque de France, *Enquête typologique 2017 sur le surendettement des ménages* <<https://particuliers.banque-france.fr/enquete-typologique-2017-sur-le-surendettement-des-menages>>

<sup>3</sup> Policy makers sometimes refer to the NINA debtor. Ronald Mann suggests that this should be extended to include ‘those who have no substantial income or assets.’ Mann, n2 (fn82).

<sup>4</sup> See World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (J Kilborn, C Booth, J Niemi, I Ramsay and J Garrido, 2013) para 439 “One of the most pressing problems is the treatment of debtors who cannot generate significant disposable income for the duration of the plan...Significant numbers of debtors in all insolvency systems for natural persons fall into this category.’

in Europe.<sup>5</sup> Bankruptcy simplification is also a significant policy issue in the US where bankruptcy costs have increased substantially since the enactment of the BAPCPA in 2005. Ronald Mann and Katherine Porter propose a 'streamlined administrative proceeding with low fees for access' for those people 'in irretrievable distress'. The process would be 'a simple one-page form that debtors could complete without an attorney's assistance', in which public expenses 'are focused on vigilant efforts to detect and punish fraud'.<sup>6</sup>

The 'global proliferation'<sup>7</sup> of individual bankruptcy systems throughout the world during recent decades raises the important question of the appropriate institutional framework which will minimize overall social costs, and retain public confidence.<sup>8</sup> Individual bankruptcy cases are not a high stakes game and NINA debtors represent a significant percentage of debtors. At the same time, individual bankruptcy may raise legal, budgeting and social issues that are not always simple. The choice of institutional structure raises issues of public administration and governance and the balance of public and private actors. The World Bank suggest

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<sup>5</sup> See e.g. Cyprus, discussed in Ramsay above n2 at 168.

<sup>6</sup> See K Porter & R Mann, 'Saving Up for Bankruptcy' (2010) 98 *Geo LJ* 289,338. And see R Mann, 'Making Sense of Nation-Level Bankruptcy Filing Rates' in J Niemi, I Ramsay & W Whitford, (eds) *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives* (Oxford, Hart, 2009) 243-244, 'The evidence points to bankruptcy simplification. The time has come to abandon the complicated structures laden with bureaucratic hurdles...At least for the desperately insolvent, with no substantial income or assets, the best process is one that is stripped down to its most central elements...the system should function as an administrative process designed to provide a service at the lowest possible transaction cost...the system should provide complete and unconditional relief as quickly as practicable. This should occur within days or weeks after the filing...Finally the system should impose stern criminal sanctions for fraud...A simple and expedient process will collapse if it is tainted by fraud.'

Angela Littwin in discussing the impact of BAPCPA on bankruptcy costs notes: 'To make matters worse, clients who had particularly low incomes, were elderly, spoke little English or were otherwise not technologically savvy required additional resources to shepherd them through post-BAPCPA bankruptcy. This is a particular problem because disadvantaged clients are less able to afford these costs than others, and most of the attorneys who discussed this issue appeared to serve mainly this type of client.' A Littwin, 'Adapting to BAPCPA' (2016) 90 *American Bankruptcy Law Journal* 183, 223. See also A Littwin, 'The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for its Surprising Success' (2011) 53 *Wm & Mary L Rev* 1933.

<sup>7</sup> See F Trentmann, *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty First* (London, Allen Lane, 2016) 432: 'The global proliferation of bankruptcy laws, finally, is a recognition that overindebtedness is a problem in all affluent societies, including social market and welfare states.'

<sup>8</sup> See World Bank, above n4, II.2 "The Institutional Context"

that institutional frameworks represent a continuum ranging from the situation where an administrative agency dominates the process to court-based systems serviced by publicly funded or private intermediaries<sup>9</sup>. Two further contemporary observations are relevant. Many countries are unwilling to invest significant public resources in consumer bankruptcy systems, posing the question of how to finance low income bankruptcy, and there is a tendency therefore towards increased routinization of processing of individual bankruptcy cases.

Against this background, this article focuses on one jurisdiction's response to the issue of the NINA debtor, the English Debt Relief Order (DRO), a low-cost, means-tested, administrative procedure only accessible online. Introduced in 2009, its objectives are to provide access to debt relief and financial inclusion for those unable to pay for bankruptcy and for whom bankruptcy might be a disproportionate remedy.<sup>10</sup> It is delivered through a partnership between the English Insolvency Service and accredited debt advice agencies. The term Debt Relief Order rather than bankruptcy was intended to reduce the stigma associated with bankruptcy, encouraging those in irretrievable distress to seek a remedy. The media dubbed it 'bankruptcy light'<sup>11</sup> and it is now the most frequently used 'straight bankruptcy' remedy (see Figure 1). The idea for a DRO originated with a New Zealand proposal for a 'No Asset Procedure' for consumer debtors in the early 2000s.<sup>12</sup> Ireland<sup>13</sup> subsequently introduced a variation on the English procedure and the No-Asset

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<sup>9</sup> Ibid para 159.

<sup>10</sup> The DRO provisions were enacted within Part V of the Tribunals, Courts and Enforcement Act 2007 and brought into force in 2009. When introducing the DRO the government stated that 'it deals with those who cannot pay their debts and are unable to access current procedures of debt relief... [it seeks] to promote financial inclusion' Hansard, HL vol 687, col 766 (November 29, 2006). Lady Justice Hale has described the procedure as 'a new and simplified way of wiping the slate clean for debtors who are too poor to go bankrupt.' *Secretary of State v. Payne* [2011] UKSC 60,63.

<sup>11</sup> See e.g. James Andrews, 'Bankruptcy light soars – and it could get a lot worse: How to beat bad debt' *Daily Mirror* 29 April 2016; *Daily Mail*, 'Bankruptcy light' orders up 40% as graduates battle to find jobs and pay off debts'

<sup>12</sup> See New Zealand Ministry of Economic Development, *No Asset Procedure Paper* (Wellington, Ministry of Economic Development, 2002) 3, discussed in T Telfer, 'New Zealand Bankruptcy Law Reform: The New Role of the Official Assignee and the Prospects for a No-Asset Regime' in Niemi, Ramsay and Whitford ch 12. 263-267. See also T Keeper, 'New Zealand's No Asset Procedure: A Fresh Start at No Cost?' (2014) 14 *QUT L Rev* 79

<sup>13</sup> Personal Insolvency Act 2012 (as amended) Part 3 Chapter 1. Scotland introduced a 'Low Income Low Asset' bankruptcy procedure in 2007, subsequently replacing it with a "Minimal Asset" procedure in 2015. See now Bankruptcy (Scotland) Act 2016 s 2(2) and Schedule 1.

procedure has been transplanted to emerging and developing economies including Kenya<sup>14</sup>, India<sup>15</sup> and South Africa.<sup>16</sup> In contrast, no such procedure exists in several European countries such as Germany and Sweden, where a mandatory repayment plan of several years remains a condition of discharge, notwithstanding the fact that many individuals have no repayment capacity.

A central finding of this article is that although the DRO promised bankruptcy simplification it has in fact resulted in a more complex access procedure than bankruptcy. This occurred because of the relatively restrictive means test, liability limits and other overinclusive access controls, which increased significantly processing costs. The intermediary debt advice agencies, rather than the Insolvency Service or debtors, bear many of these costs which are in turn spread among the public and private sources of debt advice funding in England and Wales<sup>17</sup>. This English solution for the NINA reflected partly the influential role of the relevant government departments in the establishment of the scheme for whom the introduction of the DRO solved problems which they faced in addressing debt cases. Civil servants played a central role in reform, setting the agenda, framing the policy options and drafting the legislation. This story suggests that although the *idea* of bankruptcy simplification might be widely accepted internationally, any actual procedure will reflect the politics and institutional history of particular jurisdictions.

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<sup>14</sup> See Kenya, Insolvency Act 2015 ss343 and following. Section 345 sets out the means tested procedure in s345. In South Africa see National Credit Amendment Bill, 2018.

<sup>15</sup> See the Insolvency and Bankruptcy Code 2016 Chapter II Fresh Start Process. Reports leading up to reform had identified the DRO as a useful model: “[T]he innovative amendment of the DRO in the UK is a process of quick settlement between debtor... and creditors leading to automatic discharge in a year without the label of insolvent attaching to the debtor. A DRO kind of a mechanism will be very useful in the Indian context considering the large number of poor debtors who could benefit from it.” S Ramann, R Sane & S Thomas, ‘Reforming personal insolvency law in India’ 20.

(Indira Gandhi Institute of Development Research, Mumbai, December 2015)

<https://ifrogs.org/PDF/WP-2015-035.pdf> For a general background to the Indian reforms see A Feibelman, ‘Anticipating the Function and Impact India’s New Personal Insolvency and Bankruptcy Regime’ ssrn [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3092042](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3092042)

<sup>16</sup> See Draft National Credit Amendment Bill 2018 <https://pmg.org.za/call-for-comment/628/>

<sup>17</sup> See below section 2 for an outline of the funding of debt advice agencies involved in the Debt Relief Order.

This article contributes therefore to understanding why particular institutional frameworks for individual bankruptcy emerge and change.<sup>18</sup>

Part 2 outlines briefly the DRO process. Part 3 analyzes the legislative background of the Order as a response to problems faced by the Ministry of Justice, responsible for the courts in England and Wales, and the Insolvency Service, the English executive agency responsible for administering the vast majority of individual bankrupts. These institutions played important roles in setting the agenda and framing the issues for reform, against the background of UK Treasury requirements that the Insolvency Service should cover its costs. This part describes the arguments marshalled for the DRO as a 'bankruptcy light' remedy which framed the policy process and discusses why the DRO developed its particular institutional form. Part 4 discusses briefly experience with the Order and contrasts it with existing bankruptcy practice in England and Wales. This suggests that the arguments for the DRO as an alternative 'bankruptcy light' remedy are not convincing, and that the DRO represents a more rigorous process of scrutiny than bankruptcy for many debtors. Part 5 provides brief comparative perspectives on bankruptcy simplification, comparing the relevance of the English experience for US proposals for a simplified administrative bankruptcy, and suggests a future comparative research agenda.

## **2. Outline of the DRO process**

A debtor<sup>19</sup> must make an online application to the Insolvency Service through a limited number of intermediaries accredited by competent authorities<sup>20</sup> (See Table 1). These are Debt Advice Agencies whose work is funded through a combination of fair share financing<sup>21</sup>, a debt advice levy imposed on creditors by the Financial Conduct Authority<sup>22</sup>, and public or charitable funding.<sup>23</sup> These agencies act as

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<sup>18</sup> Existing explanations include the influence of interest groups, legal origins, or the influence of ideas See discussion in I Ramsay, above n2, 11.

<sup>19</sup> The process is only available to individual debtors and creditors may not initiate the process.

<sup>20</sup> See Debt Relief Orders (Designation of Competent Authorities) Regulations 2009. Citizens Advice is the major intermediary (See Table 1). See discussion below, section 3, 4.1 of its role.

<sup>21</sup> Stepchange represents this model.

<sup>22</sup> Specialist Debt Advice is funded through a levy on creditors by the Financial Conduct Authority. The levy is related to the amount of credit extended. See CP17/38: Regulatory fees and levies: policy proposals for 2018/19, The current levy is £48million. This money is disbursed through the Money Advice Service, established under the Financial Services and

screening agencies checking the eligibility of the debtor using credit reference data<sup>24</sup>. Debtor access is limited to individuals with non-exempt assets below £1000<sup>25</sup>, a vehicle valued at less than £1000, unsecured debts less than £20,000, and no more than £50 in surplus income, determined by reference to the reasonable domestic needs of the individual and her family, which is in practice determined by the "common financial statement".<sup>26</sup>

Individuals must pay £90 for access to the DRO with £10 going to the approved intermediary. The bankruptcy access fee is £680. The DRO fee may be paid in

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Markets Act 2000 which since amendments in 2012 is responsible for co-ordinating debt advice in England and Wales. See Financial Services and Markets Act 2000 (as amended) s3S. See <https://www.moneyadvice.service.org.uk/en/corporate/money-advice-service-and-funding-of-debt-advice-services>

<sup>23</sup> Local authorities, for example, may fund specialist debt advice provided by Citizens Advice. One intermediary, Christians against Poverty, is financed through donations which may be made through churches. See Christians against Poverty, Annual Report, 2016 available at <[https://capuk.org/downloads/finance/accounts\\_2016.pdf](https://capuk.org/downloads/finance/accounts_2016.pdf)> Approved intermediaries may also work in Law Centres which provide money advice and may be able to bring test cases. Legal aid is limited now in debt cases since the enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which as part of austerity measures substantially cut back the availability of legal aid. See the House of Commons Justice Committee Report, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*. Accessible at <<https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>>

<sup>24</sup> The three main credit reference agencies, Experian, Equifax and CallCredit provides free access to data for approved intermediaries. The formal checks are found in Insolvency Rules 5A.7. — Prescribed verification checks — conditions in paragraphs 1 to 8 of Schedule 4ZA

<sup>25</sup> Insolvency Rules 1986/1925 Part 1 Preliminary 5A.10. — Particular descriptions of property to be excluded for the purpose of determining the value of a person's property

<sup>26</sup> The Schedule defines "monthly surplus income" as 'the amount by which a person's monthly income exceeds the amount necessary for the reasonable domestic needs of himself and his family'. Sch 4Z (2) This is generally calculated using the Common Financial Statement (now known as the Standard Financial Statement). The Common Financial Statement was first developed by the Money Advice Trust (a debt charity) and the British Bankers Association in November 2002 for debt management plans. The Bankers Association agreed that if a debtor's expenditure was within the guidelines of the statement they would accept the plan. Scotland has conferred statutory force on its use as the exclusive tool for determining surplus income. It does not have statutory force in England and Wales but The Money Advice Service has co-ordinated an agreement with a wide variety of groups on the use of the statement and "it is intended that the SFS will become the only format used by the debt advice sector, replacing the many alternative financial statements currently in use." <https://sfs.moneyadvice.service.org.uk/en/what-is-the-standard-financial-statement>



instalments, but it must be paid before accessing the procedure.<sup>27</sup> Access to a DRO is barred to individuals who have entered into a transaction at an undervalue or given a preference within the previous two years,<sup>28</sup> and debtor behavior may be sanctioned through a Debt Restriction Order.<sup>29</sup> Creditors can oppose the making of an order. A debtor must inform the Insolvency service of any change in her financial status (e.g. increase in income) during the one-year period.<sup>30</sup> This may result in the Order being revoked. The use of the term “Debt Relief” rather than bankruptcy is intended to avoid the stigma of bankruptcy which might deter some applicants.<sup>31</sup> The order can only be accessed every six years.

### **3. The Legislative Background to the English DRO**

The growth of consumer overindebtedness during the 1980s and 90s raised the question of the appropriate forms of debt relief for the consumer debtor. Government committees had proposed that the central form of relief for consumer debtors should be a revised administration order, a court administered remedy originally introduced in 1883. Under the proposals, a debtor would make a partial repayment over a period of three years with a write off of any residual debt after this period.<sup>32</sup> This

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<sup>27</sup> Contrast therefore with e.g. the Canadian summary procedure where individuals can pay the fees in instalments during the nine-month discharge period and if necessary for another 12 months after discharge.

<sup>28</sup> S 251 (c) (5) Part 1 Schedule 4ZC 9,10. The explanatory notes indicate that the rationale for this prohibition is ‘to avoid a situation where the debtor has disposed of his assets in order to meet the permitted criterion for obtaining a debt relief order and to protect the position of creditors’

<sup>29</sup> A restriction order may be made either through the court or an undertaking by the debtor to the Insolvency Service. It will continue the bankruptcy restrictions on a debtor such as the requirement that an individual must declare her status if making an application for a loan, as well as statutory disabilities attached to bankruptcy. A broad discretion exists to make such an order where it is appropriate structured by a list of factors such as ‘incurring, before the date of the determination of the application for the debt relief order, a debt which the debtor had no reasonable expectation of being able to pay’ See Schedule 4ZB (2)(h).

<sup>30</sup> S251J (5).

<sup>31</sup> A 2004 research paper on administration orders found that ‘some of the people we interviewed were very resistant to the idea of bankruptcy, and were deterred by the stigma they would face given the relatively small sums of money they owed...A simplified debt procedure would therefore seem more appropriate for people on very low incomes that are unlikely to increase. This could be called something other than bankruptcy, to overcome the stigma that people feel and differentiate it from the full bankruptcy procedure. E Kempson & S Collard *Managing Multiple Debts: Experiences of County Court Administration Orders among Debtors, Creditors and Advisors* DCA Research Series 1/04, 76 (2004).

<sup>32</sup> See Ramsay n2, 81-84.

proposal, although enacted by Parliament in 1990,<sup>33</sup> was never implemented by the relevant government department, the Ministry of Justice (then the Lord Chancellor's Department), partly through fear of increased court costs. During the 1990s consumer bankruptcies increased substantially notwithstanding the significant upfront fee to access bankruptcy. In 2002, the New Labour government reduced the bankruptcy discharge period from three years to one year as part of a policy to promote entrepreneurialism. During the parliamentary debates MPs, briefed by Citizens Advice,<sup>34</sup> had pressed unsuccessfully for the removal of the fee for individuals with limited means<sup>35</sup>. The bankruptcy deposit fee had also been

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<sup>33</sup> See s13 Courts and Legal Services Act 1990.

<sup>34</sup> Citizens Advice was established during the second world war to assist citizens with gaining knowledge of their rights. It became in the 1960s and 70s a significant source of consumer advice and is now a primary source of legal advice to consumers on modest incomes and represents the largest independent network of free advice centres in Europe. Citizens Advice is a national charity which is funded by a number of government departments with a core grant and grants for specific purposes, such as money advice. Its services are delivered through approximately 600 sites by 300 independent local bureaux, independent charities funded through local authorities, charitable donations and grants from CA. The national central office provides expertise but trained volunteers comprise the largest percentage of workers in the local bureaux. Its website indicates that 'of the 28,500 people who work for the service, over 22,000 of them are volunteers and nearly 6,500 are paid staff.' The top five issues for advice are social benefits and tax credits, debt, consumer, housing and employment.

Citizens Advice performs a dual advice and campaigning role. The 2015-16 Annual Report states: 'We support people to develop the skills they need to help themselves and we use our evidence on the issues that our clients face to bring about policy changes that benefit everyone.' For a recent overview see S Kirwan, M McDermot and J Clarke, 'Imagining and practising citizenship in austere times: the work of Citizens Advice' (2016) 20 *Citizenship Studies* 764-778.

Collections of individual case studies feed into its campaigning and policy role. This knowledge-acquisition role has led Jones to characterize it as part of a 'shadow state' which assists citizens to learn about their rights but also contributes to a knowledge acquisition process by the state about the impact of its policies. R Jones, 'Learning Beyond the State: the pedagogical spaces of the CAB service' (2011) 14(6) *Citizenship Studies* 725. Jones refers to the following definition of the shadow state by Wolch (1990) *The shadow state: government and voluntary sector in transition* New York, the Foundation Center xvi 'para-state apparatus comprised of multiple voluntary sector organizations, administered outside of traditional democratic politics and charged with major collective service responsibilities previously shouldered by the public sector, yet remaining within the purview of state control.'

<sup>35</sup> See Citizens Advice, *Insolvency: A Second Chance: A Response by the CAB Service to the Insolvency Services White Paper* 13/11/2001; Opposition members briefed by Citizens Advice raised the issue of fees during the Parliamentary passage of the Bill. See e.g. J Walley MP 'Citizens Advice Bureaux have already circulated their concerns to many members of Parliament. They are concerned about whether those on means tested benefits and in hardship will be exempt from the bankruptcy deposit fee...Many of our constituents

challenged unsuccessfully in a test case as a contravention of human rights law.<sup>36</sup> The court concluded that that no fundamental human right of access to the courts was challenged by a mandatory bankruptcy administration fee. The court did however express concern for the plight of an individual denied access to debt relief because of cost, but indicated that this was an issue for Parliament. The court was signaling, in traditional English judicial fashion, that ‘something ought to be done’.<sup>37</sup>

The New Labour government had committed in 1997 to reform the administration order. It also established an ambitious overindebtedness task force in 2004<sup>38</sup>. This involved a large number of initiatives by central and local government departments to reduce over-indebtedness and provide support for those who

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cannot afford to take advantage of some of the Bill’s proposals’. HC Parl Deb Second Reading Enterprise Bill Col 69.

<sup>36</sup> Specifically, a common law right to access to courts and article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See *R v. Lord Chancellor ex parte Lightfoot* [2000] QB 597. This case was brought by the Public Law Project, with support and information provided by the Money Advice Association, the Law Centres Federation, the Federation of Independent Advice Centres and the National Association of Citizens’ Advice Bureaux. The debtor in this case was a casualty of the economic recession of the early 1990s, and had also experienced marriage breakdown. Her primary debt was the negative equity of £40,000 owing to the mortgagee. The European Court of Human Rights rejected an appeal from this decision.

Simon Brown LJ in the Court of Appeal did note that ‘the appellant, Mrs Lightfoot, is unable to pay this deposit. She has debts of nearly £60,000 and no significant assets. She simply cannot raise the money. Nor is she alone in this predicament. Rather it appears that large numbers of debtors are similarly placed. It is, indeed, apparently for this reason that the great majority of those wishing to petition for bankruptcy do not in fact do so. To them, therefore, is denied what Lord Jauncey of Tullichettle in *In re Smith (A Bankrupt); Ex parte Braintree District Council* [1990] 2 A.C. 215, 237 called “the importance of the rehabilitation of the individual insolvent.” They face instead a lifetime of unrelieved indebtedness.’ *Ibid* 617.

<sup>37</sup> Simon Brown LJ concluded that ‘[I]t is not difficult to recognise the hardship and worry that many will suffer through their financial exclusion from the undoubted benefits of this rehabilitation scheme and, in the more compassionate times in which we now live, it may be hoped that the competing interests will be considered anew and perhaps a fresh balance struck.’ *Ibid* 631. Chadwick LJ commented that ‘If that consequence is now thought unacceptable, it is for Parliament to alter the law or for the Lord Chancellor, as the rule-making body, to make an amendment to the rules. It is not for the court to give effect to whatever view it might hold as to the appropriate social policy in this field under the guise of discovering some hitherto unrecognised fundamental constitutional right.’ *Ibid* at 635.

<sup>38</sup> See the subsequent interdepartmental strategy paper, ‘Tackling Overindebtedness’ (DTI, DWP, 2004) which included reference to the proposed Debt Relief Order <http://webarchive.nationalarchives.gov.uk/20090609023014/http://www.berr.gov.uk/files/file18559.pdf>

became overindebted.<sup>39</sup> Several initiatives were promised in this document under the category “The Justice System and Debt”. Government departments and their civil servants play a significant role in the development of English bankruptcy law<sup>40</sup> and personal insolvency engages two Ministries, the Ministry of Justice<sup>41</sup>, responsible for court administration and the then Department of Trade and Industry<sup>42</sup>, within which sits the executive agency, the Insolvency Service.<sup>43</sup> Understanding the priorities of the two Ministries explains the particular approach, and framing of reform, and the structure of the DRO procedure.

A research report commissioned by the Ministry of Justice in 2004 painted a picture of a failing administration order in the county court with high levels of default in repayment, and inconsistent application of the possibility of composition. Users of the order were primarily female lone parents, 70 percent of whom were unemployed<sup>44</sup>. The Ministry of Justice (then Department of Constitutional Affairs) proposed therefore the introduction of a NINA process<sup>45</sup> as part of the solution to the problem of the administration order in the county court and the prohibitive costs of a bankruptcy petition for low income debtors.<sup>46</sup> The DRO represented an alternative for ‘those with no disposable income or assets and little prospect of getting any in the

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<sup>39</sup> The strategy is reviewed critically by the National Audit Office in *Helping Overindebted Consumers* Report by the Comptroller and Auditor General HC 292 (2009-10).

<sup>40</sup> See for example the discussion of earlier English reforms by Halliday and Carruthers in T Halliday & B Carruthers, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* (Oxford, OUP, 1998) Part 1, 3.

<sup>41</sup> Then known as the Department of Constitutional Affairs and previously the Lord Chancellor’s Office.

<sup>42</sup> Now the Department for Business, Energy and Industrial Strategy.

<sup>43</sup> These Ministries are regularly renamed so that the Ministry of Justice succeeded the Department of Constitutional Affairs, which succeeded the Lord Chancellor’s Office. The current Department for Business, Energy & Industrial Strategy succeeded the Department of Business Innovation and Skills.

<sup>44</sup> See E Kempson & S Collard, *Managing Multiple Debts: Experiences of County Court Administration Orders among Debtors, Creditors and Advisors* (London, Department of Constitutional Affairs, 2004) discussed in Ramsay n 2,85.

<sup>45</sup> See Department of Constitutional Affairs, ‘A Choice of Paths: Better Options to manage over-indebtedness CP23/04 para 35 ‘The Government is therefore developing a ‘No income No assets debt relief scheme’ (NINA) which would be administered by the Insolvency Service to provide debt relief to the can’t pay group.’

<http://webarchive.nationalarchives.gov.uk/20040722013541/http://www.dca.gov.uk/consult/dibt/debt.pdf>

<sup>46</sup> Ibid para 32.

foreseeable future (especially those on long term low-income)' <sup>47</sup>. The introduction of the NINA would divert a proportion of administration cases from the courts to the new procedure and also some bankruptcy cases, currently processed through the courts.<sup>48</sup> The Ministry rejected administration of the NINA procedure through the courts since this would be costly and fell outside the central role of the courts in dispute settlement<sup>49</sup>. Ministry of Justice officials had picked up the idea of the Debt Relief Order from proposals for a 'No-Asset' procedure in New Zealand designed for 'consumer debtors' whom it was assumed would have few assets and limited repayment capacity.

The summary of responses to the NINA consultation by the Ministry of Justice paper indicated that some consultees preferred the abolition of the bankruptcy deposit to the creation of a NINA procedure. However the Ministry simply responded that it was not convinced of the option of waiving the petition deposit, concluded that there was broad support for a NINA scheme, and handed over responsibility for its development to the Insolvency Service<sup>50</sup>.

The Insolvency Service, an executive agency within the Department of Business, processes and acts as trustee in bankruptcies which are not profitable for the private sector. It has done so since its creation in 1883. These cases now represent approximately 80-90 percent of individual bankruptcies, with a small percentage of individual small business bankruptcies handled by the private sector.<sup>51</sup> The

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<sup>47</sup> Ibid para 22. The subsequent Insolvency Service consultation indicated that 'The type of person at whom the scheme is aimed cannot pay even a portion of their debt within a reasonable timeframe. Such people are often living on very low incomes, and whilst at the time they borrowed the money they had every intention of paying it back, they simply lack the means to do so.'The Insolvency Service, 'Relief for the Indebted: An Alternative to Bankruptcy (2005) 4.

[http://webarchive.nationalarchives.gov.uk/20080610165612/http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con\\_doc\\_register/consultationpaperwithnewannex1.pdf](http://webarchive.nationalarchives.gov.uk/20080610165612/http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/consultationpaperwithnewannex1.pdf)

<sup>48</sup> The Legislative Impact Analysis estimated that 14% of individuals currently presenting their own bankruptcy petition would be eligible for relief under the DRO, thus freeing up court time.

<sup>49</sup> "Choice of Paths" above n 38, para 34.

<sup>50</sup> See the summary of responses at

<http://webarchive.nationalarchives.gov.uk/20070101085734/http://www.dca.gov.uk/consult/dabt/responses.pdf>

<sup>51</sup> In 2015 15,845 bankruptcies were processed by the Insolvency Service, 2, 545 by private insolvency practitioners. Including DROs with bankruptcies as a form of bankruptcy light, private processing accounts for approximately 6% of bankruptcies. Of course, IPs will deal with IVAs. Research by R3 (The Insolvency Practitioners Association) of their members

Insolvency Service follows the new public management model where government agencies operate along business lines and on a cost-recovery basis in relation to the processing of bankruptcies.<sup>52</sup> Since the great majority of bankruptcy cases have no assets this is increasingly not a sustainable funding model.<sup>53</sup> A continuing challenge has been to reduce the costs associated with processing small bankruptcies which offer no dividend. During the 1990s the Service developed a summary process which involved a relatively light-touch investigation of the majority of bankrupts, and a bankruptcy discharge after two rather than three years.

The introduction of the Debt Relief Order would not necessarily reduce the costs of the Insolvency Service if it were required to determine and check eligibility of debtors for the process. The Service proposed therefore the assistance of debt advice agencies<sup>54</sup> as competent authorities in processing the online applications. Debt advice agencies would benefit, it was argued, from the existence of the Debt Relief Order through a reduction in the need for continuing negotiations with creditors to write off debts or make token payments. They would be able to close the file.<sup>55</sup>

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suggested that the average insolvency handled by a private practitioner involves unsecured debt of £109,780 and assets of £43,590; the bankrupt is usually self-employed with an average estimated income of £28,080. See R 3 'Closing the Gap' [https://www.r3.org.uk/media/R3\\_Gender\\_Insolvency\\_June\\_2016.pdf](https://www.r3.org.uk/media/R3_Gender_Insolvency_June_2016.pdf)

<sup>52</sup> See Financial Memorandum between the DBIS and the Insolvency Service, 2004. The Service finances its bankruptcy processing costs from fee income: investigation and enforcement and redundancy payment recovery are funded from government grants and successful litigation.

<sup>53</sup> See discussion in House of Commons Business, Innovation and Skills Committee *The Insolvency Service Sixth Report of Session 2012–13 Report*, together with formal minutes, oral and written evidence. (HMSO, London, 2013).

<sup>54</sup> 'In order to keep costs to as low a level as possible, we think there would be a need to involve the debt advice sector (which would act as an intermediary to assess whether a case is suitable before the debtor applies to the official receiver) and for the facility to apply for a debt relief order to be available only online.' Above n 47, para 6.

<sup>55</sup> Ibid. Para 44. "We are aware that intermediaries would need to be properly resourced to fulfil this task. We do feel that the availability of a scheme such as that which is proposed should, overall, represent a time saving for debt advisers. In cases at present where the debtor has nothing to offer his creditors, debt advisers spend large amounts of time negotiating and attempting to persuade creditors that the debt should be written off. They also devote time to assisting debtors to apply for grants in order to petition for bankruptcy and then assisting with queries arising out of any proceedings that ensue. The proposed scheme would remove the need for much of this work, but we recognise that the availability of a new form of debt relief may, at least in the short term, result in an increased workload

Several themes appear in the consultation<sup>56</sup>, the subsequent working group on the DRO<sup>57</sup> and the legislative impact analysis of the Debt Relief Order in the omnibus Tribunals Courts and Enforcement Bill 2007. First, the idea of the approved intermediary, intended to make the system more accessible and efficient, received broad support from both creditors, intermediaries and the debt advice sector, although the latter raised concerns about funding the process and ensuring their independence. The approved intermediary was viewed as crucial to the success and legitimacy of the process, although the New Zealand model did not incorporate this aspect. Second, a majority favoured a moderate fee for the process although some debt advisors demurred arguing that since the scheme was aimed at those with no income or assets it was 'nonsensical' to require a fee.<sup>58</sup> The government did not really engage with the argument that the process might be funded by a creditor levy or through general taxation. The Insolvency Service was clear that the process must be self-funding. The Legislative Impact analysis for the Tribunals Courts and Enforcement Act also rejected the alternative of waiving the fees for bankruptcy arguing that bankruptcy was a disproportionate remedy for this group of debtors,

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for debt advisers while they become accustomed to the procedure and while clients who might not previously have sought advice seek a resolution to their problems."

The Service then refers to how advisors view the setting up of an administration order as a method of effectively closing a case 'once an order has been set up a case can be effectively closed. In contrast, other multiple debt cases involve negotiations with a number of creditors and can remain open for a year or more'.

<sup>56</sup> The consultation received 70 responses. They included creditors, including public creditors, and their trade associations (such as the Finance and Leasing Association), debt advisers, and professional intermediaries such as PWC. The idea of the approved intermediary received overwhelming support (50 in favour, two opposed) with a general view that it would make the system easier to function and would provide 'useful face-to-face contact'. But the debt advice agencies demonstrated two concerns: a possible loss of independence, and the need for extra resources required for processing DROs. The Insolvency Service, 'Relief for the Indebted---an alternative to bankruptcy. Summary of Responses and Government Reply' (November, 2005) 16-17

<sup>57</sup> The Working Group consisted of Citizens Advice Bureaux, Institute of Money Advisers, Advice Services Commission, National Debtline/Money Advice Trust, Advice UK, CCCS (now Stepchange) and the Legal Services Commission. A summary of the intermediary working group discussions can be found at the following page of the webarchive of the Insolvency Service

<<http://webarchive.nationalarchives.gov.uk/20090903115335/http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/DebtRelief.htm>> The working group concluded that "IMs are required to enable the DRO process. Without the IMs, there would be no link between the applying debtor and the INSS, and hence the system would not be workable.'

<sup>58</sup> Above n 45,11.

that it would be unfair for other creditors to cross-subsidise these cases, and “inappropriate” that it should be met out of general taxation.<sup>59</sup> A recurring theme was that although the DRO would impose costs on the Debt Advice sector, this would be offset by a reduction in the need for continued correspondence with creditors, and agencies would be able to provide debtors with access to a new remedy.

In summary, the Debt Advice sector had lobbied for abolition of the bankruptcy fee for low income debtors. The response of the DRO drew its initial inspiration from a transplant from a foreign jurisdiction but the agenda of reform and the consequent structure and financing were driven by the interests of the Ministry of Justice and the Insolvency Service in removing debt administration from the courts and reducing the costs of the Service to ensure that it met the Treasury imperative of cost-recovery. The framing of the debate marginalized the possibility of abolition of the bankruptcy fee. The reduction in Insolvency Service costs could only be achieved by convincing the debt advice sector to play a ‘partnership’<sup>60</sup> role in the process. Embedding the debt advice agencies in the process might also justify further government funding for debt advice, a continuing concern in an era of austerity<sup>61</sup>.

Creditors could be reassured that given the ‘robust entry criteria’<sup>62</sup> to the process (screening by approved debt advisers, preferences barring access, once

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<sup>59</sup> Tribunals Courts and Enforcement Bill: Regulatory Impact Assessment at 90 available at [http://webarchive.nationalarchives.gov.uk/20081106064111/http://www.dca.gov.uk/risk/tce\\_bill.pdf](http://webarchive.nationalarchives.gov.uk/20081106064111/http://www.dca.gov.uk/risk/tce_bill.pdf). This repeated the earlier statement by the Insolvency Service in the 2005 Consultation. Above n 47, para 7.

<sup>60</sup> See Intermediary Guidance Notes, DRO2, 3. The Insolvency Service Guidance Notes describe the intermediary as an ‘agent’ between the debtor and the Insolvency Service, playing a ‘pivotal position’ in the process. Citizens Advice indicate that their role within the DRO should not compromise its partnership agreement with Government that it ‘will always act independently and in the best interests of our clients, and not as an agent of government’.

<sup>61</sup> The Insolvency Service argued in the Working Group that the statutory requirement to consult debt advisors could benefit the sector and in addition ‘may help safeguard existing funding (perhaps even encouraging more). One debt advisor on the working group did recognize that it would confer a larger statutory role on debt advice agencies.

Kirwan, McDermot and Clarke identify three pressures on the contemporary CABx, the increased demands caused by austerity, the pressures on funding, and the reductions in legal aid. See generally S Kirwan, M McDermot and J Clarke, (n34).

<sup>62</sup> Legislative Impact Analysis para 5.36. For creditor concerns see e.g.D Atkinson, “Alarm at ‘quickie’ bankruptcy plan; debts of up to £15000 could be written off after a year with no



every six years, obligation to inform of changes during the one year period, limits on the discharge, the possibility of a Debt Restriction Order) individuals would be genuine ‘can’t pay’ and creditors did not need to continue chasing a debt. The intention was to create a simplified procedure, but the ultimate legislation, which probably reflected departmental concerns about potential abuse, includes a battery of provisions to ensure a proper ‘balance’ is achieved between debt relief and moral hazard concerns. Such controls might be justified by a concern to maintain a credible system, as suggested by Katherine Porter and Ronald Mann in the quotation at the beginning of this article.<sup>63</sup>

Little parliamentary discussion took place concerning the Debt Relief Order provisions during the passage of the Tribunals Courts and Enforcement Bill<sup>64</sup>. Since the DRO was part of a larger set of government reforms, it benefited from the dominance of the executive in the UK parliamentary system, with little opportunity for substantial parliamentary changes. Throughout the development of the DRO evidence of comparative experience (by the consultees or the Insolvency Service) was modest<sup>65</sup>.

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need for court” *Mail on Sunday* Nov 28,2006,5”; D Atkinson, “Debtors may hide assets” *Mail on Sunday*, March 30,2008,67.

<sup>63</sup> (n6). The City of London Law Society commented on a subsequent consultation on DROs that ‘[t]here is clearly a moral hazard risk in making the DRO process available to an individual with few or no assets, whatever the size of their debt, as this may simply encourage reckless borrowing’. City Of London Law Society Insolvency Committee, Response to the Insolvency Service call for evidence on Insolvency Proceedings: Review of debt relief orders and the bankruptcy petition limit Consultation

[http://www.citysolicitors.org.uk/index.php?option=com\\_content&view=category&id=132](http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=132) 2.

See also written evidence of the Insolvency Practices Council Memorandum submitted to Tribunals Courts and Enforcement Bill, 2007 concerning the DRO ‘We are concerned that, in the absence of adequate verification of debtors’ circumstances, the DRO procedure may be vulnerable to fraudulent claims.’

<sup>64</sup> On second reading in the House of Commons 5 March Col 1318 Mr Heald MP quoted NACAB input that ‘in particular, the Debt Relief Order proposals have the potential to help a substantial proportion of CAB clients, many of whom are vulnerable and on low incomes’. See National Association of Citizens Advice Bureaux, *Deeper in Debt: The Profile of CAB clients* (2006) which indicated that half of their debt clients had less than £20 to offer their creditors and on average ‘it would take CAB debt clients who were able to make a repayment to their non-priority creditors 77 years to repay the debts at the amount offered’ <16 <https://www.citizensadvice.org.uk/about-us/policy/policy-research-topics/debt-and-money-policy-research/deeper-in-debt/>>

<sup>65</sup> A brief reference was made to the New Zealand scheme in the 2005 Insolvency Paper along with a reference to the Australian process where the Australian Insolvency Service subsidizes personal insolvency law by providing free access where there are no assets to

The English process suggests the important role of civil servants in the Westminster-style legislative process in framing a reform agenda. My account draws support from Joe Spooner's detailed analysis of the subsequent introduction of the DRO procedure in Ireland.<sup>66</sup> This took place against the background of the bailout of Ireland in the wake of the world financial crisis and the collapse of the Irish housing market. He argues that initial proposals for a relatively debtor friendly law were watered down in the 'quiet politics'<sup>67</sup> of departmental framing of detailed legislation with the result that relief under the Irish DRO is cabined more restrictively than the English procedure<sup>68</sup>. Although these Irish changes reflected the political pressure of both creditor interests and the International Financial Institutions, they also reflected civil servant influence. The English situation differs from Ireland since the DRO was a modification of an existing bankruptcy system rather than the introduction of a completely new law, which often induces caution, and the English legislation was enacted before the financial crisis of 2008.

#### 4. Implementation of the DRO

The primary objectives of the NINA process are simplification and cost reduction, thus extending access to debt relief. However, its implementation has thrown up many legal issues such as the scope of the moratorium<sup>69</sup>, the scope of excluded

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pay a trustee fee, justified by the public good from reduction of externalities (such as costs to health care, and social security) from debt. In the early 2000s the Insolvency and Trustee Service Australia proposed to introduce a fee but this was rejected on the basis that the 'personal insolvency system provides an overriding general community benefit, not just relief for the debtor, so the cost of processing the petitions ...should be met by taxpayers, not individual debtors.' See Insolvency and Trustee Service Australia, Cost Recovery Impact Statement 17-18 (2005). A fee was introduced in 2014 but was then removed after criticism that it impeded access to bankruptcy. See <https://www.afsa.gov.au/insolvency/how-we-can-help/fees-and-charges-0>

<sup>66</sup> See J Spooner, 'The Quiet-Loud-Quiet Politics of Post-Crisis Consumer Bankruptcy Law Reform: the case of Ireland and the Troika' (2018) *MLR* (forthcoming).

<sup>67</sup> See P Culpepper, *Quiet Politics and Business Power: Corporate Control in Europe and Japan* (Cambridge, Cambridge University Press, 2011).

<sup>68</sup> For example, the 'once in a lifetime' approach, a qualified insolvency test (no likelihood of becoming solvent within a 3-year period), debtor must not have arranged her financial affairs within past 6 months to become eligible for a DRN, three-year moratorium period.

<sup>69</sup> See e.g. *R. (on the application of Payne) v. Secretary of State for Work and Pensions* [2011] UKSC 60 (application of moratorium to government attempts to recover overpayment of welfare benefits). The moratorium will not prevent a landlord evicting the debtor. See *Places for People Homes Ltd v. Sharples* [2011] EWCA Civ 813 (CA). See J Spooner, 'Seeking Shelter in Personal Insolvency Law: Recession, Eviction, and Bankruptcy's Social Safety net' (2017) 44 (3) *Journal of Law and Society* 374.

debts<sup>70</sup>, the nature of Insolvency Service decision making under the DRO,<sup>71</sup> the construction of the preference provision<sup>72</sup>, the application to annual utility or Council tax bills which may be paid by instalments,<sup>73</sup> and the treatment of amounts received by the debtor during the moratorium. The Insolvency Service also issues intermediary guidance and meets with competent authorities on a regular basis to discuss emerging issues.<sup>74</sup>

The government estimated the potential uptake for the DRO as 43,000 after two years.<sup>75</sup> However only approximately 30,000 individuals used a DRO in 2012 and this remains the current level, notwithstanding an increase in qualifying liabilities from £15,000 to £20,000 in 2015.<sup>76</sup> Women represent almost two-thirds of applicants and many are sole parents. The majority are unemployed. They owe debts to central and local state creditors and public utilities as well as private creditors.<sup>77</sup> Comparison of the causes of bankruptcy and DROs (Tables 2,3 ) indicate the higher

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<sup>70</sup> For example, is a parking charge penalty a fine and therefore an excluded debt?

<sup>71</sup> See *R(Howard) v. Official Receiver* (QBD) [2013] EWHC 1839 (In adjudicating on DRO applications is the Official Receiver acting in a judicial or administrative manner).

<sup>72</sup> See e.g. *Islington LBC v. C* [2012] BPIR 363.

<sup>73</sup> See *Kaye v South Oxfordshire District Council* [2013] EWHC 4165; *Severn Trent Water Ltd v. Said* (2015, unreported, Coventry County Court).

<sup>74</sup> See Insolvency Service, Intermediary Guidance Notes version 16

<https://www.gov.uk/government/publications/intermediary-guidance-notes-v15-dro2-guidance-for-approved-intermediaries>.

<sup>75</sup> See Legislative Impact Analysis (n58) at 89. This was based partly on a survey of individuals who sought advice on debt problems with Citizens Advice Bureaux. The earlier Insolvency Service paper in 2004 (n 46, para 26) had predicted an uptake of 36,000.

<sup>76</sup> And notwithstanding media predictions that the introduction of the DRO would result in 'soaring' insolvencies. See D Atkinson, 'Insolvencies to Soar with Quickie rules' *The Mail on Sunday* April 5, 2009.

<sup>77</sup> An early survey by the Insolvency Service noted that the profile of debtors accessing the DRO system was primarily low income, predominantly unemployed individuals with an average of six creditors; over 53% of debt was owed to banks, building societies and credit card companies. See Insolvency Service, (2010) 'Debt Relief Orders: initial evaluation report',3

[http://webarchive.nationalarchives.gov.uk/20110119225508/http://www.insolvency.gov.uk/in-solvencyprofessionandlegislation/con\\_doc\\_register/DRO%20interim%20evaluation%20report%20-FINAL.pdf](http://webarchive.nationalarchives.gov.uk/20110119225508/http://www.insolvency.gov.uk/in-solvencyprofessionandlegislation/con_doc_register/DRO%20interim%20evaluation%20report%20-FINAL.pdf) . More informal data since the recession suggest that public creditors may now be more significant. See e.g. A Pardo, J Lane, P Lane, D Hertzberg, Citizens Advice, *Unsecured and Insecure* (2015). This paper argues that over the past five years there has been a significant shift in problems 'away from mainstream credit issues towards problems with arrears on council tax, rent and energy bills. Five years ago, credit cards were the main debt issue we saw. Now council tax arrears top the list.'

percentage of illness/accidents as a primary cause for DROs, and the dominance of factors such as significant reduction in income and increase in expense.

No comprehensive evaluation of the DRO programme has been undertaken, notwithstanding government promises to do so, but a government review in 2015 which collected input from intermediaries, concluded that the ‘the DRO competent authority and intermediary model is working well and...DROs have a very significant impact on the wellbeing of debtors.’<sup>78</sup> Feedback from clients of the approved intermediaries indicate that the DRO had the immediate effect of improving their mental and physical health, family relationships and reduced stress.<sup>79</sup> However, little evidence exists concerning the economic and financial long term impact of a DRO.<sup>80</sup>

#### **4.1. The central role of intermediaries in the DRO ‘partnership’.**

The Insolvency Service is the decision-making body for DROs<sup>81</sup> but devotes modest resources to the DRO and covers its costs through the user fee<sup>82</sup>. It does not actively monitor debtors during the moratorium period.

The system relies heavily on the intermediaries. Citizens Advice, the dominant intermediary, operates a specialist unit for processing Debt Relief Orders<sup>83</sup>, in

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<sup>78</sup> See Department of Business, Innovation and Skills, ‘Insolvency Proceedings: Debt Relief Orders and the bankruptcy petition limit—Call for Evidence (London, DBIS, 2015) 2. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/398279/Analysis\\_of\\_responses\\_for\\_internet\\_-\\_revised\\_version\\_-\\_23\\_January\\_2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/398279/Analysis_of_responses_for_internet_-_revised_version_-_23_January_2015.pdf)

<sup>79</sup> National Debtline survey of 30 clients who had completed the moratorium period within the last 6 months. See Money Advice Trust, ‘Insolvency Service—DROs & the Bankruptcy Petition Limit’ (2014).

<sup>80</sup> Citizens Advice provide one example of an individual stressed by debt who was able to come off benefits move back into work and be promoted. See Citizens Advice, ‘Response to the Insolvency Service, ‘Debt Relief Orders and the Bankruptcy Petition Limit: Call for Evidence’”(2014). The Intermediary Christians against Poverty conducted a study of their clients which suggested that the DRO had been successful. See CAP, The Freedom Report (2017) [https://capuk.org/downloads/policy\\_and\\_government/the\\_freedom\\_report.pdf](https://capuk.org/downloads/policy_and_government/the_freedom_report.pdf) The study had an 18% response rate.

<sup>81</sup> The Act makes it the decision-making body but also contains several presumptions which require the Service to assume the correctness of an application if it appears so on the record. See Insolvency Act 1986 s251C-D. See discussion of the judicial role of the Insolvency Service in DROs in *Regina (Howard) v. Official Receiver* [2013] EWHC 1839 (admin).

<sup>82</sup> See Insolvency Service Annual Report and Accounts 2015-16, Financial Statements 6 (HC 482) which indicates a surplus of £415,000 in 2015-16. The Insolvency Service has a single division at Plymouth which administers DROs.

addition to processing cases through local bureaux, and introduced a central unit which provides expert legal advice to local bureaux in complex cases<sup>84</sup>. This latter unit meets with the Insolvency Service periodically to discuss current legal issues concerning the interpretation of DRO provisions, and the intermediary guidance. Both units are funded by the creditor levy distributed through the Money Advice Service. Citizens Advice has also initiated test cases on the interpretation of the DRO.

The DRO promised cost savings for debt advisors but the major intermediaries in a review in 2014 indicate that the fee does not cover the costs of processing DROs. Step Change (funded through the fair share model) argued that ‘the current £10 payment to competent authorities for each DRO is nowhere close to the actual cost of advising on and processing a DRO application. This funding situation is not sustainable in the long term...’<sup>85</sup> Citizens Advice was more muted noting simply that ‘the income generated via DRO application fees does not fully cover the costs of providing the competent authority role.’<sup>86</sup> A recent inquiry claims that the average cost of processing a DRO is £300.<sup>87</sup> My preliminary research suggests that processing a DRO takes up significant time and costs for intermediaries because of the need to check credit reference data<sup>88</sup>, ensure that all debts and assets are included and stated correctly,<sup>89</sup> and do not exceed the relevant ceilings. Possible preferences must be identified. Issues with rent arrears may require attention.

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<sup>83</sup> Established in 2014, this includes about 17 approved intermediaries who take references from local CABx throughout England and Wales.

<sup>84</sup> This service is now operated by Shelter, the primary housing charity in the UK. See <https://www.nhas.org.uk/news/article/shelter-to-offer-specialist-debt-advice-service>

<sup>85</sup> Indicating a shortfall of £890,000 in the annual costs of processing DROs. Response by Step Change Debt Charity to the Insolvency Service Consultation Paper: Insolvency Proceedings: Debt relief orders and the bankruptcy petition limit (2014) 7.

<sup>86</sup> Citizens Advice, 'Debt Relief Orders and the bankruptcy petition limit: Call for evidence: Citizens Advice response to the Insolvency Service, 9. The Money Advice Trust, another intermediary financed primarily by creditor contributions, pointed to the high costs of ensuring a debtor qualified for the DRO but noted that it ‘provides reassurance for creditors. They can be confident that applying for a DRO is not an easy option’. Money Advice Trust at 13.

<sup>87</sup> See P Wyman, 'Independent Review of the Funding of Debt Advice in England, Wales, Scotland and Northern Ireland' (2018) 26. The basis for this calculation is not clear.

<sup>88</sup> This may still be done by post rather than online.

<sup>89</sup> Thus, if an outstanding balance is stated as £500 but is in fact £600, only £500 will be written off.

Significant numbers of individuals applying for a DRO may be in vulnerable situations and require face-to-face advice in the DRO approval process<sup>90</sup>. Whether these short-term costs for intermediaries are being outweighed by savings in the long-term costs of continuing negotiations with creditors has not been tested. The DRO permitted the government to retain the integrity of its cost-recovery model, an imperative of central government, while passing on much of the costs to agencies which are funded through a mixture of public funds and creditor levies.

Screening by a limited number of approved intermediaries does ensure that only qualified debtors apply since almost no applications are rejected by the Insolvency Service.<sup>91</sup> It may heighten the legitimacy of the system and reduce calls to introduce other controls. This English model contrasts with New Zealand where the absence of screening agencies results in a high percentage of rejected applications by the state Insolvency Trustee service (see Table 4).<sup>92</sup> Few DROs are revoked (0.9%) under the Insolvency Service's discretionary power.<sup>93</sup> The Insolvency Service guidance indicates that revocation is unlikely where small increases occur to a debtor's income.<sup>94</sup>

Limiting access through approved intermediaries may however increase access costs. An advisor who is not an approved intermediary may have to refer an individual to another agency, and the profit-making debt management sector lacks incentives to promote this alternative. Anecdotal evidence also suggests that the existence of the £90 fee may restrict access for some low-income debtors.<sup>95</sup>

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<sup>90</sup> Compare with Littwin's comments in 'Adapting to BAPCPA' n6.

<sup>91</sup> Data provided to me by the Insolvency Service indicate that about 1% of applications are rejected by the Insolvency Service with further information requested in about 5 percent of cases.

<sup>92</sup> See Ministry of Economic Development, (n0) 47 which indicates that the primary reasons for the high levels of rejection are incomplete applications, debts higher than the statutory ceiling and objections by creditors.

<sup>93</sup> Data provided by Insolvency Service. See Insolvency Act s 251 L for the various grounds under which the Insolvency Service 'may' revoke an order.

<sup>94</sup> "[A]pplicants are clearly required to comply with the legislation, they should not overly worry about small increases in income affecting their eligibility. Provided the increase in benefits or income does not permanently increase their income such that the parameter is breached, no further action will be taken by the Official Receiver'. See Insolvency Service Guide for Intermediaries 6 <https://www.gov.uk/government/publications/intermediary-guidance-notes-v15-dro2-guidance-for-approved-intermediaries>

<sup>95</sup> See Christians against Poverty press release at <https://capuk.org/fileserver/downloads/press/DROrelease17.pdf> Research in Australia also found

## 4.2. Comparison of the DRO process to Bankruptcy.

A primary reason for rejecting the policy of a reduced bankruptcy fee for those on low incomes was that bankruptcy was a disproportionate remedy. However, a comparison of the two procedures suggests that the DRO process may impose more rigorous requirements than bankruptcy. First, both a DRO and debtor applications for bankruptcy are now administrative rather than court based procedures and may be completed online. Second, a DRO can be applied for only every six years whereas no such restriction applies to bankruptcy. Third, preferential payments are treated differently under DRO provisions. A preferential payment (without any need to demonstrate an intent to prefer) bars a DRO application, but does not prevent a bankruptcy petition being filed. The official rationale for this approach to DROs is to prevent individuals transferring away their property and then applying for an order<sup>96</sup>. The use of a bright line rule on preferences to achieve this objective may have been intended to reduce administration costs but this sanction will catch many small fry in its net, where individuals may have made some modest payments to family members. In addition the courts have indicated that in practice a desire to prefer should be read into the section, creating uncertainty in application.<sup>97</sup> The preference provision also conflicts with the approach of the major debt advice agencies in drawing up budgets for clients. These agencies prioritize certain debt repayments for example to landlords and utilities. A literal application of the rule would permit a challenge of any

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that the introduction of a fee of AU\$120 for bankruptcy resulted in many individuals having to delay or forego access to bankruptcy. See Financial Counselling Australia, 'Too Poor to go Bankrupt: The Impact of the New Fee for Lodging a Debtor's Petition (2014).

<https://www.financialcounsellingaustralia.org.au/Corporate/News/FCA-Releases-Too-Poor-to-Go-Bankrupt>

<sup>96</sup> The explanatory notes indicate that the rationale is 'to avoid a situation where the debtor has disposed of his assets in order to meet the permitted criterion for obtaining a debt relief order and to protect the position of creditors.'

<sup>97</sup> See *Islington LBC v C* [2012] BPIR 363. In this case, a debtor had prioritised payments to a landlord to clear arrears of rent and avoid repossession. District Judge Hart concluded that a desire to prefer must be read into the section, "[o]therwise, almost any payment by the debtor to a qualifying creditor in the two years prior to the DRO application being determined would amount to a preference and rule out the possibility of a DRO being made. It is very unlikely that very many DROs could ever be made in the circumstances...a payment to a landlord is likely to be motivated by a desire to avoid possession proceedings, rather than by a desire to better the position of the landlord" id 366.

subsequent Debt Relief Order.<sup>98</sup> Debt advisors criticized the reach of the preference provision in the governmental review in 2014.<sup>99</sup> The rather clumsy strict preference provision seems animated by a fear of moral hazard, and a concern by government policy makers to allay any creditor fears of debtors avoiding repayment.

Third, a DRO releases an individual only from the qualifying debts listed in the order. Bankruptcy releases an individual from all bankruptcy debts, defined more broadly than debts in a DRO<sup>100</sup>. Fourth, an individual receiving income or property during the moratorium period may be subject to the order being revoked. The Insolvency Service exercises a discretion as to revocation.<sup>101</sup> Although only a small percentage of orders are revoked the possibility of revocation because of an increase in income or assets raises the question of whether this reduces incentives for individuals to seek employment.

Fifth, a contrast exists between the DRO and bankruptcy in the timing and nature of investigation of the debtors conduct. Bankrupts are subject to investigation by the Insolvency Service after they have filed for bankruptcy. In practice evidence exists that this may be a relatively light-touch experience for many debtors. In 2012 I noted that two-thirds of bankrupts are interviewed briefly by

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<sup>98</sup> As in the case above. The Insolvency Service guidance indicates that 'preference transactions are typically (but not restricted to) payments to friends or family members.' They provide no authority for this statement. See The Insolvency Service, Intermediary Guidance Notes DRO2 (2016) 39. It seems that payments to friends and family are more likely to lead to decline of an order rather than payments to priority creditors See CA response to the Insolvency Service 'Debt Relief Orders and the bankruptcy petition: Call for evidence', 21.

<sup>99</sup> The Money Advice Trust's submission to the 2014 review claimed that 'there are many instances where we have had clients who have applied for a DRO but have either been declined or have not gone ahead with their application because of issues such as preference payments....It seems unfair that some clients do not qualify for a DRO as a result of taking action (often entirely innocently) such as repaying a family member or friend before repaying creditors. We would expect most people would be likely to do the same in a similar situation.' Money Advice Trust, 'DROs and the Bankruptcy Petition Limit', 17.

<sup>100</sup> Contingent liabilities are not included, presumably because of the cost of assessing them.

<sup>101</sup> The Insolvency Service Intermediary Guidance indicates at 6 that the 'decision to revoke is discretionary and where the value of the property acquired is modest, the Official Receiver will not revoke for all cases where the applicant is open and honest and the value of the asset in question is less than £1000, provided that the total sum involved does not exceed 50% of the applicant's total liabilities'. However, if the debtor receives a lump sum 'which is associated with a permanent increase in income, bringing the applicant's surplus income to over £50 per month then this will lead to revocation.'" Ibid 7.



phone<sup>102</sup> and anecdotal commentary suggests that the actual experience of debtors with the Insolvency Service is less draconian than they feared<sup>103</sup>. In contrast, the bulk of investigation of a debtor in a DRO is undertaken by an approved intermediary. The DRO shifts the weight of investigation to the pre-filing stage and advisors will be careful to ensure accuracy since their client risks losing £90 if the strict criteria of the DRO are not met. Notwithstanding this pre-filing investigation by an approved intermediary an individual must wait a year before discharge. Sixth, a debtor's assets do not vest in a trustee in a DRO since by definition they have few assets. However the majority of bankrupts also have no or limited assets and a very small percentage of bankruptcies are likely to offer a dividend to creditors after payment of the OR administration fee. Seventh, the requirement of access to the DRO through a limited number of competent authorities with approved intermediaries, may increase access costs for individuals and be one reason for the failure of DRO numbers to meet government predictions. Finally, both bankruptcies and DROs will remain on a credit file for six years and will appear on the insolvency register.<sup>104</sup>

**Table 5: Comparison of Debt Relief Orders with Bankruptcy**

<b>Access online</b>	Yes	Yes
<b>Court application necessary</b>	No	No

<sup>102</sup> I D C Ramsay, 'A Tale of Two Debtors: Responding to the Shock of Over-indebtedness in France and England-A Story from the *Trente Piteuses* (202) 75(2) *MLR* 180, n168.

<sup>103</sup> See e.g. DD Wray, 'Here's what it's like to go bankrupt at 30' Buzzfeed [https://www.buzzfeed.com/danieldylanwray/heres-what-its-like-to-file-bankruptcy-at-30?utm\\_term=.brvAegVex#.njeB8K389](https://www.buzzfeed.com/danieldylanwray/heres-what-its-like-to-file-bankruptcy-at-30?utm_term=.brvAegVex#.njeB8K389) "My official receiver was great: She was kind and I felt she was going out of her way to help me rather than trip me up. The purpose of the interview with the official receiver is to work out how and why you got into the situation and to work out your current income and outgoings, with the idea that you may be assigned an income payment agreement (IPA) to continue to make reduced payments to your creditors (the people you owe money to).

Because I had continued to make all my repayments and had got into debt in a pretty traditional and genuine way, it seemed like I was in fairly good shape. The overwhelming feeling that soon took hold was that if you're not fraudulent and haven't simply taken out a massive loan, spent it, repaid nothing, and then declared bankruptcy, then you're generally going to be OK.'

<sup>104</sup> In the case of a DRO for a period of three months after completion of the DRO.

<b>Application through approved intermediary</b>	No	Yes
<b>Decision by Insolvency Service</b>	Yes	Yes
<b>Discharge period one year</b>	Yes	Yes
<b>Investigation of bankrupt?</b>	Post-bankruptcy	Pre-bankruptcy
<b>Restrictions on filing</b>		Once every 6 years
<b>Cost</b>	£680	£90
<b>Preference bar access</b>	No	Yes
<b>Sanction of behaviour</b>	Yes BRO	Yes DRO
<b>Trustee over property</b>	Yes	No
<b>Credit file</b>	6 years	6 years

The relevant Ministries argued that bankruptcy was a disproportionate remedy for lower income debtors. But in practice this conclusion appears questionable.

### **Summary**

The idea of bankruptcy simplification through an administrative No Income-No Asset Procedure is attractive as a method of minimizing the overall social costs of overindebtedness. This brief description of the English approach suggests that the actual implementation has resulted in legislation which is not as simple as proponents might have expected and represents a screening process at least as rigorous as bankruptcy for most debtors. The DRO, a process established for the ‘deserving poor’ seems to be more stringent than bankruptcy, raising questions about equality of access to debt relief. However, the increased costs of screening are borne by the Debt Advice sector, and the credit reference agencies, rather than the debtor or the Insolvency Service. Funding of the process is partly underwritten financially by creditors through the creditor levy which finances debt advice, and specialist Citizens Advice DRO unit. This role of creditors in funding the DRO is ironic in the light of the opposition to such an approach in the initial consultations on the DRO. The DRO is a form of public-private partnership in its delivery. If it is an effective system (little research exists on long term effects of the DRO ‘fresh start’) it is primarily because of the relatively well developed institutional structure of bankruptcy administration and debt advice in England and Wales.

The DRO process, although apparently simple, is suffused with law and continuing legal issues of interpretation, requiring legal knowledge. Intermediaries play a significant role in processing debtors in this administrative system and in the application and development of the legal provisions. They also provide legitimacy to the process. This article is not directed towards reform of the DRO but it could be a more effective and less costly remedy if the level of liabilities were substantially increased and access barred only where there was likelihood of a significant dividend to creditors.<sup>105</sup>

### **Part 5: Comparative Thoughts: administrative justice and US bankruptcy simplification**

In 2003 we highlighted the topic of ‘administrative versus judicialized systems for implementing law’,<sup>106</sup> as a topic in the comparative study of consumer bankruptcy. We suggested that future comparative research could attempt to explain why different systems for implementing consumer bankruptcy law have emerged in different countries, and to draw judgments about whether an administrative or judicialised system is most effective. Systems of debt relief for consumers are increasingly systems of administrative justice<sup>107</sup>, but this general description masks substantial differences in terms of the role of institutions and intermediaries, their origins, objectives and values. The over indebtedness commissions in France, composed of representatives of the central and local state, creditors and consumers, and managed by the Bank of France, are distinct in origin and operation to the Swedish enforcement office (the KFM), originally a tax collection agency, and now striving to balance increased productivity with more debt relief.<sup>108</sup>

Future comparative research might compare these systems within distinct models and normative ideals of administrative justice. The treatment of NINAs is a

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<sup>105</sup> Joe Spooner and I argued for this in the 2014 review. See I Ramsay & J Spooner, ‘Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit’ <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2601349](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2601349)>

<sup>106</sup> See J Niemi, I Ramsay & W Whitford (eds) *Consumer Bankruptcy in Global Perspective* (Hart, Oxford, 2003) 11.

<sup>107</sup> World Bank above n4 paras 161, 163.

<sup>108</sup> For a discussion of the development of the French system see Ramsay above n2 ch4 and for Sweden, ch5, 139. See also B Larsson & B Jacobsson, ‘Discretion in the ‘Backyard of Law: Case Handling of Debt Relief in Sweden’ (2013) 3(1) *Professions and Professionalism* 1.

useful site for research, since many proposals for NINA programmes assume an administrative model. Jerry Mashaw, in a study of the US disability entitlement programme, identified three models of administrative justice; bureaucratic rationality, professional treatment and moral judgment.<sup>109</sup> These ideals responded to different critiques of the US disability system—that it was inconsistent and poorly managed, that it failed to serve the client in providing rehabilitation, and that it operated unfairly without adequate attention to ‘due process’. These models are not mutually exclusive so that any administrative system may contain a combination of aspects of these models. Mashaw’s model permits analysis of potential trade-offs between normative values in an administrative system, and identification of the influence of different groups on a system. The English system of DROs represents a model of bureaucratic rationality, stressing the application of rules, driven by computerization, modestly tempered by professional treatment of debtors by the intermediaries.

At first sight the US model of consumer bankruptcy administration might not seem to fit the description of a system of administrative justice with its assumption of state administration, given the central role of courts, and the ‘primacy [of] lawyers rather than administrators’.<sup>110</sup> However, commentators recognize that the contemporary US system of consumer bankruptcy is *in fact* an administrative system. The ‘overwhelming majority of consumer bankruptcy cases are non-adversarial in nature’,<sup>111</sup> and this has been the case for ‘at least fifty years’.<sup>112</sup> Judges rarely deal with Chapter 7 cases which are processed in a routinized manner, often by para-legal staff.

The recognition of the administrative nature of US consumer bankruptcy raises the question of its relationship to Mashaw’s categories. Bureaucratic rationality motivated the continuing attempts since the 1930s to introduce an administrative

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<sup>109</sup> J. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven, Yale, 1983) 26 et seq. See an updated and modified model based on Mashaw in M. Adler, “A Socio-Legal Approach to Administrative Justice” (2003) 25 *Law & Policy* 323.

<sup>110</sup> D Skeel, *Debt’s Dominion: A History of Bankruptcy Law in America* (Princeton, Princeton U Press, 2004) 47

<sup>111</sup> *Id.* 1982.

<sup>112</sup> Littwin, above n 0, 2011 citing data which indicate that even after BAPCPA ‘Chapter 7 remains a non-adversarial process.’

agency to process consumer bankruptcies in the US<sup>113</sup>. In 1970 the National Bankruptcy Review Commission adopted the findings of the Brookings Commission that much of the bankruptcy system was in fact administrative rather than judicial in nature,<sup>114</sup> and that ‘there is no reason to involve judges in handling of papers and procedures for many thousands of cases in which no contest arises.’<sup>115</sup> The introduction of a Federal Bankruptcy Agency could process more swiftly the large number of uncontested cases, provide greater uniformity in administration, and offer budget and counselling services: debtors would not need legal representation within this system, substantially reducing bankruptcy costs. The idea of budget counselling intended to achieve better rehabilitation for debtors introduced an element of professional treatment, based on a model of the debtor as poor debt managers.<sup>116</sup>

The story of the political failure of these initiatives is well known. Bankruptcy judges and lawyers mounted a fierce opposition to the introduction of an administrative agency processing bankruptcies, evoking images of a “despot state”— a ‘huge bureaucracy with tentacles reaching into every area of the country and marked with all the weaknesses of inept officialism, expensive red tape and corruption’<sup>117</sup>. Creditors also opposed an administrative system fearing the possibility of a bankruptcy explosion. The success of lawyers in defeating the administrative agency concept represents the continuing historical influence of legal professionals on bankruptcy policymaking in the US. David Skeel argues that the early role of professional lawyers in bankruptcy administration in the US resulted in a path dependency, entrenching the role of lawyers and courts, which raised the

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<sup>113</sup> Littwin, n 2 1981-1986. The Brookings Commission described the administration of bankruptcy in 1964 as a ‘multimillion-dollar loosely connected structure’ which would benefit from greater administrative co-ordination’ D Stanley & M Girth, *Bankruptcy: Problem, Process, Reform* (Washington, DC, Brookings, 1971) 111.

<sup>114</sup> See Report of the Commission on the Bankruptcy Laws of the United States as summarized in (1973-74) 29 Bus Law 75, 88.

<sup>115</sup> *Id.* 89.

<sup>116</sup> The Bankruptcy Commission cited the Brookings study which concluded that the leading reason for bankruptcy was ‘poor debt management’. See Stanley & Girth (n111) 47.

<sup>117</sup> Asa Herzog a distinguished bankruptcy judge quoted in E Posner, ‘The Political Economy of the Bankruptcy Reform Act of 1978 (1997) *Michigan L Rev* 47,78.

political costs for subsequent attempts to introduce administrative regulation of bankruptcy procedures in the 1930s and the 1960s.<sup>118</sup>

The US is unlikely to adopt a model of public processing of debtors similar to England and Wales. However, this should not blind us to the fact that the US system is an administrative system, with the administrative infrastructure provided by lawyers, and para-legals, overseen by both the judiciary and the Federal Trustee service which now has extensive powers over the system.<sup>119</sup> The US system lacks the appearance of a centralized and unified ‘top-down’ government bureaucracy but remains a loosely structured ‘infrastructural power’, represented by ‘the positive capacity of the state to ‘penetrate civil society’ and implement policies throughout a given territory’, using private actors (for example Chapter 7 trustees) to achieve public objectives.<sup>120</sup> For example, the 2005 amendments to the BAPCPA harness the role of lawyers as gatekeepers, imposing penalties if they do not adequately monitor information provided by their client. Trends towards bureaucratic rationality may be accelerated by the increasing use of online technology. However, the existence of ‘local legal culture’<sup>121</sup> indicates that the US system does not fit snugly into a bureaucratic rationality model. Varying interpretations of appropriate professional treatment exist. Jean Braucher’s important study of US consumer bankruptcy lawyers demonstrated how lawyers’ financial interests and social

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<sup>118</sup> D Skeel, *Debt’s Dominion: A History of Bankruptcy Law in America* (Princeton, Princeton U Press, 2001) 43-47

<sup>119</sup> Ramsay n2, 62-66.

<sup>120</sup> William Novak, “The Myth of the Weak American State” (2008) 113 *The American Historical Review* 752, 763. Novak argues that historians have underestimated the important infrastructural role of the state in US history, because of the influence of European writers such as Max Weber who associated the modern state with ‘unification, centralization, rationalization, organization, administration and bureaucratization’. Novak argues that although the US state may appear dispersed and disorganized, perhaps deliberately to avoid becoming a “despot state”, it has significant ‘infrastructural power’. W Novak, ‘The Myth of the weak American state’ (2008) 113 *The American Historical Review* 752.

<sup>121</sup> ‘[S]ystematic and persistent variations in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials in a particular locality and differing in identifiable ways from the practices, perceptions, and expectations existing in other localities subject to the same or a similar formal regime.’ See T Sullivan, E Warren & J Westbrook, ‘Consumer Bankruptcy in the United States: A Study of Alleged Abuse and of Local Legal Culture’ (1997) 20 *Journal of Consumer Policy* 223, 244.

attitudes affected their advice and that varied models of client counselling existed<sup>122</sup>. She found that some lawyers played ‘the role of a helping professional, part teacher, part social worker, part financial adviser’; some saw their role as a consumer advocate.<sup>123</sup>

Intermediaries in this system might be analogized to ‘street level bureaucrats’<sup>124</sup> who have a level of discretion in the implementation of law and policy: their interpretation may be the policy.<sup>125</sup> While the concept of the street level bureaucrat was coined to describe intermediaries in public services addressing problems between the individual and the state, it might be extended to consumer bankruptcy practice which is often a high volume and routinized procedure.

Angela Littwin, recognizing the administrative nature of the US bankruptcy system, argues that unlike other redistributive programmes in the US, such as the ‘Kafkaesque’ social security administration, consumer bankruptcy administration represents an effective system because of ‘the existence of the paid bar, strong bankruptcy judges and the prestige associated with the corporate bar’.<sup>126</sup> Procedural barriers, unmet legal needs and poor quality decision making characterize social security administration in the US. In contrast, she argues that bankruptcy administration is characterized by high quality decision makers, and the benefits of paid professionals. Lawyers act as consumer advocates, lobbyists for the system, and represent a professional corps which sustains the workability of the bankruptcy system.<sup>127</sup> She points, for example, to the Bankruptcy Rules Committee where bankruptcy lawyers and judges ironed out potential problems in the implementation of BAPCPA.

Littwin’s arguments concerning US consumer bankruptcy administration underline three points for future comparative analysis. First, the institutional structure

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<sup>122</sup> See J Braucher, ‘Lawyers and Consumer Bankruptcy: One Code, Many Cultures’ (1993) 67 *Am Bankr L J* 501.

<sup>123</sup> *Id*

<sup>124</sup> See M Lipsky, *Street-level Bureaucracy: Dilemmas of the Individual in Public Services*. (New York, NY: Russell Sage Foundation, 1980).

<sup>125</sup> See S Laws ‘What is Owed: Debt: Bankruptcy and American Citizenship’ PhD thesis, Univ of Minnesota, 2011) suggesting that Chapter 7 trustees might be conceptualized as street level bureaucrats.

<sup>126</sup> Littwin (n6)1988.

<sup>127</sup> *Id* 2009-2022.

of consumer bankruptcy is a key aspect in determining the credibility and legitimacy of the system. Second, both the English DRO and US bankruptcy system harness civil society actors in bankruptcy administration. Third, intermediaries play a key role in both systems. The English experience suggests that even with bankruptcy simplification, intermediaries make the system work more effectively and ensure its credibility.<sup>128</sup> Citizens Advice functions in England and Wales as a lawyer, debt advisor, emotional supporter and processor for clients.<sup>129</sup> Debt problems are complex requiring a knowledge of bankruptcy law, consumer law, social security, housing law and budgeting.<sup>130</sup> Citizens Advice also acts as a lobbyist for change in the interests of debtors using sample cases to develop policy briefs on many topics. It participates in discussions on rule development through the intermediary guidance process. It thus appears to perform similar functions to private lawyers, judges and their organizations in the US. An empirical study of the quality of decision making by private lawyers and Citizens Advice agencies in relation to debt concluded that debt advisers in Citizens Advice were operating at a higher level of quality than private lawyers.<sup>131</sup> Social support programmes in the UK have also become stigmatized as residual, means tested institutions with similar stories of Kafkaesque bureaucracies,<sup>132</sup> but accessing administrative debt relief does not seem to be viewed in this light by its users who generally praise the role of Citizens Advice and the Insolvency Service.

These observations suggest the value of further comparative analysis of consumer bankruptcy systems as systems of administrative justice. Comparative institutional analysis of the law in action might puncture myths, undermine simple comparisons between private and public systems, and heighten understanding.

## **CONCLUSION**

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<sup>128</sup> And see comments of Jay Westbrook on the need for lawyers in the US system. J Westbrook, "The Retreat of American Bankruptcy Law" (2017) 17 *QUT LRev.* 40, 56.

<sup>129</sup> See e.g. S Kirwan, "Advice on the Law but not legal advice so much": Weaving Law and Life into Debt Advice" in S Kirwan (ed) *Advising in Austerity: reflections on challenging times for advice agencies* (Bristol, Policy Press, 2017) 147-155.

<sup>130</sup> See e.g. the topics covered in Child Poverty Action Group, *Debt Advice Handbook* (11<sup>th</sup> edition, 2015).

<sup>131</sup> R Moorhead et al, 'Contesting Professionalism: Legal Aid and NonLawyers in England and Wales (2003) 37 *Law and Society Rev* 765, 796

<sup>132</sup> Epitomised in the film *I Daniel Blake* (2016).



This paper outlined the response of one jurisdiction to addressing the issue of the NINA or LILA debtor. The cautious English approach increased the costs of the process although they were masked by being borne by intermediaries rather than debtors. The English approach illustrates Jay Westbrook's caveat that although bankruptcy simplification is desirable, the moral ambiguity of bankruptcy often 'causes lawmakers to fill it with exceptions and qualifications'<sup>133</sup> leading to greater complexity and the consequent need for trained intermediaries, such as lawyers in the US system.

Further comparative analysis of the institutional administration of consumer bankruptcies and its financing, should permit more generalization about why particular bankruptcy institutions emerge and change, the influence of different groups over this structure and the relative role of a variety of intermediaries--- lawyers, accountants, debt advice agencies—in ensuring the effectiveness of these bankruptcy systems. Existing institutional structures in those countries with established bankruptcy systems are likely to have a patterning effect on any future reforms to address NINA or LILA debtors. Law reform projects in those jurisdictions which propose to introduce individual bankruptcy laws need also pay close attention to the importance of institutional structure in any transplantation of ideas, such as “No Asset Procedures”.

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<sup>133</sup> n122, 56.

## Annex

Figure 1: Bankruptcy, IVAs, (1999-2017), Debt Relief Orders (2009-2017)



**Table 1: Main Competent Authorities and approved intermediaries 2013-14**

Competent Authority	No of intermediaries	No of DRO apps
Citizens Advice	1337 (72%)	14520 (53%)
Institute of Money Advisers	287 (16%)	3703(14%)
National Debtline	12 (1%)	1227 (4%)
Payplan	12(1%)	269 (1%)
Stepchange Debt Charity	31(2%)	4962 (18%)
Christians against Poverty	7 (0.4)	1097 (4%)
Other	165 (9%)	1547 (6%)
Total	1851	27329

**Table 2: Causes of Bankruptcy as recorded by Official Receiver 2015**

	Non-Trading Cases (n=11095) %	All cases (n=14905)%
Business Related Failure	--	25
Living Beyond Means	19	14
Relationship Breakdown	16	12
Loss of Employment	12	9
Illness/Accident	11	8
Reduction in household	24	18

income		
Speculation	1	1
Other	17	13

In 955 cases the cause was recorded as 'unknown/non-surrender'. These cases are not included in the Table.

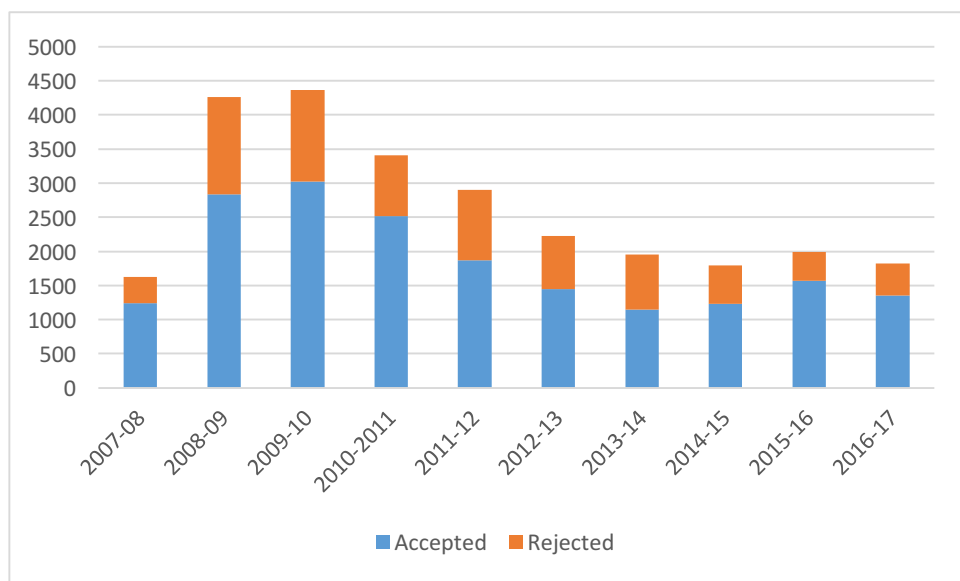
**Source: Insolvency Service, Bankruptcies by age gender and cause of insolvency 2015** (<https://www.gov.uk/government/statistics/individual-insolvencies-by-location-age-and-gender-england-and-wales-2015>) (last accessed 19/12/2016)

**Table 3: Causes of DRO: 2015**

Business failure	180	0.74
Illness /Accident	5540	22.9
Increase in expense	2885	11.9
Living Beyond Means	3760	15.5
Loss of employment	2795	11.5
Relationship Breakdown	3430	14.8
Reduction in household income	8080	33.3
Other	1595	6.5
Unknown	225	0.9

N cases =24175, multiple causes cited in some cases. Source Insolvency Service

**Table 4: Accepted and Rejected Files NZ No Asset Procedure 2007-2017**



Source: NZ Insolvency and Trustee Service  
<https://www.insolvency.govt.nz/support/about/statistics/statistical-data-reports/>



