Money Advice and Budgeting Service

Personal Insolvency Bill

Submission to the Department of Justice and Equality - CONFIDENTIAL
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Executive Summary

In drafting this submission, we have endeavoured to view the draft legislation from our clients’ perspective and, from there, proposed a response which we believe will enhance the efficacy of the new structure, particularly for the most vulnerable of debtors.

This response includes the following recommendations:

→ Incentives for the creditor and debtor to engage with the process in a holistic way which takes cognisance of the overall circumstances of the debtor.

→ That Guidelines relating to essential income and expenditures are drafted with reference to the large body of research in this area, not least that carried out by the Vincentian Partnership, Social Justice Ireland, and the ESRI, to ensure a suitable level of income is retained by the debtor.

→ That debtors participating in any proposed arrangement are not precluded from accessing financial products as a result of such participation.

→ Greater, non-judicial, right of appeal for debtors.

→ Amendment of debt thresholds generally, with particular focus on the minimum threshold in respect of Debt Settlement Arrangements, to ensure that arrangements are available to those who most require them.

→ That a timeframe be introduced for the agreement of a valuation of assets to prevent unnecessary delays to accessing arrangements.

→ Greater clarity to be provided on the inclusion of utility debts, and the introduction of Guidelines and Codes of Conduct by the Commission for Energy Regulation to ensure debtors maintain a continuous supply of essential utilities.

→ Clarity on the criteria applied when determining residency status, with reference to either tax residency or Habitual Residency Condition.

→ Confirmation that local authority rent and mortgage debts will be included in the proposed arrangements.

→ Clarity re definition of “household goods”, with possible widening of threshold for self-employed debtors.

→ Clarity in respect of remuneration for Personal Insolvency Trustees, and possible reduction in the administration fee for a Debt Relief Certificate.

→ Synopsis and critique of each proposed arrangement with focus on the impact this will have for MABS clients and other over-indebted borrowers, with a proposal that lenders and borrowers be required to engage in a voluntary process prior to accessing statutory arrangements.

→ Proposal that a review of the efficacy of the legislation in respect of Personal Insolvency Arrangements be undertaken annually, at least while the operation of the legislation is “bedding down”.

→ Submission in respect of the potential role for MABS within the proposed structure.
Introduction

MABS has long advocated for a non-judicial debt settlement and views the publication of the Heads of Bill as a positive step in this regard, however there are many wide-ranging issues which await the publication of Guidelines, Codes and Statutory Instruments, the content of which will have a significant impact on the debtor’s experience in engaging with these processes. Without sight of drafts of these documents, we must raise serious concerns in respect of the proposed application of the legislation.

General Overview

While much in the draft legislation is to be welcomed, the focus must be on rehabilitation of the debtor and enabling him / her to participate in society in a relatively short timeframe, rather than on punishing a debtor for accruing debt.

The success of the proposed legislation will be wholly dependent on the full engagement of both the lender and borrower in the process. While lenders will have various opportunities to object to proposals made, to veto arrangements and to bring action against borrowers for the offences provided for in the draft legislation, there is little recourse for borrowers who are unfairly treated. Monitoring of the behaviour of lenders in this new system will be necessary to ensure that fair and sustainable arrangements are not unduly rejected, moral hazard on the part of the lender is avoided and that the borrower is not forced to enter into more protracted proceedings. It is to be hoped that all lenders will embrace this new architecture, seeking to work with borrowers to achieve workable solutions.

The Client

The Central Statistics Office (CSO) figures for 2009 (Statistical Yearbook 2011) show that 14.1% of the population were at risk of poverty and a further 5.5% were in consistent poverty. To break these figures down further, the unemployment rate in 2009 was 11.8% (seasonally adjusted), of which 24.8% were at risk of poverty (with 11.5% in consistent poverty). Of those in employment, 5.5% were at risk of poverty (with 1.1% in consistent poverty). Accordingly, with a population of approximately 4,459,000 in 2009, 628,719 people were at risk of poverty, of which 130,488 were unemployed and 102,245 were “working poor”.

Holistic Approach

Based on two decades of working with those who find themselves over indebted, our considerable experience advises that all initiatives to resolve problem debt must be client-centred and holistic. Sustainable arrangements for the paying down of debt must take account of the whole situation of the client: all debt, all income, all outgoings. Any methodology which selects debt on the basis of type or of lender will make it harder for the borrower to achieve and maintain a workable arrangement across his whole range of commitments and increase the complexity of the process.

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2 It should be noted that, according to the EU-SILC these figures have increased for 2010 to 15.8% and 6.2% respectively, with 22.5% at the deprivation rate.
3 Based on International Labour Office criteria, not Live Register numbers
The absence of a holistic approach in the proposed scheme has potentially serious consequences for
the client as the failure of any of the proposed arrangements is recorded on a register held by the
Insolvency Service for 3 to 5 years and could have a negative impact on the borrower’s ability to
obtain any future credit or access financial services, which is at odds with the National Strategy for
Financial Inclusion.

Minimum Income Standards
The legislation refers in a number of places to sufficient income. While we acknowledge the
recommendation, in Part 8 of the Heads of Bill, to the Insolvency Service referencing the National
Anti-Poverty Strategy and National Action Plan for Social Inclusion, the Basic Supplementary Welfare
calculation and the need to incentivise debtors to seek and maintain employment, we refer to the
work carried out in this area by the Vincentian Partnership for Social Justice\(^4\), Social Justice Ireland\(^5\)
and the European Anti-Poverty Network\(^6\) which provides in-depth analysis and commentary on the
inadequacy of income in various households including the working poor, and submit that both the
Insolvency Service and the credit industry be placed under an obligation to ensure that borrowers
availing of one of these arrangements continue to have sufficient resources available to them to
meet their everyday living costs, as well as direct a small amount toward savings to assist with
unexpected emergencies and/or life events.

Financial Exclusion
A 2011 ESRI report\(^7\) considered the liquidity of a household (i.e. when asked “Can your household
afford an unexpected expense of €985\(^8\) without borrowing? the response is “That the household is
unable to remedy the situation by recourse to (financial and non-financial) assets...” – Davydoff et al.
2008). Of those households surveyed, 67.9% of the households in the bottom quintile responded no
to this question. Furthermore, there was found to be a high overlap (97%) between those in
persistent arrears and those unable to raise such contingency funds.

The above indicates the need for a level of contingency/emergency fund for over-indebted
households which is currently lacking in the Irish market. Accordingly, when considering applications
for any of the mechanisms proposed by the Heads of Bill, care must be taken to ensure that these
over-indebted households are not barred from obtaining emergency credit from reputable sources,
forcing them to seek high-cost loans from moneylenders, both legal and illegal, again contrary to the
National Strategy for Financial Inclusion.

Asset Valuations
On the matter of valuation of assets, the legislation recommends reverting to an independent valuer
only in the event of dispute. We would be concerned that this could be used to delay access to an
arrangement and suggest that a time limit of 30 days be applied before referral to a professional
valuer for determination.

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\(^4\) A Minimum Income Standard for Ireland, 2012
\(^5\) Policy Briefing – Poverty and Income Distribution, January 2011
\(^6\) Measuring Inequality in Ireland and the EU
\(^7\) Financial Exclusion and Over-indebtedness in Irish Households, Helen Russell, Bertrand Maitre and Nora
Donnelly, ESRI, 2011
\(^8\) This figure was increased during the seminar launching this research to €1,085.
Utility Debts

The proposed legislation includes ‘utilities’ in the list of eligible debts for consideration for a Debt Relief Certificate application. With electricity and gas disconnections reaching 17,794 in 2011\textsuperscript{9}, the highest since 2007, and 315,000 ESB customers on “special arrangements” in the same period, further detail will be required on the level of utility debt which may be considered supported by regulations issued by the Commission for Energy Regulation to ensure that participation in such a scheme will not preclude the debtor from continuous supply of essential utilities.

Residency

The matter of residency of the borrower is yet to be clarified, as to whether that is with reference to the Habitual Residency Condition for social welfare payments or to the residency criteria for tax purposes. A person is resident in Ireland for tax purposes if the spend 183 days or 280 days over two years (minimum of 30 days in each year) in Ireland. The burden of proof is far higher in relation to the Habitual Residency Condition which is determined by five criteria, namely:

1. The length and continuity of living in the State or another country;
2. The length and reasons for any absences in the State;
3. The nature and pattern of the person’s employment;
4. The person’s main centre of interest (i.e. where the person has close family ties or an established business interest); and
5. The future intentions of the person applying for the social welfare scheme.

Local Authority Rent / Mortgage Arrears

There is no explicit provision within the proposed legislation for dealing with local authority rent or mortgage arrears. Local authority mortgage arrears hit an average of 22.4% in 2010 (an increase from an average of 16.5% in 2009), an average of 87.7% of which were outstanding by more than 3 months. Local authority rent arrears are also showing an increase to an average of 11.53% in 2010 (an increase from an average of 10.9% in 2009), with an average of 71.7% in excess of 12 weeks\textsuperscript{10}.

With those qualifying for local authority loans and tenancies being those in the bottom income deciles, some provision must be made to ensure that they have an equal right to access the mechanisms provided for in the draft legislation.

Right of Appeal

The legislation proposed secures many rights for the lender, including in certain instances the right of veto. There is little protection for the borrower, nor a mechanism through which he may appeal, save during the Personal Insolvency Arrangement application, where the borrower has a right of appeal to the Circuit Court. Such a situation raises questions of balance of power, particularly in light of the research carried out by FLAC in 2009\textsuperscript{11} and based on interviews carried out with MABS clients which found that over-indebted borrowers were reluctant to attend court due to lack of awareness and understanding of the documents and procedures, fear of the process, significant cost implications and lack of availability of appropriate advocacy support, such as that provided in criminal proceedings by the Legal Aid Board.

\textsuperscript{9} Electricity and Gas Customer Disconnections Report, January – December 2011, CER
\textsuperscript{10} \url{http://www.lgmsb.ie/Upload/documents/Final_SI_Report_2010%20for%20website.pdf}
\textsuperscript{11} To No One’s Credit, FLAC, 2009
We would further suggest in respect of secured creditors that, where such creditors unreasonably withhold consent to an arrangement, evidence to this effect be admissible in court and sanctions imposed should proceedings for possession be taken against the borrower.

The rationale for having recourse only to the courts in a system of non-judicial debt settlement is also questionable, and we would submit that the Insolvency Service should have a role in dispute resolution at least at the early stages of the process.

*Debt Thresholds*

The latest statistics from the Central Bank of Ireland indicate that Irish households owe in excess of €29.8 billion in respect of non-mortgage debt, and in excess of €80.3 billion in mortgage loans. With this in mind, we would query the appropriateness of the debt thresholds used to determine availability of any of the options proposed. In particular, the levels of debt, assets and income proposed for attaining a Debt Relief Certificate are prohibitively restrictive when one considers that only an estimated 14% of the current MABS active caseload would qualify for this arrangement\(^{12}\). This restriction creates further difficulties when considered in light of the minimum debt threshold for access to a Debt Settlement Arrangement, thereby creating a potential lacuna for borrowers who may be able to make some small repayment, but who are precluded from doing so within the proposed structures. We would also suggest that any threshold amount be index-linked to make provision for inflation / deflation rates.

We would further suggest that, rather than the existence or otherwise of secured debt being a determining factor in participation in a particular scheme, that it would be more appropriate to amend the debt thresholds.

*Household Goods*

We note that the definition of household goods in the proposed legislation is analogous to that set out in the Bankruptcy Act, 1988, and would welcome greater clarity on what constitutes household goods for this purpose.

*Cost*

It would appear that all of these arrangements will carry a financial cost, such as the €90 for the Debt Relief Certificate and the likely costs of availing of the services of a Personal Insolvency Trustee, that to be determined with reference to Guidelines and Codes of Practice to be drafted by the Insolvency Service. Further, as described above, asset valuation will also carry a cost. We would question a system of front-loading costs on a distressed borrower as part of a debt settlement process and submit that this will act as a deterrent to availing of these arrangements.

With particular reference to applicants for a Debt Relief Certificate, we would suggest that the €90 administrative fee be reduced to a sum below the monthly disposable income threshold of €60.

\(^{12}\) MABS National Development Limited
The Options

While some over-indebted consumers may choose not to avail of the mechanisms outlined in the proposed legislation, their inclusion provides a borrower with a suite of available options for dealing with their debt difficulties (see Fig.1).

Figure 1 - Borrower's Options once Legislation Passed

However care must be taken by advisors, intermediaries and Personal Insolvency Trustees to ensure that each of these options is properly explained to a borrower in consideration of their individual circumstances (see Fig.2), and that the borrower remains fully informed of any potential consequences of entering into any formal debt settlement mechanism.

In order to inform our deliberations on the suitability of the proposed mechanisms for MABS clients and any potential role for MABS money advice staff, we have endeavoured to critically assess each of the proposed options, having regard to the foregoing considerations contained in this paper.
<table>
<thead>
<tr>
<th>Voluntary Arrangement</th>
<th>Debt Relief Certificate</th>
<th>Debt Settlement Arrangement</th>
<th>Personal Insolvency Arrangement</th>
<th>Bankruptcy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Debt Threshold</td>
<td>None</td>
<td>€20,001 and above</td>
<td>€20,001 to €3 million</td>
<td>€20,001 and above</td>
</tr>
<tr>
<td>Who makes the</td>
<td>Self Help, through MABS</td>
<td>Approved Intermediary</td>
<td>Personal Insolvency Trustee</td>
<td>Application to Court by debtor, creditor or Personal Insolvency Trustee</td>
</tr>
<tr>
<td>application</td>
<td>or other intermediary</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Protected Income</td>
<td>No</td>
<td>Only available to debtors</td>
<td>Essential Income Calculation</td>
<td>Essential Income Calculation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>with disposable income of</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>€60 or less per month</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Secured Debts</td>
<td>Yes – voluntary basis</td>
<td>No – Only available to</td>
<td>No – voluntary arrangements for secured debts</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td>debtors with minimal assets</td>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td>Creditors’ Right to Veto</td>
<td>Yes - creditor by creditor basis</td>
<td>Yes – may object during moratorium period</td>
<td>Yes – 65% in value of votes</td>
<td>Yes – on application to Court</td>
</tr>
<tr>
<td>Debtor’s Right to Veto</td>
<td>Yes – should debtor choose not to engage</td>
<td>No</td>
<td>No</td>
<td>Yes – on application to Court</td>
</tr>
<tr>
<td>Moratorium / Protection Period</td>
<td>No</td>
<td>1 year moratorium, possible extension for further 3 months</td>
<td>Protective Certificate for 30 days</td>
<td>Protective Certificate for min.40, max.60 working days</td>
</tr>
<tr>
<td>Duration</td>
<td>Not specified</td>
<td>Indefinite</td>
<td>Max.5 years, possible extension to 6 years</td>
<td>Max.6.6 years, possible extension to 7 years</td>
</tr>
<tr>
<td>Multiple Applications</td>
<td>Yes</td>
<td>6 years</td>
<td>10 years</td>
<td>3 years, possible extension to 8 years</td>
</tr>
<tr>
<td>Cost to Debtor</td>
<td>No, through MABS</td>
<td>€90 flat rate</td>
<td>Unspecified</td>
<td>Unspecified</td>
</tr>
<tr>
<td>Role of Money Adviser</td>
<td>Advocate, Adviser and intermediary</td>
<td>Adviser and intermediary, potential role in the development of SFS</td>
<td>Adviser and intermediary, potential role in the development of SFS</td>
<td>Adviser and intermediary, potential role in the development of SFS</td>
</tr>
<tr>
<td>Role of PIT</td>
<td>None</td>
<td>None – Approved intermediary only</td>
<td>In-depth</td>
<td>In-depth</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Limited functions</td>
</tr>
</tbody>
</table>
Voluntary Arrangements

Once the pros and cons of each option are explained to debtors, it is possible that many will opt to enter into a voluntary arrangement with their creditors (as in the case in the UK where the level of formal insolvency arrangements is decreasing\(^\text{13}\)). In these circumstances, creditors must be encouraged and incentivised to work with their borrowers to come to affordable, sustainable arrangements which, should circumstances warrant, may result in the settlement of a portion of the debt after a sustained repayment period and, in this regard, we refer to the Debt Settlement Pilot (the Pilot) operated by MABS, with the assistance of FLAC, and the Irish Bankers Federation in 2002 (see Figure 3).

The main feature of the Pilot was a voluntary, out of court arrangement dealing with secured and unsecured credit debt. It was an alternative to the Irish legal system of debt enforcement which can be expensive, stressful and time consuming, often producing outcomes which are unsatisfactory to the creditor and the debtor. The Pilot was designed to assist the heavily over-indebted who, in the normal course of events, would be paying back borrowings with no end in sight. It aimed at rehabilitating the debtor and, in common with other countries, (once rehabilitated) also aimed to enable debtors to participate again in economic life.

Figure 3 – Features of the Debt Settlement Pilot

**Innovative Features:**

The scheme introduced a range of innovative features common in other countries but not available in Ireland such as:

1. an agreed out of court debt settlement process
2. an arbitration mechanism for dispute resolution
3. a finite period for an agreed debt repayment programme,
4. a suspension of interest and other charges
5. the inclusion of a Fresh Start Principle.
6. the debtor’s principal private residence is secured against enforced sale or repossession.
7. it addressed the overindebtedness of the consumer in its entirety

**Objectives:**

The debt settlement Pilot was set up to:

- Help debtors to address the problem of their debt and, with the assistance of MABS personnel, to mediate an affordable repayment plan avoiding an ongoing unrealistic repayment arrangement.
- Achieve out of court solutions and prevent possible imprisonment
- Apply the concept of income retention and that this should amount to more than a basis for mere survival.
- Assist the debtor and all creditors to reach agreement in an non adversarial manner
- Use the principle of full disclosure in arriving at affordable and sustainable agreements
- Assist the debtor by applying the principle of fresh start so removing the burden of debt where the possibility of repaying the full debt over a reasonable period is impossible and a poor quality of life is foreseen long term.
- Protect the principal private residence, where owned, against enforced sale or repossession.

\(^{13}\) [www.insolvencydirect.bis.gov.uk/otherinformation/statistics/201202/index.htm](http://www.insolvencydirect.bis.gov.uk/otherinformation/statistics/201202/index.htm)
In this regard, we refer to the recommendation of the Law Reform Commission\(^\text{14}\) of the introduction of a “pre-action protocol” in proceedings against debtors which obliges both creditors and debtors to consider engaging in an arrangement or voluntary debt management plan prior to a petition for bankruptcy, and suggest that such a protocol be included in the draft legislation to ensure that creditors and debtors attempt to come to a realistic, affordable and sustainable repayment plan for the repayment of debt prior to engaging with the statutory arrangements.

**Debt Relief Certificates**

As mentioned above, the proposed eligibility criteria are prohibitively restrictive, even with 69% of MABS clients being social welfare dependent, only an estimated 14% of this cohort is likely to be eligible for a Debt Relief Certificate, due in no small part to the fact that 48% of MABS clients are living in mortgaged accommodation.

We would also query how the net disposable income figure of €60 was determined, particularly as it takes no account of household size (i.e. a single person living at home has the same disposable income threshold as a single mother in rented accommodation). While we and other stakeholders are aware of many households who would fall below this amount, there are many who would not prior to making debt-payment provisions. Furthermore, the inclusion of “periodic payment orders” in the list of excluded debt prefers creditors who have obtained an instalment order over other types of creditor, without reference to a review of the sustainability of any such instalment order. This preferential treatment may cause creditors to seek instalment orders where arrangements are currently in place to ensure their debt is excluded from this mechanism.

It is MABS’ experience that clients want to repay their debts so as to maintain a line of emergency or contingency credit. While a Debt Relief Certificate is commendable in its intention to provide a reprieve for the “no income, no asset” debtor (as provided for in the Law Reform Commission’s Final Report, December 2010), there is no mechanism for those debtors who wish to make some repayment, however small but who do not meet the minimum debt threshold for participation in a Debt Settlement Arrangement.

With regard to the “assets” referred to in the eligibility criteria, clarity is required as to whether credit union shares would be included in this definition as, for most MABS clients with a credit union personal loan, these are not accessible by the debtor. Furthermore, we would submit that the value of €1,200 is too low for a vehicle, particularly where that vehicle is required for the debtor’s work, as a car of that value would be quite old and potentially require greater levels of maintenance and carry higher tax, than that of a higher value.

While there is a prohibition on a creditor bringing legal action against a debtor during the moratorium period, there is nothing preventing them continuing to contact the debtor for payment of the debt. With many MABS clients suffering harassment for the payment of debts, we would be concerned that the moratorium does not provide adequate protection.

**Debt Settlement Arrangements**

A consideration of MABS’ clients in light of the eligibility criteria for a Debt Settlement Arrangement suggests that only an estimated 18% would qualify for this option, primarily due to the high

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\(^{14}\) Personal Debt Management and Debt Enforcement Final Report, December 2010, pg.152
minimum debt threshold. Where borrowers do not satisfy the restrictive disposable income threshold for access to a Debt Relief Certificate, they should not be precluded from availing of a Debt Settlement Arrangement as an alternative option.

The act of making an application for a Debt Settlement Arrangement is described in the draft legislation as an act of bankruptcy for the purpose of the Bankruptcy Act, 1988, on foot of which a bankruptcy petition may be brought. We would submit that this would act as a significant deterrent to those whose contracts of employment may be terminated in the event of bankruptcy, such as public sector workers, Gardai, solicitors, accountants and some bank employees.

Creditors to which a Debt Settlement Arrangement may apply are afforded a right of veto of 65% in value of votes. It is unclear from the draft legislation how those votes are allocated and, while we presume that the creditor with the largest debt will receive the largest amount of votes, would welcome clarification in this area.

While secured debts do not form part of a Debt Settlement Arrangement, it is possible that a debtor participating in this process will have a mortgage or other secured debt. This raises the question as to how secured debts are to be prioritised when considered in light of those to which a Debt Settlement Arrangement applies.

Similar to the above, while there is a prohibition on a creditor bringing legal action against a debtor during the period that the protective certificate is in place, there is nothing preventing them continuing to contact the debtor for payment of the debt. With many MABS clients suffering harassment for the payment of debts, we would be concerned that the protective certificate does not provide adequate protection.

Personal Insolvency Arrangements
As 48% of MABS clients are currently mortgaged, with many experiencing difficulty with their mortgages, we welcome the inclusion of secured debt in the proposed legislation as a mechanism for dealing with the client’s circumstances holistically in the event of problem secured and unsecured debt. However, we are particularly concerned about the inclusion of judgement mortgages in the definition of secured debt as this may encourage unsecured creditors to bring legal proceedings against their debtors to secure the judgement against their property. In fact, anecdotal evidence from MABS staff supports this and suggests that some creditors have brought such action, even where agreed repayments are in place, as a result of the publication of the draft legislation. Accordingly, we would submit that were the inclusion of judgement mortgage creditors to remain, that the registration period be extended from three months to two years prior to the date the application for a personal insolvency arrangement is made.

Similar to the above, creditors to which a Personal Insolvency Arrangement may apply are afforded an overall right of veto of 65% in value of votes, with a 75% right in favour of secured creditors and 55% for unsecured creditors. Clarity is required in respect of how the value of votes is calculated.

The proposed legislation also allows for secured creditors to determine, after the personal insolvency arrangement has ended, how any shortfall will be treated. While we acknowledge the need to prevent “moral hazard” in respect of mortgage debt, the application process for a personal insolvency arrangement should be sufficiently robust to establish cases of unsustainable mortgages
(and, in fact, there is an obligation on the part of the Personal Insolvency Trustee to advise in this regard) and to make some provision for write-down of the debt.

Again, while there is a prohibition on a creditor bringing legal action against a debtor during the period that the protective certificate is in place, there is nothing preventing them continuing to contact the debtor for payment of the debt. With many MABS clients suffering harassment for the payment of debts, we would be concerned that the protective certificate does not provide adequate protection.

As mentioned above, the only right of recourse the borrower has in any of the proposed arrangements, is to the Circuit Court on a Personal Insolvency Arrangement application. This is not only costly for the debtor, but would seem inappropriate in a non-judicial debt settlement mechanism.

Finally, it is envisaged that the Minister will review the efficacy of the Personal Insolvency Arrangements after 10 years. We submit that, particularly while the legislation is in its infancy, such reviews should be carried out annually to ensure compliance by creditors, debtors and Personal Insolvency Trustees with the obligations attaching to their respective roles in such arrangements, and also to establish a picture of the profiles and perspectives of the debtor in going through this process.

**Bankruptcy**

While currently outside the remit of MABS, were MABS to engage as Personal Insolvency Trustee, we would be obliged to provide advice to debtors of their available options, including Bankruptcy, and for that reason we raise the following by way of a limited submission in this regard:

a) We would submit that the proposed threshold for retention of household goods and tools of the debtor’s trade etc., be increased from €5,000 to €10,000 as, depending on the nature of the self-employment, the debtor may require a vehicle and heavy machinery which would cost in excess of the proposed amount.

b) We welcome the reduction in the period for automatic discharge from bankruptcy, however we submit that the potential additional period of five years attachment of earnings is excessively punitive, and may preclude the debtor from participating meaningfully in society.

c) The right of objection by a creditor to a debtor’s discharge from bankruptcy must be subject to clearly defined parameters and not open-ended on the basis of a subjective definition of “wrongful conduct”.

**Standard Financial Statement**

Applications of the proposed arrangements are primarily based on a client’s Standard Financial Statement which includes a declaration that the borrower “has never previously been insolvent and has never made arrangements with creditors and has never been involved in any court proceedings.” Many, if not most, over-indebted consumers anxiously awaiting the passing of this legislation (and indeed all MABS clients) would not be in a position to make the above declaration on the grounds that they have already made arrangements with their creditors on the basis of their inability to pay.
their debts as they fell due and, in some cases, their creditor(s) have obtained a judgement for monies due.

**The Personal Insolvency Trustee**

There is no detail as to the remuneration structure for the Personal Insolvency Trustee. This role is critical, and how the fees associated with this service are to be calculated is of great importance. If the fee is to be commission-based, the Personal Insolvency Trustee may be incentivised to seek greater levels of recovery of the debt on behalf of the lender, perhaps to the detriment of the borrower. The fee for the Personal Insolvency Trustee must be calculated so that it is not linked to the value of the debt recovered, as this may also preclude those who are most vulnerable, who cannot afford high level payments, from accessing any arrangement administered by a Personal Insolvency Trustee, thereby creating a market gap.

Furthermore, the process followed by a Personal Insolvency Trustee, the criteria applied in making proposals, any affiliation or connection with any lending institution, must be transparent and defined by Codes of Conduct developed by the Insolvency Service.

There is no detail as to the qualifications necessary for the role of the Personal Insolvency Trustee. We would contend that there is a need for strict regulation and licensing in this regard, to ensure that both the borrower and the lender may trust in the integrity of the post.

**Proposed Role for MABS**

It is possible that MABS will have a number of distinct roles following the introduction of the legislation; the current role in negotiating voluntary arrangements both as a solution in its own right and as a supplementary solution for borrowers who have been denied a Debt Settlement Arrangement or Personal Insolvency Arrangement and who are reluctant to engage in the Bankruptcy process; the processing of Debt Relief Certificates as an approved intermediary; and the possibility of providing Personal Insolvency Trustee services in our own right.

**MABS and Voluntary Arrangements**

MABS, as the only free, independent and confidential service in the State providing support to overindebted borrowers has a long and successful history in negotiating realistic and affordable payment arrangements on behalf of its clients. Our success is demonstrated by the sustainability of those arrangements and the consistent empowerment of our clients to engage in a meaningful way with their creditors.

Building on this experience MABS NDL has been instrumental in the development of protocols across the credit industry, and the negotiation of robust consumer protection mechanisms to provide adequate support and protection of the wider consumer cohort.

Were voluntary arrangements recognised in the proposed legislation as an important part of the debt resolution process in the manner proposed above, the current high level of support provided by MABS in this area would be significantly enhanced by an obligation on the credit industry to engage.
Some recent, and poignant, examples of the positive impact of the work carried out by MABS money advice staff can be seen in ‘Lifting the Load’\textsuperscript{15}, research commissioned by Waterford MABS and supported by the Citizen’s Information Board and MABS NDL, which explores the impact of mortgage debt from a borrower’s perspective and provides numerous quotes from MABS clients on the supports provided.

**MABS and the Approved Intermediary Role**

MABS currently perform the role of trusted intermediary and so could easily perform that role with regard to Debt Relief Certificates, notwithstanding concern raised earlier that MABS could find nearly all candidates seeking a Debt Relief Certificates coming to us, simply because there is no other cost-free intermediary service available.

No detail is provided for the regulation of such a body, or of what ‘approved’ is to constitute, save for the requirement of a licence to be issued from the Insolvency Service. Neither is there any detail offered on how remuneration for the services of an intermediary might be calculated, if any, or paid. Given that MABS is the only free debt advice service, it is logical to assume that any person wishing to apply for a Debt Relief Certificate will do so through MABS. Such a set of circumstances will require critical consideration in terms of the future role of MABS and the appropriateness of such a development.

**MABS and the Personal Insolvency Trustee Role**

As can be seen in Appendix 1, MABS advice staff already performs many of the functions outlined as those intended for performance by a Personal Insolvency Trustee, and those not currently within the role of an Adviser could be developed and included. Whether MABS staff would satisfy the regulatory standards for this role remains to be seen, but it should be noted that MABS have begun to embark on an accredited programme of certification.

It is not possible for the same person to act as both an advocate and as a Personal Insolvency Trustee for a borrower, as while the Personal Insolvency Trustee will have an advisory function, it cannot engage in advocacy work on behalf of the borrower, and so where MABS may employ Personal Insolvency Trustees at some stage, structures would need to provide for separation of power between the two. Personal Insolvency Trustees within MABS must operate on the same footing as their commercial counterparts, with fees payable for their services creating a revenue stream.

As this legislation takes shape, a new market will open for the provision of intermediary and personal insolvency services. There is a social rationale for the maintenance of MABS in this space as a public service. It can continue as currently constituted, but with the possible addition of a team of Personal Insolvency Trustees available within its walls. Although the services of these Personal Insolvency Trustees will not be free to the public, they will be free from profit considerations (and therefore will be more likely to work towards affordable, sustainable repayment arrangements regardless of price structure), targeting resources to make the full suite of options available based on criteria that reflects the MABS client base. This proposal maintains for the client a consistency of process for the resolution of their difficulty in their particular circumstances.

\textsuperscript{15} Lifting the Load, Norris and Brooke, commissioned by Waterford MABS, 2011
MABS is a strong brand, nationally and internationally recognised and respected in the area of holistic debt advice. The introduction of a Personal Insolvency Trustee system would only strengthen this brand, relying as it would on the vast experience and expertise within the MABS and the current relationship of MABS with all creditors who acknowledge the integrity of the MABS process.

Accordingly, we would envisage a space within MABS for a Personal Insolvency Trustee service, regulated and remunerated in line with commercial operators but with a MABS ethos and approach to consumer protection, to whom MABS advisers may make referrals.

**Figure 4 - Potential Structure**

**Conclusion**

The current legislative structure is no longer fit for purpose in addressing the needs of both debtor and creditor when dealing with over-indebtedness and, in this regard, we welcome the proposed Heads of Bill and the additional mechanisms outlined therein as a positive step towards debt resolution for over-indebted borrowers. However, as seen above, there are numerous issues which warrant further exploration before the primary legislation is passed, and others which await the development by the Insolvency Service of Guidelines, Codes of Conduct and Statutory Instruments, the content of which will have a significant impact on borrowers’ interaction with the proposed arrangements. While we have made every effort to align the modalities of the proposals to our experience of dealing with over-indebted borrowers, a fully informed view will not be possible until such time as the secondary structures have been put in place.

Accordingly, we make a final submission that the needs of the borrower be a focal point in this new non-judicial configuration, and that an onus be placed on all stakeholders participating in this process to take account of those borrowers’ individual circumstances and resultant needs.
Appendix 1 – The Origins and Experience of MABS

Origins of MABS

MABS was established in 1992 as an anti-poverty measure in response to the problem of illegal money lending. The initial pilot programme was evaluated and the programme expanded and over the intervening years MABS grew to become a national network of 51 services and 2 support services (MABS NDL and National Traveller MABS) operating in every county in Ireland. There are several counties with more than one Service – reflecting the community origins of the Programme. Services are small in size; most having a Co-ordinator, one or more money advisors and an administrator. The Services are operated by voluntary Boards of Management comprising key local stakeholders including, inter alia, the St. Vincent de Paul, local CIC, Credit Union, local authority, Department of Social Protection representatives and relevant others.

The role of MABS over the last two decades as the primary response to personal over indebtedness in Ireland has been consistently and independently recognised (e.g. the 2011 report of the ESRI ‘Financial Exclusion and Over-indebtedness in Irish Households’).

Role of MABS National Development Limited

Since 2004, MABS has received specialist technical casework and other support from a dedicated support company, MABS National Development Limited (MABS ndl). MABS ndl employs 11 support staff and provides:

- support on complex casework issues for all Services and staff,
- all manuals and casework materials for MABS money advisers
- dedicated training to all MABS personnel,
- operates the MABS information system (MABSIS) and provides central administration for the MABS ‘Special Account’
- supports MABS work in money management education (locally and nationally)
- produces and provides all information resources for the MABS services and the public and for use in MABS casework
- operates the MABS website and provides MABS self-help materials – including the widely used MABS Debt Management Guide
- handles all media and communications in relation to MABS and related money advice issues
- through its social policy work seeks to effect positive change for clients and liaises regularly with Government Departments and Agencies and all major creditors – this work has resulted in the putting in place of agreed good practice protocols with all of the major banks and financial institutions

A further 6 full time employees are employed to operate the MABS National Helpline.

Over the recent past (i.e. 2008-date) there has been very significant growth in the number of cases supported by the 51 MABS services that provide ‘face to face’ support. There has also been growing

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\[16\] This aspect of its work continues and MABS is referenced in the current National Action Plan on Social Inclusion
complexity in the casework support provided by MABS. As such, MABS Services are working with an active client base (clients whose cases may take several months and in some instances several years to resolve, especially if a client’s situation deteriorates and cases need to be reviewed/offers revised) as well as growing numbers of new clients.

Furthermore, as certain debts and, in particular mortgage debt, contribute to the total indebtedness of a household; MABS client data often reflects the position of couples/householders (in this regard ‘client’ data may underestimate the numbers of people affected.

**The Money Advice Process**

In the twenty years since its inception, MABS has developed a proven track record in the area of personal debt management, adapting and developing over time in accordance with the needs of our clients. In 2003 MABS was chosen for Peer Review in the EU. Quoting from the findings of the Eustace/Clarke evaluation, the MABS Peer Review report states (page 17):

“The extent to which MABS is regarded as a benefit to communities is extraordinary. Eighty percent or more of the respondents indicated that the community had benefited significantly because people had been helped to deal with debt and/or to manage their money better. Around seventy percent answered that MABS had contributed to improve health and quality of life”.

It is this community-based ethos that is central to the holistic Money Advice Process (see Figure 1).

**Figure 1 – MABS Money Advice Process**

There are 6 main components to the process of rights-based money advice. These can be summarised as follows:

*(i) Identifying Problems*

By using listening, counselling and interviewing skills to build a rapport with the client, the adviser begins the process of finding out the nature and extent of the difficulties involved. An explanation of the service is provided which describes the main features of the service, (free, confidential, independent etc.) The appropriate level of service to be provided is identified – based on the capacity of the client. Once authorised to proceed, initial holding action is taken either by the client or MABS as appropriate. This affords time to compile the client’s financial profile.

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(ii) Assessment of the Situation
Letters, phone calls and the client’s own records are used, as appropriate, to establish a full picture of the financial situation. Emergencies are dealt with by requesting that creditors allow the money adviser sufficient time to consider the total extent of the problems. Discussions take place as to the liability and enforceability of the various debts and the client’s rights relevant to their situation. Possible ways of maximising income are explored. Possibilities of redirecting or reducing expenditure are discussed. A preliminary budget is prepared, as priorities are identified in partnership with the client. Where appropriate, discussions take place on the desirability of a client beginning to set aside agreed amounts e.g. into a credit union account, as per the agreed payment plan to ensure that the client can afford the proposed payments and to demonstrate to creditors his / her commitment to it.

(iii) Deciding on a Payment Plan
At this stage, a standard financial statement is drawn up and is signed and ‘owned’ by the client. A plan is drawn up giving priority to those debts with more serious consequences, housing, utilities etc. As well as setting aside sufficient disposable income to maintain an adequate standard of living, (provision for food, clothing etc.) this plan also endeavours to include a small savings element for future credit needs. Finally, the plan distributes any surplus financial resources on an equitable (pro-rata) basis between the remaining creditors, generally unsecured loans owing to various financial institutions.

(iv) Implementing the Strategy
Proposals can now be forwarded to the various creditors on the basis of what is realistic, affordable and sustainable given the client’s present circumstances, rather than what the creditor may demand. Negotiation and mediation may be required if the creditor refuses to consent. Appropriate payment facilities are agreed (household budget scheme, special account scheme etc). Where third parties are involved, (solicitors, debt collectors, courts etc), proposals are made to these parties also. The client commences proposed payments on a given date.

(v) Monitoring Progress
Creditor replies to proposals are acknowledged. Where MABS intercedes on the client’s behalf, the client is kept informed of such communications and creditors are kept informed of progress. Those who do not reply are followed up. Case notes of all contacts are kept. Payments through the Special Account Scheme (where availed of) are monitored. Clients who are having difficulty making payments in line with the agreed plan are contacted to ascertain why this might be so and whether the plan needs to be revised.

(vi) Case Review and Closure
At periodic intervals cases are reviewed, clients are contacted and payment plans are revised where appropriate. Creditors are updated as to progress/changes and a procedure for case closure is instigated where appropriate. The clients are given the opportunity to give feedback on the service they received. They are advised that the case can be reopened if, and when, necessary.
Where clients elect to pay through the special account system, the case can stay at the monitoring/review stage unless/until the relationship between the client and the service breaks down or the client chooses to make payments by another method.

The empowerment of the client is core to the MABS approach to money advice, a 7 level model of client support is applied, that both respects the extent of the capacity (ability) of the client to do things for themselves whilst, at the same time, respecting the capacity of the service to respond to clients’ needs. The model further aims to maximise the usefulness of the MABS helpline, self-help workbook (MABS Money Management Guide), website and information leaflets produced by MABS (and other agencies) on different credit and debt topics as well as sample letters and other materials for those who wish to deal with their creditors directly.

MABS has developed a number of materials to support and reinforce the ethics and practice of money advice, they include:

→ The MABS Customer Charter
→ The MABS Code of Practice
→ The MABS Service Agreement Leaflet
→ The MABS Money Management Guide
→ The MABS client authorisation form
→ MABS Standard Financial Statement

The success of MABS is measured by the level of sustainable voluntary arrangements made with creditors and the acceptance of the Money Advice Process by the credit industry with the development of the IBF / MABS Operational Protocol and the Utilities Providers / MABS Operational Protocol which rely heavily on these principles. MABS is also active at national level in areas of debt-related social policy, providing inputs on the development of the Standard Financial Statement under the Code of Conduct on Mortgage Arrears and the drafting of the Central Bank’s Guide to completing it.